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## Forum

# The Case Must Go On

By Monty Agarwal and Aaron Schur

Employee departures are a fact of life in almost any commercial litigation. But in these troubled economic times the increased scope of business downsizing has the potential to create substantial risks to ongoing cases. With careful communication, planning and some proactive steps, however, businesses and their counsel can weather departures without irreparably harming ongoing litigation. The following are options to consider.

Early communication between business principals and counsel about potential employee departures is critical. Layoffs understandably raise sensitive issues and too often counsel are not privy to the decision-making process until it is too late. This lack of communication can cause serious problems. Key documents and evidence in the custody of a departing employee can be lost. Valuable witnesses might be hard to track down after they have left or a departing employee can become hostile and refuse to cooperate. In the worst scenario, a former employee may independently seek out the other side and work with them against his or her former employer.

To avoid these problems, as soon as layoffs are considered, counsel and business executives should communicate about decisions that may impact employees who are part of ongoing litigation. At a minimum, counsel should discuss with the company the status of all employees identified in initial disclosures and interrogatory responses as well as any others who might be people most knowledgeable or party experts. Counsel should also discuss those employees from whom documents have been collected in discovery.

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In some cases, early communication might influence whether a particular employee is let go at all, or at least the timing of a departure. At a minimum, early communication will ensure that a business makes conscious decisions about any layoffs after weighing the risks to ongoing litigation. Early communication is also key to allowing counsel the opportunity to implement other mitigating steps.

One key strategy is to enter into a consulting agreement with the departing employee. This is particularly important with key witnesses such as an employee who was critical to negotiating or implementing a contract at the center of a contract dispute or an engineer knowledgeable about a technology at issue in a case. These employees are often disclosed as possible witnesses in initial disclosures, as people most knowledgeable, or as corporate designees under Federal Rule of Civil Procedure 30(b) (6).

If the employee is being offered a severance package, then such ongoing cooperation can be a condition or component of the severance payment. At a minimum, in any agreement the employee should agree to make him or herself available for consultation, depositions and trial over the course of the case. The agreement should also remind the witness about continuing confidentiality obligations, the attorney-client privilege and require that the employee agree to contact the company's counsel if approached by the other side. Finally, the company should assure the departing employee that it will bear the costs of defending the employee in any deposition or trial.

A business can also agree to compensate the departing employee for any time spent

on the case. The rate should be in line with amounts that the employee would have made while working for the company. Excessive payments may provoke charges of bias and "bought" testimony. Departing employees often welcome such agreements.

Headlines about discovery sanctions against litigants are commonplace, and in many cases the penalties are severe. With such severe repercussions, businesses are advised to take steps to ensure that relevant materials are not lost when employees depart.

A departing employee should be interviewed to determine what documents and other materials he or she may have, either in hard copies or electronically. The employee should be asked if any documents have been taken home or elsewhere, and if so, the company should arrange to have them returned. If an interview was previously conducted with the employee for the purpose of identifying documents to produce in the litigation, any interview notes should be reviewed to make certain that all documents previously identified by the employee are retained by the company.

Similarly, if the employee previously identified any specific relevant documents in the course of discovery — for example, in a deposition or as part of a verified interrogatory response — the company should make sure the employee identifies where such information resides and quarantine it for review by outside counsel. Finding things after the employee's departure might be complicated and is sure to increase the costs of litigation.

Businesses should also attempt to account for employee files, including electronic documents and e-mails and take steps to store them in a way that is organized and accessible even after the employee has left. The company should secure the employee's computer, if any, and communicate with the IT department so

that it does not erase hard drives and re-deploy them.

Neglecting to issue a records hold notice may lead to charges of discovery abuse. Too often, however, counsel will only issue a records hold notice at the beginning of litigation. The failure to reissue a records notice after significant employee turnover can cause the same serious types of problems. See *Cache La Poudre Feeds LLC v. Land O'Lakes Inc.*, 244 F.R.D. 614 (D. Colo. 2007), which found that "While instituting a 'litigation hold' may be an important first step in the discovery process, the obligation to conduct a reasonable search for responsive documents continues throughout the litigation;" and *Zubulake v. UBS Warburg LLC*, 229 F.R.D. 422 (S.D.N.Y. 2004), finding that "The litigation hold should be periodically re-issued so that new employees are aware

of it, and so that it is fresh in the minds of all employees."

Specifically, after employee departures, counsel should reissue a records hold notice to those who take over the departing employee's responsibility. This new employee should be made aware of the responsibility to maintain any old documents, or documents that may be created in the course of their new duties, if relevant to the case. If possible, the departing employee should explain to another remaining employee where materials are kept. This will provide some continuity of information among the company's employees.

Counsel should encourage their clients to maintain contacts with former employees who might remain involved in the company's litigation, and remind them that they should not divulge any privileged

communications they had while at the company. Checking in periodically with a former employee allows the company to more easily schedule depositions or hearings and to keep tabs on whether the former employee has been contacted by opposing counsel. Maintaining good contact also can allow the company to determine whether the former employee will continue to be a promising witness for trial.

While the circumstances prompting most departures — and the exigencies of litigation — usually do not allow in-house and outside counsel the luxury of implementing all of these options, the attention one can devote to these issues will be repaid in avoiding problems and costs later in litigation.

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