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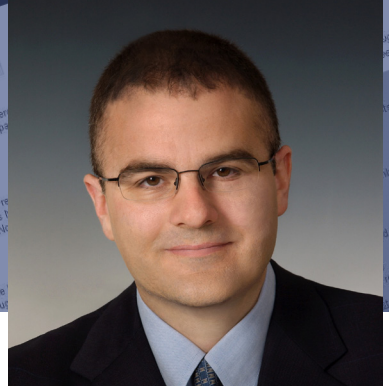
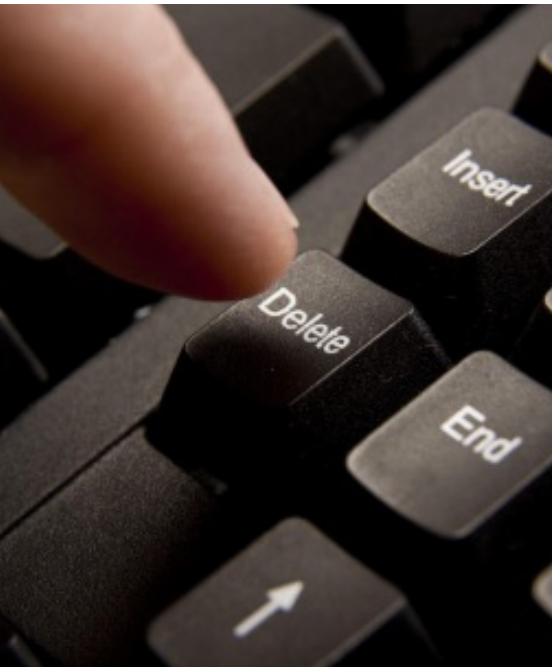


BRIAN J. *LAMOUREUX* PARTNER

TO HAVE AND TO HOLD: Delete E-Mail At Your Peril

Every day, companies and their employees are bombarded by email. To handle this flood of electronic information, some companies have adopted record retention policies that automatically and routinely delete emails after a certain number of days. While this seems like defensible and justifiable advice for managing vast amounts of data, a recent Rhode Island court decision exposes the dangers of such a practice when a company is involved in litigation.

On a mild September morning, a school bus rear-ended a tractor trailer which was parked in the breakdown lane along Route 95. The tractor trailer was owned by Jevic Transportation. The accident produced one fatality and other injuries. Litigation soon followed. The hotly-contested issue in the lawsuit is whether Jevic's tractor trailer was fully parked in the break-down lane, or whether it was partially blocking the travel lane.



Within hours of the accident, Jevic began its own investigation, which included employees communicating by email. As the lawsuit progressed, it became apparent that relevant Jevic emails may have been automatically deleted pursuant to Jevic's routine email deletion policy, which purged emails after 270 days. Significantly, Jevic did not institute a "litigation hold" immediately after the accident. A litigation hold is a notice to employees to preserve documents and other materials that may be relevant to a lawsuit or investigation. These procedures ensure that companies swiftly preserve all relevant evidence.

Jevic was accused of wrongfully allowing potentially relevant emails to be deleted under its routine deletion program. Jevic claimed that if any relevant emails were deleted, Jevic deleted them as part of a standard routine and without any fraudulent intent. Jevic's argument appeared sound because it was premised upon a prior Rhode Island Supreme Court decision which seemed to support such a practice.

However, the Superior Court saw the issue differently, and ruled that Jevic failed to preserve relevant emails and other evidence. The Court focused on two primary issues. First, when a party has notice of a potential legal claim, it must preserve all evidence that may be relevant to the claim, even prior to the filing of any lawsuit. Second, the Court set a relatively low bar in establishing what evidence should be deemed "relevant" and therefore preserved.

In Jevic's case, the Court determined that Jevic was a sophisticated trucking company and therefore, should have known immediately after a fatal accident that litigation was likely. The Court concluded that Jevic should have instituted a litigation hold immediately after the accident by either suspending or modifying its routine deletion policy to ensure that relevant emails were not deleted. Because Jevic failed to do so, the Court severely sanctioned Jevic by: (a) prohibiting Jevic from offering expert witness evidence about the accident; (b) instructing the jury that Jevic spoiled relevant evidence which was likely harmful to Jevic's case; and (c) requiring Jevic to pay attorneys' fees to the opposing party.

This case highlights three critical issues that companies must keep in mind. First, companies must have a written and defensible document retention policy. Second, if they have a routine email deletion policy, companies must quickly have a means to suspend it, when necessary. Finally, companies must ensure that they begin preserving relevant evidence when a claim or litigation is likely. Waiting until a lawsuit is filed will be too late.

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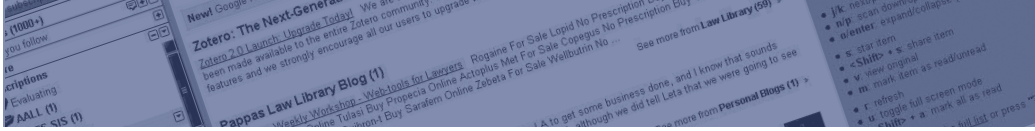

SUMMARY OF HOUSE BILL 5255

SOCIAL MEDIA PRIVACY FOR STUDENTS AND EMPLOYEES

Overview:

- On February 5, 2013, a bill was introduced in the Rhode Island General Assembly that would restrict certain activities by schools and employers with respect to their students', employees', and applicants' social media accounts

Highlights:

- "Social media account" is broadly defined, and includes sites such as Facebook, Twitter, and LinkedIn
- "Employer" is also broadly defined, and includes supervisors, managers, and others who are "acting in the interest of an employer directly or indirectly"
- Schools and employers would be prohibited from *requiring, requesting, suggesting,* or *causing* students/employees/applicants to:
  - *disclose* their username, password, or any other means for accessing their social media accounts;
  - *access* a personal social media account in the presence of a school or employer representative;
  - *divulge* any personal social media information (except an employer may ask an employee to divulge personal social media information which is reasonably believed to be relevant to an investigation of allegations of employee misconduct or law-breaking);
  - *add* coaches, teachers, administrators, supervisors, etc. as "friends," "followers," or "connections" on social media accounts;
  - *change* their privacy settings on any social media account.
- Schools and employers also cannot:
  - refuse to admit any applicant or hire any employee for refusing to add coaches, teachers, administrators, supervisors, etc. as "friends," "followers," or "connections" on social media accounts;
  - expel, suspend, discipline, or terminate any student or employee for refusing to add coaches, teachers, administrators, supervisors, etc. as "friends," "followers," or "connections" on social media accounts.

Penalties:

- Actual damages, punitive damages, injunctive relief, and attorneys' fees

SOURCE: http://webserver.rilin.state.ri.us/BillText/BillText13/HouseText13/H5255.pdf

Brian J. Lamoureux is a Partner at Pannone Lopes Devereaux & West, LLC in Providence. He is a litigator with experience in e-discovery and electronic evidence issues, as well as legal issues relating to social media use in the workplace and marketplace. He can be reached at 401-824-5100 or bjl@pldw.com.