

FTC and DOJ Emphasize Companies' Duty to Preserve Ephemeral Messaging and Data on Collaboration Platforms in Updated Guidance

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The Federal Trade Commission and United States Department of Justice recently released new guidance on preservation of electronically stored information from ephemeral messaging tools and collaboration platforms like Slack, Microsoft Teams and Signal. These updates make clear that in future enforcement matters, the DOJ and FTC will be requesting information about which messaging applications, both ephemeral and non-ephemeral, are used within companies. They will also request companies' policies on retaining and storing data from these applications and seek relevant data from these sources. In a press release, the FTC and DOJ emphasized that failure to comply with these new guidelines may lead to spoliation sanctions or even obstruction of justice charges. And we may begin to see non-governmental parties in civil suits raising similar arguments and insisting on similar preservation efforts.

The updates were prompted at least in part by the government's concern that attorneys and clients have been "feign [ing] ignorance" to avoid discovery preservation obligations. The government has raised this argument in antitrust cases, and some courts have echoed its frustration. Last year, the Northern District of California sanctioned Google for failing to take reasonable steps to preserve data from its internal ephemeral messaging platforms, explaining that "Google is a frequent and sophisticated litigation party," with the technical ability to preserve internal chats exchanged by employees, but that it "did not check to see if custodians were actually preserving relevant Chats as directed by the hold notice, and did nothing in the way of auditing or monitoring Chat preservation." *In re Google Play Store Antitrust Litig.*, 664 F. Supp. 3d 981 (N.D. Cal. 2023).

You can read the updated guidelines and press release at the links below:

https://www.ftc.gov/system/files/ftc_gov/pdf/Final-Rev-Model-Second-Request-01-26-2024.pdf

<https://www.ftc.gov/news-events/news/press-releases/2024/01/ftc-doj-update-guidance-reinforces-parties-preservation-obligations-collaboration-tools-ephemeral>

In the wake of these updates, companies should revisit their policies on storing and preserving data from messaging applications and collaboration platforms and assess their overall technical capabilities for ensuring compliance with their duty to preserve electronic evidence when that duty arises.

If you have questions about how this new FTC and DOJ guidance and recent case law may impact your company's data preservation policies, or about electronic discovery in general, Miller Canfield's Electronic Discovery and Legal Tech Services Team is happy to help. Please contact your Miller Canfield attorney or one of the authors of this alert for more information.