



Lawyers since 1897

Ryan, Swanson & Cleveland, PLLC
1201 Third Avenue, Suite 3400
Seattle, WA 98101-3034

www.ryanswansonlaw.com

Internal Electronic Policies in the Age of “E-Discovery”

by Robin Schachter

What

Every company, regardless of size, needs a comprehensive, manageable and flexible policy to maintain, store, back-up, index, selectively destroy and retrieve the electronic data as well as hard copy documents that its employees create, receive and send.

Comprehensive:

Your policy should cover all forms of technology used. To do this, you must understand how your employees use your paper and electronic systems at the office, on the road, and from home.

Examples: office desk top hard drives, servers, lap tops, PDAs (Blackberry-type devices), home computers, fax machines, cell phones, digital cameras, CDs/DVDs, external memory devices (zip sticks, flash drives, etc.) , Web-based memory/storage (ie – web based email accounts such as msn/Comcast/yahoo/gmail) to/from which employees may send work related messages and attachments

You must understand the different kinds of data and documents that your employees create receive and send, the various requirements for maintaining each kind of data over time, and the various ways you can and should index, store and destroy each kind of data.

Examples:

- Employee personnel data
- Work product – spreadsheets, word documents, drawings, formulas, reports, lab results, confidential client information, emails
- Company tax returns and other financial data
- Email

You must understand the memory capacity needs for maintaining your systems, (email mailbox, hard drive, server, etc.) and how often you should back up your data for routine and emergency purposes.

Manageable

Your policy must be clear, comprehensible, written, mandatory, acknowledged and actually followed. You should designate one person/department as responsible for implementing and monitoring each aspect of the electronic document maintenance policy.

Flexible

Your policy should be able to accommodate new technologies and new business ventures without needing frequent, complete overhauls. Be aware that storage technologies may change as well over the time period that you are mandated to maintain certain data.

Why

Federal, state and local regulations require maintenance of certain data (which you need to be aware of now, whether your documents are stored in paper or electronic form!):

- Employee personnel data

- Regulatory compliance
- Financial – audit, tax
- Length of time to maintain certain data may be mandated by law; statutes of limitations for claims and audits should be considered as well.

Litigation and resolution of disputes of all sorts may require production of the data, both explicitly through court rules and practically, to resolve the dispute successfully and/or economically.

- Employee initiated claims (discharge or discrimination)
- Contract disputes that you or another party may initiate
- Intellectual property ownership, protection or enforcement disputes
- The “litigation hold” letter – from your lawyer, from opposing counsel, the memo you send to your key employees
- Business needs may require access to/production of the data.
- Technical emergencies may require restoration of electronic systems and data.

Enormous consequences, both market and court-imposed, for failure to be able to identify, locate, retrieve and produce information in a timely and cost effective manner.

Who

All entities (and even sole proprietors, independent contractors, and consultants) that create, receive and send information electronically.

When

The sooner the better.

How

With help from your Information Technology in house staff and/or consultants, your key employees, and your legal counsel.

How to begin:

Identify key players

Identify different categories of documents and data

- Presently existing
- Future created
- Hard copy only
- Business unit – contracts, sales data, client identification data,
- Employee records/HR/benefits
- Financial, tax, accounting, audit
- I.P. – trade secrets, patents, trademarks, copyrights, designs,

Identify key issues

- Mandatory to retain
- Length of time to retain
- Best form to retain
- Current purposes/other purposes
- Other ways to retrieve information if document is lost
 - Multiple copies within company/system?
- Adverse consequences if document/data is lost

Email – consider email content separate from attachments