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CLIENT ALERT

Federal Court Imposes Broad Preservation Obligation Regarding Potential Class Members in FLSA Action

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In a ruling that could have a widespread impact on the employment law landscape, the U.S. District Court for the Southern District of New York recently ruled that KPMG LLP, defendant in a suit alleging FLSA and NY state class action claims, is required to preserve electronically stored information relating to all potential plaintiffs, at least until class membership is settled. While the district court's decision in *Pippins v. KPMG* may provide some relief from the more onerous requirements of the magistrate judge's earlier ruling, the decision still represents an expansive view of e-discovery preservation requirements in the employment class action context.

In *Pippins*, KPMG was faced with a potential FLSA class of 2,500 members, and a smaller number of putative New York state class members. KPMG presented evidence that the cost of retaining hard drives for the entire putative class would exceed $1.5 million. It appears that the parties had made efforts to meet and confer in an effort to limit KPMG's preservation obligation to some reasonable sample of the putative class members' hard drives, but they were unsuccessful because KPMG would not agree to plaintiffs' request to hand over five random hard drives in their entirety for inspection and review by plaintiffs' counsel. Instead, KPMG proposed to limit their preservation obligation to approximately 100 putative class members' hard drives. Having reached an impasse, KPMG moved for a protective order pursuant to FRCP 26(c). The issue was "whether KPMG must preserve computer hard drives for thousands of former employees who fall within a potential nationwide FLSA collective and/or a putative New York State class, or whether random sampling of a small number of hard drives would be sufficient to fulfill KPMG's preservation obligations."

In considering the motion at the pre-certification stage, Magistrate Judge Cott found that every "potential" member of a putative class (or collective) action is a "key player" and therefore relevant evidence relating to such individuals must be preserved. Magistrate Judge Cott ordered KPMG to preserve all existing hard drives until the parties reached agreement on a methodology to obtain an appropriate sample.

By the time the district court considered whether the magistrate's order was clearly erroneous or contrary to law, the court had already conditionally certified a nationwide FLSA class. Citing the reasonable-anticipation-of-litigation standard from *Zubulake v. UBS Warburg LLC*, District Judge McMahon adopted an extraordinarily broad definition of "key player" by holding that "KPMG should 'reasonably anticipate' that *every* Audit Associate who will be receiving opt-in notice is a potential plaintiff in this action." (Emphasis added.) Accordingly, because KMPG had not provided evidence as to what is on the hard drives, or the extent to which such data is relevant and/or duplicative of more readily accessible ESI, the court agreed with the magistrate that hard drives must be preserved until the end of the "opt-in" period – unless KPMG reaches some agreement with plaintiffs regarding a sampling methodology or abandons its litigation position that all potential plaintiffs are non-exempt employees. The district court concluded that, upon expiration of the opt-in period, KPMG can destroy the hard drives of putative class members who fail to opt into the FLSA class and cannot be part of the New York state class.

In addition, although the Court stated that "proportionality is necessarily a factor in determining a party's preservation obligation," it held that it could not balance the costs and benefits of preservation because KPMG had not voluntarily allowed plaintiffs to review a sampling of hard drives. Judge McMahon stated that "had I been contacted, I would have immediately ordered KPMG to produce a small number of hard drives so that Plaintiffs' counsel could peruse them, and that would have been the end of the matter."

On one hand, the district court limited the magistrate judge's very burdensome ruling that KPMG must preserve hard drives for every putative FLSA class member *even if class certification was denied,* "because of the potential individual actions" that could be filed. The district court chose not to endorse this, holding that "obviously, this last ruling by Judge Cott can and should be vacated, because the certification motion was granted."

However, the decision imposes an expansive and burdensome preservation requirement on employers facing FLSA and other employment class action suits – especially in the pre-certification phase where there might be a vast number of *potential* plaintiffs.

Moreover, the Court's insistence that KPMG agree to an informal review of hard drives before a proportionality analysis could even be undertaken places a heavy burden and risk on employers who want to seek relief from disproportionate preservation and/or discovery demands. Such a requirement, which may be referred to as a "forced quick peek," would expose all of an employee's hard drive data – relevant, non-relevant, privileged, personal – to inspection by plaintiffs' counsel.

This ruling arguably changes the playing field in the S.D.N.Y. and will surely be cited by plaintiffs across the country. Going forward, employers faced with large class actions must be prepared to negotiate with plaintiffs early in the discovery process regarding the size of a potential sample of putative class members for discovery purposes in the hope of minimizing defense costs while maintaining the evidence necessary to sustain all viable defenses in the matter. Further, employers should expect that courts may want defendants to produce a sub-sample of ESI sources for review by plaintiffs at the outset of discovery to assist in determining the scope of discovery going forward, in order to get any relief regarding disproportionately broad preservation and discovery demands.

For more information, please contact the professional(s) listed below, or your regular Crowell & Moring contact.

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