

# RUEGSEGGER REPORT

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## EMPLOYERS' DUTIES REGARDING EMPLOYMENT RECORDS

By Paul D. Godec, Esq.

Employment records often contain private employee data or information that employees generally do not want disclosed to others. In some cases, legal requirements actually forbid employers from disclosing private employee data to others. Private employee data contains such information as home addresses, photographs, social security numbers, dates of birth, demographic information reflecting protected class status, and medical information. Employment records could also include private financial information such as compensation and benefit plan participation that could have value as a commodity to marketers.

### 1. Medical Information

The Americans with Disabilities Act ("ADA") and the Family and Medical Leave Act ("FMLA") place specific requirements on employers regarding medical information about employees. Employers must maintain information collected from or about employees' medical condition or medical histories on separate forms and in separate files. Employers must also treat the medical information as confidential. Employers should not disclose such medical information in response to a subpoena or release that only requests an employee's personnel records.

Employers may only disclose such medical information to: (a) supervisors and managers who need the information regarding work restrictions and accommodations; (b) first aid or safety personnel for purposes of emergency treatment; and (c)

government officials who investigate compliances with law.

The HIPAA Privacy Rule prohibits employer-sponsored benefit plans from disclosing employee medical information without a HIPAA-complaint written authorization. If employers sponsor self-funded health plans, the employees of the health plans must not allow access to employee private health information by employees who do not work for the health plans.

### 2. Criminal and Credit Information

Many employers routinely undertake criminal background checks on employees and prospective employees. Employers many also undertake credit background checks on employees and prospective employee responsible for an employer's financial resources or monetary transactions. The Fair Credit Reporting Act ("FCRA") places narrow limitations on the circumstances in which employers may use such information. Consequently, employers should take precautions to prevent disclosures of credit information for purposes not authorized by the FCRA. In particular, employers should maintain pre-employment investigative records separate from post-employment personnel records.

### 3. Personal Information Protection Statutes

Colorado has recently enacted statutes that require employers to protect employees from potential identity theft. One statute requires employers to give notice to employees if an employer believes, or have rea-

son to believe, that another person has obtained an employee's private or personal data. Another statute requires employers to develop a policy for the proper destruction or disposal of paper documents containing "personal identifying information."

### 4. Tort Theories of Liability

Colorado has recognized common law invasion of privacy tort theories. With respect to private employee data, these claims fall under two theories. First, the "publication of private facts" theory arises when an employer (a) unreasonably creates publicity about a person's private life; (b) in a highly offensive manner to a reasonable person; and (c) involving disclosures that lack a legitimate public concern. Colorado law initially recognized this tort theory in a case in which an employer publicized the HIV-positive status of an employee.

Second, the "misappropriation of name or likeness" theory arises if an employer permits or facilitates a misappropriation of the name or likeness of an employee for another's benefit. This theory could arise if a supervisor began using an employee's photograph or identifying information without her permission for the personal gain of the supervisor.

Because of these legal obligations, employers should develop policies and practices designed to protect and preserve personal information contained in employment records.

### In this Issue:

Page 1: Employers Duties Regarding Employment Records

Page 2: Top Ten Concerns About E-Discovery in Litigation

Page 3: Workplace Investigations Seminar

Page 3: Proper Employee Evaluations May Foil Discrimination Claims

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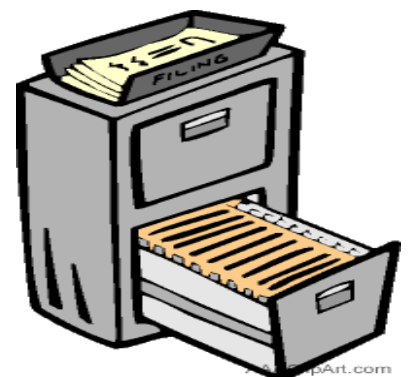
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## TOP TEN CONCERNS ABOUT E-DISCOVERY IN LITIGATION

By Paul D. Godec, Esq.

Roughly, 92 percent of all new information created exists in digital or electronic form. About 99 percent of businesses use e-mail, but only 39 percent have a formal e-mail retention policy. These tendencies with respect to digital information create significant risks if litigation arises.

Hundreds of legal and practical concerns exist concerning electronic data, but employers should consider at least these top 10 issues:

1. **Best Practices.** Lawyers and judges have begun standardizing various conventions and expectations for the discovery of electronic data when litigation commences. An employer's failure to follow these best practices could have devastating impacts on an employer's ability to prevail in any civil litigation.
2. **Electronic Documents Never Disappear.** A forensic expert can likely recover virtually any document from a computer hard drive. During litigation, an employer may have to produce thousands of documents hiding on old hard drives as well as documents in current systems. The "E" in email usually stands for "eternal."
3. **Sources of Electronic Data.** Electronic documents may lurk on personal computers, laptops, thumb drives, Blackberries, Personal Digital Assistants, cell phones, servers and other locations. When litigation begins, employers may have to search all of these information "haystacks" to find the helpful information "needle" to support a claim or defense. Counsel may have to interview IT custodians; learn information system architecture; and identify electronic storage devices and all applicable servers and mapping in order to represent the employer adequately.
4. **Now-Not Later.** In many federal and state courts, parties must obtain and exchange information about electronic documents and systems soon after the litigation begins. Eventually, parties may have to exchange voluminous electronic data and documents. These requirements place tremendous pressure on parties and their counsel as litigation progresses. Employers should design their IT systems now to recognize the possible need for retrieval later.
5. **Focus on the merits.** The failure to address electronic discovery issues may become a trap for the unwary. The focus of the litigation could shift from the merits of the case to the manner in which discovery occurs. To avoid this trap, or to spring the trap on an opponent, employers must deal with these issues at the outset of any case.
6. **Paper and Electronics.** Paper documents will still need to be collected, managed, reviewed and produced in litigation. In many cases, digitizing paper documents may represent the most convenient and cost-effective way to manage paper documents. This approach to managing paper documents during litigation is not without its costs and pitfalls, however.
7. **Do-It-Yourself Electronic Discovery.** An employer's in-house IT department may have the capacity to collect documents. Yet, the IT department may lack the experience necessary to preserve the chain of custody, protect metadata and provide testimony regarding the document collection process. To avoid spoliation of evidence, assure document integrity, protect metadata, and provide testimony, an employer may need to hire an outside IT expert. In certain cases, IT experts may also provide document review platforms, sophisticated programming, decryption, forensics and other services.
8. **Expert Selection.** An employer or its counsel might have to interview several computer forensic experts to find the right computer expert for the case. Finding the right fit of technical expertise for the nature and risk in the case can prove difficult.
9. **Apples and Oranges.** Although *best practices* regarding e-discovery have emerged, no definitive standard for comparing IT experts' pricing models exists. Each IT expert's technology, methodology and pricing strategy may vary from every other expert. Employers should request standard pricing models such as a per gigabyte price or a per page price.
10. **What about the other guys?** Opposing parties should seek to negotiate reasonable rules for discovery to avoid the electronic data equivalent of "mutually assured destruction" through discovery. Those rules of engagement should consider:
  - Paper and electronic collections,
  - Exchange of basic system data,
  - Discovery of back up and archival data,
  - A common document production format,
  - Methods to deal with native format documents,
  - Document marking,
  - Privileges,
  - Databases,
  - Redaction, and
  - Dispute resolution.





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## FREE EMPLOYMENT LAW SEMINAR



WORKPLACE  
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INVESTIGATIONS**

Workplace Investigations will provide attendees with methods to prevent, prepare for, protect from, and react to, theft of intellectual property and business information in the workplace. This seminar will prove helpful for all employers, human resource personnel, business owners and others who face the challenges of hiring, retaining and terminating employees while protecting their proprietary business interests. For more information, go to [www.rs3legal.com](http://www.rs3legal.com).

*Friday, June 22, 2007*

*Registration 7:30 A.M.*

*Presentation 8:00 A.M. to 12:00 P.M.*

*Denver Marriott City Center*

*1701 California Street*

*Denver, Colorado 80202*

*For information and reservations*

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## PROPER EMPLOYEE EVALUATIONS MAY FOIL DISCRIMINATION CLAIMS

**By Paul D. Godec, Esq.**

A court recently upheld the dismissal of an age discrimination lawsuit because of the dismissed employee's well-documented performance deficiencies. In 1987, the employee began working for Sprint's predecessor. In 1990, he began working in another division on a part-time basis. In 1993, the employee began working for the division full-time. In 1995, he received a promotion.

From 1990 to 1998, the employee received favorable performance evaluations and pay increases. Yet, his evaluations in 1996 and 1997 showed certain deficiencies. In 1998, a new manager began supervising the employee. In 1999 and 2000, the new manager documented meetings with the employee about performance deficiencies despite evaluations that he "fully meets expectations."

In 2001 and 2002, Sprint began using new performance evaluation systems. Under the new systems, the employee consistently scored as "less effective" than other employees in his division. One evaluation noted that, despite being the longest tenured employee in the division, the employee took longer to perform many tasks than less-experienced employees.

In 2003, different managers evaluated the employee's performance on several specific projects. In January and February 2003, and twice in May 2003, the employee received criticisms for his performance on those projects. In June 2003, two supervisors suggested that he apply for a position in another division. In July 2003, the employee received a written warning that his performance had to improve within 30 days. In October 2003, two managers identified additional performance difficulties and fired him. At the time, the employee was 50 years old. The employee sued Sprint for age discrimination.

An age discrimination claim requires evidence that an employee (1) is at least 40 years old; (2) was doing satisfactory work; (3) was discharged; and (4) was replaced by a younger worker. After that showing, an employer must offer a legitimate and non-discriminatory reason for the discharge. If an employer offers such evidence, then an employee must demonstrate that the employer's reasons constitute a pretext for discrimination.

The trial court dismissed the employee's lawsuit for a lack of evidence of pretext. The appellate court rejected the employee's appeal for several reasons. First, the court found no

pattern that older workers received less favorable reviews under the new evaluation systems. Second, the court noted that younger workers who received similar reviews as the employee had resigned before Sprint took an adverse employment action. Third, the court noted that the employee consistently received negative evaluations from several managers. Fourth, the court rejected the assertion that comments about the employee's "longest tenure" suggested age discrimination. The court found that employers could legitimately expect employees' performance to improve with experience.

The systematic, accurate and honest performance evaluations convinced the court that no evidence of pretext existed. This result should remind employers of the importance of systematic, meaningful, accurate, and honest performance evaluations. See *Bolton v. Sprint United Mgmt. Co.*, 04-cv-2156 (10<sup>th</sup> Cir., Mar. 6, 2007).





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RS<sup>3</sup>

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## RUEGSEGGER SIMONS SMITH & STERN, LLC

Our firm is dedicated to advising and representing employers and insurers in workers' compensation and employment matters, and in other areas of civil litigation. We advise our clients on a broad variety of business and operational issues that involve legal compliance or corporate contracting. We help clients accomplish their objectives while minimizing their legal risks.

We have become one of Colorado's largest firms dedicated to defending employers in a broad range of employment matters. Our attorneys have represented hundreds of employers and insurance carriers in hearings and appeals before the Colorado Division of Administrative Hearings, the Industrial Claim Appeals Office, the Colorado Court of Appeals, and the Colorado Supreme Court. Our workers' compensation practice takes us to venues all along the Front Range and throughout the state, including Durango, Glenwood Springs, and Grand Junction.

Our practice also includes employment discrimination matters; wrongful discharge and retaliation claims; violations of the Fair Labor Standards Act and the Colorado Wage Claim Act; and issues arising under the Family Medical Leave Act, the Age Discrimination in Employment Act, and the Americans with Disabilities Act. Through knowledgeable counseling tailored to employer needs, we focus on preventing everyday workplace issues from becoming legal problems. Our attorneys also represent employers aggressively in litigation before the U.S. Equal Employment Opportunity Commission, the Colorado Civil Rights Division, the Department of Labor, Wage and Hour Division, and state and federal courts.

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