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“Tip of the Month”

The Litigation Hold

If your company gets notice of a litigation hold, be prepared to take action! Disregarding the litigation hold can mean big trouble. What the heck is a litigation hold?

We are talking about evidence. The request for a “litigation hold” usually comes at the end of a lawyer’s demand letter related to some claim against your company. You are on notice. Woe unto you if you fail to protect the evidence.

Intentional or even accidental destruction or loss of evidence can lead to court fines and court rulings against your company. The judge can instruct the jury that the missing evidence is presumed to be damaging against you. Otherwise, you would have produced it.

“Spoliation” is the term applied to missing or altered evidence. To avoid being charged with spoliation, your company should have procedures in place for compliance with a litigation hold notice.

“Reasonable anticipation” is the standard applied to evidence that company managers should preserve. When the company has reasonable anticipation that a lawsuit is coming, the managers need to identify (1) the people involved and (2) the documents they have. The documents might be electronic, including email.

After company managers determine the scope of the litigation hold, they should notify the key player to locate the relevant data and to prevent its loss. Information technology (IT) personnel should be notified right away. They can help gather backup tapes and storage media to ensure preservation. IT can also make images and collections of documents all in one place related to the legal issue subject to the litigation hold.

Sometimes IT will copy computer hard drives that would otherwise suffer the day-to-day changes or, heaven forbid, computer crashes that might later be characterized as spoliation or destruction of evidence. In the discovery phase of litigation, proper preservation of this evidence early will actually make the case easier to manage.

As the case proceeds, sometimes the scope of the litigation hold expands. Reminder notices should be sent anyway so that people do not forget or be tempted in any way to “lose” pieces of evidence. Better to explain the evidence, or deal with it properly, than to be surprised by what was not saved. Lost evidence may be automatically construed against you.

If you have questions about litigation hold policies and procedures that your company can implement, please call us at 668-1971 or contact us by sending an email to mailbox @ biz-patlaw.com.

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