

## **eData Alert: Preserving Records of Former Employees**

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Properly preserving the electronic and paper records of a client's departing employees who are subject to a litigation hold has always been important. But now, due to the dramatic increase in the number of departing and transitioning employees in this recession, this preservation becomes all the more vital.

As we all know, 2008 saw a dramatic increase in the number of layoffs and reductions in force across industries. As of December, 11.1 million people in the United States were unemployed, putting the country's unemployment rate at 7.2%. Since the start of the recession in December 2007, the number of unemployed persons has grown by 3.6 million. The unemployment rate has risen since that time by 2.3%.

At this time of drastic layoffs and restructurings, it is vital to remind clients to properly preserve the records of former employees. Where those employees possess information relevant to pending or anticipated litigation, the organization may face sanctions for failing to preserve those records. *Cache Le Poudre v. Land O'Lakes*, 244 F.R.D. 614, 629-30 (D. Colo. 2007)(failure to capture data of departing employees who were on "litigation hold"); *Zubulake v. UBS Warburg, LLC*, 220 F.R.D. 212, 218 (S.D.N.Y. 2003). As is the case in many organizations, when employees depart, email accounts, network drives, and hardware are typically deleted and "wiped" clean, irretrievably destroying any data.

The obligation to preserve the electronic records includes, but is not limited to, preserving a former employee's active and archived emails, hard drive, home drive, and any other structured or unstructured electronic data that the former employee created, reviewed, and/or stored, or directed to be created, reviewed, and/or stored. In addition to data that may reside on a company's technology infrastructure, in the case of a departing employee it may be necessary to preserve the hardware (namely, a laptop, desktop, handheld wireless device, etc.) that the former employee used. At a minimum, our clients should compare the names of any departing employees with the names of all recipients of Legal Holds and should adopt preservation protocols for those whose names appear on both lists.

Morgan Lewis's eData Practice was formed in early 2004 to handle the increasing complexities of discovery and the management of electronically stored information. eData's "best practices" are nationally recognized, and its resources include four discovery management centers on the East and West Coasts, as well as a think tank, The Discovery Manager's Roundtable.

