

An Employer's Guide to Litigation Holds

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Employers have a duty to preserve information that is potentially relevant to anticipated or existing litigation and failure to comply with that duty can have dire consequences. As such, issuing a litigation hold should be at the top of every employer's to-do list once placed on notice of a lawsuit, an administrative charge, an agency investigation or any other claim or action. Below are some questions and answers that are worth considering the next time you find yourself in such a situation.

What is a Litigation Hold?

A litigation hold is an internal instruction issued by a company to its employees directing them to identify, locate and preserve paper and electronic documents and information that may be relevant to a particular dispute, claim or investigation. In addition to preventing the deletion, destruction or modification of documents and information by individuals, a litigation hold should also include the suspension of any routine document destruction pursuant to a company's document retention policies or otherwise.

When Does the Duty to Preserve Potentially Relevant Information Arise?

Most state and federal courts hold that the duty to preserve potentially relevant information arises when an employer has a reasonable basis upon which to anticipate litigation. Depending on the

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jurisdiction, the requirement to preserve relevant evidence can arise from the common law duty to prevent spoliation of evidence and/or from statutes and regulations, such as the Sarbanes-Oxley Act. Accordingly, employers should take steps to preserve potentially relevant information as early as possible after being placed on notice of a potential claim, agency investigation or lawsuit.

Who Should Receive the Litigation Hold?

One of the most important steps in the litigation hold process is deciding who should receive the instruction to preserve information. As a threshold matter, in order to ensure a company's routine destruction procedures are suspended, the Director of Information Technology or anyone else in charge of data storage or technology issues for the employer should receive a copy of the litigation hold. Anyone else who may have potentially relevant information should also receive the litigation hold. This often includes an employee's managers, supervisors and certain co-workers as well as HR employees and anyone who participated in the employment action(s) at issue.

What Documents and Information Should be Preserved?

The answer to this question varies depending on the claim or investigation, but as an initial matter employers should consider where potentially relevant information may reside and what types of information should be preserved. For example, relevant information is typically found in personnel files, other HR records and employee emails, but it can also be found in text messages, voicemails, calendar entries, employee desks or workspaces, storage facilities and even social media sites. Given the varying locations of potentially relevant information, employers should look into whether potentially relevant information may be located on desktop computers, laptops, tablets, cell phones,

hard drives, internet usage files or even backup tapes.

What Should Be Done After Issuing the Litigation Hold?

So you've issued a litigation hold, now what? After issuing a litigation hold, employers should periodically follow up with the individuals and departments who received the hold to make sure they implemented it as instructed. As the dispute, investigation or litigation progresses, it is also wise for employers to consider whether additional individuals or departments should receive the litigation hold and whether the scope of the original litigation hold is still sufficient. If claims or issues are added or the nature of the dispute changes, a new or amended litigation hold may need to be issued to ensure all potentially relevant information is preserved. In addition, as personnel decisions are made, employers should consider whether new employees should be added to the litigation hold and whether departing employees' information should be preserved.

What if an Employer Has a Document Retention Policy?

Many employers have document retention policies pursuant to which documents, emails, data and other information is automatically archived or deleted after a certain period of time. Employers with such policies should take steps to preserve all potentially relevant information, even if that means altering their standard practices. That is why it is critical for employers to keep their Information Technology Departments/Directors or the individuals in charge of data storage or technology issues for the employer in the loop.

What Are the Consequences of Failing to Preserve Potentially Relevant Information?

Courts have broad discretion to sanction employers for failure to preserve evidence. Under some circumstances, courts can issue sanctions, award attorneys' fees, dismiss claims, enter a default judgment or instruct the jury that it may draw an adverse inference against the employer.

If you have questions about litigation holds, contact your Akerman Labor and Employment lawyer.

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