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The Top 10 Ways To Reduce Discovery Costs: Nos. 10-6

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It should come as no surprise to most employers that employment litigation is on the rise. It also should come as no surprise that discovery is seen as the biggest single driver of litigation expenses. Recent studies have shown that discovery can consume up to 68 percent of the costs in a case. Unsurprisingly, the vast majority of attorneys – both plaintiff and defense attorneys alike – agree that the costs of litigation and particularly discovery are not proportional to the value of a case. As a result, far too many cases are settled not to avoid the possibility of an adverse outcome, but simply to avoid the monumental costs of litigation.

The United States is virtually alone when it comes to litigating in this fashion. Most other countries permit discovery only as to those things that are contained in the pleadings. This was the same methodology employed in the United States prior to the adoption of the Federal Rules of Civil Procedure in 1938. The idea behind more expansive discovery was to avoid ambush tactics where litigants could withhold vital information until trial. In many ways, the goals behind the discovery rules have worked. Parties today have greater opportunities to explore the relative strengths and weaknesses of the other side's case early on so that they can try to work out a negotiated settlement. On the other side of the coin, however, the costs have gone way up – and especially since the advent of the digital revolution over the last few decades.

Grappling with the ever growing costs of litigation – and particularly discovery – is a problem that vexes even the most experienced litigator or in-house counsel. While there are no quick fixes or easy answers, the following top 10 list, which represents the fruits of over a decade of hard-earned lessons drawn from real-world lawsuits, may help guide employers toward regaining some measure of control over their bursting discovery budgets.

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10. Avoid Chasing Shadows. The failure to document key events in the employment of a worker not only creates needless gaps that require quick thinking and explanations from supervisors, but also increases discovery costs. If a document is critical enough, the plaintiff's lawyer may not simply accept the explanation that it is missing or cannot be found. This could result in every stone being overturned and all avenues being investigated before the attorney (or the court) finally is satisfied that the phantom document is really gone or that it never existed in the first place – leaving the employer to deal with the ramifications of the fact that a critical document wasn't created and/or maintained as

it should have been.

9. Remember The Big Picture. Discovery is a tool – nothing more and nothing less. For any company involved in a lawsuit, the ultimate goal is to achieve the best possible and most economical result. The goal is not play games in discovery or to fight tooth and nail over something the other side is entitled to anyway just because they happen to be an adversary. Too often discovery takes on a life of its own and takes over the entirety of the litigation process. Obviously, employers should fight over what is important to them, but they are not likely to win by being obstructionists. Unreasonable conduct will just embitter the other side, antagonize the court and drag out the entire process.

8. Avoid the Data Dump. Employers know their own records and data far better than their outside counsel. However, many employers responding to discovery simply hand over a ton of data to their counsel and expect them to sort through it. This can be tedious, time consuming and expensive. While the attorneys need to review the materials for production purposes, providing context is key. Sheparding the attorney through the materials by giving context such as identifying what is (or is not) the employee's personnel file, where handwritten notes came from, who wrote the handwritten notes, and why there are multiple versions of the same document all can help defray costs down the line. Employers don't need to pay their lawyers to sort out patent inconsistencies in materials that the employer easily can resolve before it sends the items to the counsel for review.

7. Eliminate Chaos. Key documents should be kept in a secure and central location. It makes little sense to produce a personnel file only to discover months later during the deposition of a supervisor that the supervisor kept a separate personnel file with key documents that never were produced in discovery. This results in unnecessary discovery requests for the separate file and worse, exposes the supervisor to yet another deposition about that file. Beyond the inefficiency and duplication of effort, scattershot maintenance of employment records like this also can create the false impression that the company is hiding things.

6. Get Ahead of Electronic Discovery. All employers should have a document retention policy that addresses electronically stored information. Employers should know where their electronic information is stored and make sure they have a process to respond to litigation and discovery requests that may be made. Employers also should make sure they can process electronically stored materials in the event they do need to produce them. When involved in litigation, employers should have their counsel work with the other side to come up with manageable and reasonable search terms and iron out processing issues such as how the information should be produced. To the extent that an employer has sufficient resources, processing electronic discovery in-house instead of shipping it to an expensive third-party reviewer or counsel also should be considered as options to reduce costs.

Read the rest of the series:

The Top 10 Ways To Reduce Discovery Costs: Nos. 5-1

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