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CRIMINAL LIABILITY

Document Retention

Two Seyfarth Shaw LLP attorneys discuss the varying competing business and legal considerations that often shape corporate record retention policies, noting that white collar criminal law considerations are often overlooked entirely in that calculus. Sophisticated companies and their learned counsel would be wise not to focus exclusively on statutory and regulatory mandates for crafting effective document retention polices, but also to evaluate the potential that archived records could be used to demonstrate corporate criminal knowledge and even qualify for the ancient documents exception to the hearsay rule.

The Law Says You 'Know' What You Keep: Clinging on to 'Ancient' Corporate Records Can Give Rise to Corporate Criminal Liability

By Andrew S. Boutros and John R. Schleppenbach

Background

Faced with a complex web of statutes, regulations, and common law legal considerations—not to mention logistical and cost challenges—today, it can be difficult for companies (both public and private as well as large and small) to set policy for how long to retain and archive documents. For example:

(i) U.S. Customs and Immigration Services requires companies to hold certain immigration documents for three years (8 U.S.C. § 1324A(b)(3));

(ii) the Internal Revenue Service mandates that employment tax-related materials be held for four years (IRS Publication 15 (2017)); and

(iii) U.S. Customs and Border Protection requires importers, exporters, carriers, and brokers to maintain records and entry documents for five years (19 C.F.R. § 163.4).

Similarly, Title VII of the Civil Rights Act of 1964 imposes a duty on employers to retain records related to whether unlawful employment practices have been committed ''for such periods . . . as the Commission shall prescribe.'' The Commission has followed up with 29 C.F.R. § 1602.14, setting various retention periods for different types of employment-related documents. Also, States have gotten into the action as well, with their own rules about how long various materials related to tax payments, labor activities, licensing issues, and the like should be kept. With such a complex web of document-retention rules at the federal, state, and even local level, it is no wonder that corporations can be tempted to just throw their hands up and decide to keep every document indefinitely.

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But, indefinite retention policies or practices may be unwise—if not dangerous—for white-collar-criminal-liability reasons that are often overlooked in the analysis of document preservation requirements. Indeed, holding on to corporate documents can have serious white collar criminal repercussions, in addition to the obvious practical difficulties, costs, and space management issues of organizing and maintaining an ever-growing—if not mountainous—volume of corporate documentation forever.

Words of Caution

But before going any further, a few words of caution: Our article is premised on one key, fundamental assumption, namely, that the document retention question is being made ex ante before any pending or reasonably anticipated criminal, administrative, or civil matter or litigation. Thus, in this regard, this article concerns document retention policies that are applied evenhandedly to all corporate documents as a matter of practice in the ordinary course of business. Of course, danger abounds should companies seek to destroy documents that are subject to pending, threatened or anticipated litigation or enforcement.

Corporate Criminal Knowledge

Generally, because corporations cannot act except through their officers and employees, they are deemed to have knowledge of everything known by those employees responsible for the relevant aspect of the business. *United States v. Bank of New England, N.A.*, 821 F. 2d 844, 856 (1st Cir. 1987). At least in some Circuits that embrace the ''collective knowledge doctrine,'' it does not matter if no one employee ever had all of the relevant information and synthesized it; if different parts of the organization were aware of all the necessary facts, the corporation cannot claim ignorance based on compartmentalization. *Id.* Moreover, corporations are deemed to have knowledge of information included in documents within their files. *Brazos River Authority v. GE Ionics, Inc.*, 469 F.3d 416, 433 (5th Cir. 2006). Thus, companies should be aware that retaining documents means that they are retaining institutional knowledge of anything within those documents—whether good, bad, or indifferent, and whether they realize it or not.

And, unlike with individuals, corporations cannot be deemed to have forgotten information based on the passage of time. To the contrary, if documents and records exist — whether electronic or paper-based — a corporation is said to ''know'' what it clings on to, regardless of whether the materials are long lost in the belly of a corporation's storage system or otherwise available for quick retrieval on someone's shelf or email inbox. As well-known jurist and scholar Frank Easterbrook of the Seventh Circuit Court of Appeals has put it:

> Persons forget because the chemical connections in their brains change over time. Corporations do not record knowledge in neural pathways; they record it in file cabinets (and increasingly on computer disks). File cabinets do not ''forget.'' Files may be destroyed, and people may forget about data in file cabinets, but a memorandum saying ''platform X is unsound and must be repaired'' remains in the corporation's knowledge as long as the memo itself continues to exist (and, even after its destruction, as long as a responsible employee remembers it).*United States v. Ladish Malting Co*., 135 F.3d 484, 492 (7th Cir. 1998).

Other cases have likewise found corporations chargeable with knowledge of facts contained in documents in their files, even if they were not otherwise made aware of them. *See, e.g., Ceres Marine Terminal v. Director, Office of Workers' Compensation Programs*, 118 F.3d 387, 392 (5th Cir. 1997); *Bunge Corp. v. Director, OWCP*, 951 F.2d 1109, 1111 (9th Cir.1991); *Columbian Nat. Life Ins. Co. v. Rodgers*, 116 F.2d 705, 708 (10th Cir. 1940).

Thus, there does not appear to be any expiration date on corporate knowledge of information retained in company documents. That is, if you have it, you own it, and you own everything it stands for or can give rise to, even if that means corporate criminal wrongdoing.

The Ancient Documents Exception

Even further, not only can long-forgotten archived documents form a basis for liability, but with the passage of time, ***older*** corporate documents may actually become ***easier*** to admit into evidence to prove corporate knowledge as they age. Specifically, under Federal Rule of Evidence 803(16),''[a] statement in a document that is at least 20 years old and whose authenticity is established'' is ''not excluded by the rule against hearsay, regardless of whether the declarant is available as a witness.'' *Langbord v. United States Dept. of Treasury*, 832 F.3d 170, 189 (3d Cir. 2016); *see also Brumley v. Albert Brumley & Sons, Inc.*, 727 F.3d 574, 579 (6th Cir. 2013).

Thus, corporate documents that have been retained more than 20 years may be exempt from the hearsay rule and therefore rather easily admissible to show corporate knowledge—assuming they can be authenticated.

But at least on this issue, all is not lost. Fortunately, federal rule-makers have recognized the concern that the ancient documents exception could be used to introduce massive amounts of potentially unreliable electronically stored information that has managed to avoid getting ''nuked'' by the delete button (or wiped clean by the overwrite function) for more than 20 years. Accordingly, effective Dec. 1, 2017, Rule 803(16) was amended to narrow the ancient document exception to materials ''prepared before January 1, 1998, and whose authenticity is established.'' Of course, corporations should still strive to be careful about maintaining stored materials created before January 1998. And, notwithstanding the federal rule change, some state versions of the ancient documents exception have not been similarly amended, *see* Ill. R. Evid. 803(16), meaning that any stored documents older than 20 years may still be deemed admissible non hearsay in state court.

Conclusion

Companies remain free to develop customary documentation retention policies under which documents and records are routinely and automatically cleaned out, without regard to their contents, after a certain period of time has elapsed. But, in as much as companies and their records custodians (and lawyers) should make every effort to obey federal, state, and local rules-based document preservation obligations, they should also give due regard to the opposite consideration:

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namely, that holding on to documents indefinitely can expose a company to corporate criminal liability and, with the documents' old age, actually make them more reliable (and hence unencumbered by the hearsay rule) in the eyes of the law.

But, admittedly, sometimes holding on to old documents not only can be good—but actually great—for business and liability avoidance. That is, in the same way that aging documents can give rise to liability, it is also equally possible that a longer retention period could give companies greater access to exculpatory documents, such as materials showing good faith, due diligence, or reliance on the advice of counsel. Thus, the point is that companies should consider the white collar criminal implications of retention when developing a policy, just as they consider the statutory and regulatory implications.

With the stakes so high on both sides—whether ''underholding'' or ''overholding'' corporate records—companies and their representatives should be careful to avoid the trap of viewing documentation retention policies as pedestrian business matters undeserving of high attention. To the contrary, as the ''brains'' of an organization, business records and the polices that preserve or destroy them should be crafted carefully and thoughtfully in consultation with experienced counsel. This is particularly true of businesses in heavily regulated or high-profile industries, where old records can be taken out of context or otherwise be introduced into evidence without the foundational support or substantive explanation that comes with a live witness.

Therefore, careful, measured retention can achieve the dual function of helping companies fulfill their regulatory and other legal duties while also avoiding potentially corporate criminal exposure.