

Action Plan for ‘Litigation Hold Letters’

Q: We received a letter threatening a lawsuit and stating that we must “hold all of our records.” What should we do?

A: A “litigation hold letter” is a formal notice that parties send out to potential defendants prior to the initiation of litigation warning them of the duty to preserve potentially relevant evidence. The litigation hold letter reflects an actual legal duty and therefore can impose legal obligations. More specifically, the pre-litigation duty to preserve evidence stems from the courts’ inherent power to ensure the integrity of the adversarial system and to sanction those who would attempt to destroy or conceal potentially relevant and necessary evidence. Thus, if it is discovered during the course of litigation that a party destroyed or failed to preserve evidence before the litigation was commenced, but should have reasonably anticipated litigation or known that the evidence could be relevant to future litigation, that party may be subject to monetary or procedural sanctions.

In light of this, it is very important to have an action plan in place for responding to litigation hold letters. Following are some specific recommendations for such a plan:

- 1. Understand the scope of the litigation hold.** A litigation hold letter typically describes the potential litigation that is being contemplated and the type of evidence that should be preserved. Accordingly, the first step is to understand the scope of the evidence that may become subject to future litigation and to take the steps to gather and preserve that evidence. The obligation to preserve any potentially relevant evidence will continue until any resultant litigation ends or the dispute is otherwise settled.
- 2. Identify the key personnel involved.** As noted, the litigation hold letter will describe the potential dispute at issue. With that informa-



tion, it is important to identify who might be involved in the dispute or might have documents pertaining to it. Those individuals (both staff and members) will need to be contacted promptly and informed that they have a duty to preserve any potentially relevant evidence in their custody or control.

- 3. Understand the types of evidence at issue.** The litigation hold — the duty to preserve — covers all evidence that may be relevant to the anticipated lawsuit. This includes not only all hard copies of documents, but also all “electronically stored information”. ESI covers all emails, stored documents and files, hard drives and all “metadata” relating to the creation of that ESI. Thus, it is important to have an appreciation for the scope and types of ESI that are maintained by your information management systems and will need to be preserved. Similarly, it is critical that any potentially relevant ESI is promptly segregated from any programmed automatic delete functions.
- 4. Designate an IT professional to be responsible for litigation holds.** Because the preservation of ESI is often the most crucial aspect in complying with a litigation hold letter and the duty to preserve, it is important to have an action plan in place with a designated IT professional who can promptly initiate the steps to ensure that any relevant ESI is

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identified, segregated from any automatic delete function, and preserved in its original form (with metadata). That person also should have a plan for working with the key personnel involved in the potential dispute (see No. 2) to cull out from their email files and stored documents (and text messages, voicemails, thumb drives, etc.) any ESI relating to the dispute.

- 5. Contact your legal counsel and insurer.** A litigation hold letter is usually a harbinger of an impending lawsuit or, at the very least, a subpoena to produce documents and testimony. Consequently, in conjunction with the foregoing steps, it is important to advise your liability insurer of your receipt of the litigation hold letter. You should also inform your legal counsel. Your counsel can help you frame the scope of the potentially relevant information and can help you document that you have taken the proper steps to preserve records. Such documentation can be important if questions arise later regarding the sufficiency of your compliance with the duty to preserve. Your counsel can also respond to the litigation hold letter setting forth any appropriate objections and framing a reasonable scope for the information that will be preserved.

Finally, because responding to litigation holds can be time-consuming and expensive, it is prudent to ensure that in your day-to-day operations (when you are not under a litigation hold) you only create or retain documents or ESI that are necessary to your business. Being rigorous and efficient in your records retention policies will make it easier to respond to litigation hold letters. ▮

The answers provided here should not be construed as legal advice or a legal opinion. Consult a lawyer concerning your specific situation or legal questions.