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Business Texts on Personal Phones: The Growing Compliance and Enforcement Risk and What to Do About It (Part II of II)

Employees' use of unapproved messaging platforms for business-related communications—and their employers' failure to monitor and preserve such communications, even if inadvertent—may also cause employers to provide incomplete responses to subpoenas or requests for information issued by prosecutors, enforcement staff, or private civil parties. To the extent a firm is not aware that its employees are engaging in such behavior, it might fail to draft document preservation notices in response to a subpoena or anticipated litigation broadly enough to encompass responsive messages on personal devices or unapproved messaging applications. Moreover, even if the firm does issue a broadly drafted preservation notice, it is nearly impossible for the firm to ensure compliance with such notices by its employees. And, if the firm does not have systems or practices in place reasonably designed to identify, capture, and preserve business-related communications sent or received on unapproved messaging platforms, the firm cannot be confident that its document productions in response to subpoenas or requests are complete.

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