Litigation Trends and Opportunities in 2019

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Data Protection Laws Complicate Cross-Border Discovery

By Lisa Singh

For global businesses navigating litigation concerns, varying data protection laws are triggering potential complications in cross-border discovery. State and federal laws maintain differing levels of compliance, and new data protection laws overseas, led by the European Union's General Data Protection Regulation, are calling for more uniform approaches to data collection.

"The GDPR has made a huge impact internationally," said Karyn Harty, partner and e-discovery specialist with McCann FitzGerald. "So many international organizations do business in the European Union, or involving EU citizens' data, that GDPR compliance has become a significant issue for businesses in the U.S. and in other regions, such as [Asia-Pacific] and the Middle East."

The lack of exceptions in the discovery process accorded by GDPR raises the stakes. With the notable exception of the Stored Communications Act, state and federal data protection laws' allowance for the retention and disclosure of data, where the law requires it, minimizes impact on U.S. civil discovery, said David Kessler, partner and co-head of Norton Rose Fulbright's e-discovery and information governance practice. The lack of a similar loophole under GDPR complicates cross-border discovery efforts.

An Illinois Supreme Court ruling weakens a common defense strategy, reports Bloomberg Law.

"The GDPR does not have an express exception for civil discovery happening in a third country like the United States," Kessler said. In the case of co-equal sovereigns, conflict of law is now becoming more common in the discovery process.

"Compliance with a non-EU law obligation is not recognized as a valid legal basis for processing personal data from a GDPR perspective," Harty of McCann said, "whereas compliance with an EU law obligation is."

GDPR isn't the only regulation posing potential challenges to discovery. "Beyond GDPR, there are country-specific regulations that require navigation, such as blocking statutes and works council notification," said Bryant Isbell, managing director of the global e-discovery and data advisory group at Baker McKenzie.

Meanwhile, even as experts see limited impact on discovery from federal and state data protection laws, this may soon change as well.

"Increased requirements around data security in some newer privacy regulations are raising concerns among organizations and their counsel regarding security infrastructure and retention policies," said Rich Vestuto, managing director in discovery for Deloitte Transactions and Business Analytics. He cites the California Consumer Privacy Act and the New York Department of Financial Services' cybersecurity regulation, which shares tenets with the GDPR.

Additional measures nationwide are further cementing public expectations of data protection safeguards. The recent Illinois Supreme Court ruling that plaintiffs need not demonstrate adverse effect in order to sue companies under the state's biometric privacy law weakens a common defense strategy, reports Bloomberg Law. It's only a matter of time before discovery, even where data is housed stateside, may face additional complications, experts predict.

"To the extent that the California Consumer Privacy Act enhances people's awareness of privacy and cybersecurity, they're going to want [to extend it to] any process that handles personal data—that [could] include discovery," Kessler said.

Internationally, while EU lawmakers now allow companies to store nonpersonal information anywhere in the bloc, as reported by Bloomberg Law, the scope of the GDPR remains far-reaching, and is increasingly hard to ignore.

In the past, "many companies would practically make a choice—not produce the data and potentially get fined or take the risk that the data protection authority in the EU would fine [them]," Kessler said. "That decision is a lot harder now, because the fines under GDPR are so enormous." Organizations, in turn, are exercising extra precaution.

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"We are seeing increasing use of documented legitimate interest assessments prior to searching," Harty said. "Real thought is given to the nature of the data within the producing organization and the extent to which it falls within the scope of the discovery order."

In this environment, there's a growing trend to revisit information governance. "If you have data organized and classified correctly, you're improving your efficiency 20 percent," said Bennett Borden, chief data scientist at Drinker Biddle. "Not only that, your e-discovery costs plummet."

Establishing teams on the ground is critical in navigating the escalating intricacies of cross-border discovery—particularly, experts say, as individual data privacy concerns grow.

"We may see more complaints specifically in the context of discovery, especially where the production in another country may have direct personal repercussions for an individual," said Natascha Gerlach, an e-discovery and European data protection law expert.

"It is important to have a network of local experts to fall back on to help identify specific issues early on, to brief the client, opposing counsel, and the court [in a] timely [manner], and avoid unnecessary conflict," she said.

Also important is employing the right mix of technology, people, and protocols—and ensuring the other side does as well, experts say.

"Parties should not only require appropriate protective orders before exchanging data," Kessler said, but ensure that their opponents "are implementing appropriate administrative, organizational, and technical security protocols to protect the data they are producing."

Automation, Kessler added, will be key.

"Law firms that leverage technology and analytics to reduce the amount of data in discovery, so that less is manually reviewed and produced, will be [in a] better position to protect privacy in discovery."

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