

Implementing Effective Litigation Holds

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Does your company have an established procedure for issuing timely litigation holds? Recent court decisions make it clear that employers have a duty to preserve electronically stored information and paper documents they know or should know would be relevant to a current or threatened legal action. The consequences for failing to do so can be severe. Events which trigger an employer's duty to preserve information/documents include, but are not limited to, the following:

- Receiving notice that the employer is a party to a legal or an administrative proceeding, such as a charge of discrimination;
- Receiving a letter threatening a claim on behalf of an applicant or current or former employee;
- A verbal demand from an applicant or current or former employee relating to a legal claim;
- Other "red flags" exist or a "totality of circumstances" indicate a claim is likely to be made by an applicant or current or former employee.

A litigation hold notice is best made in writing. It should instruct recipients to preserve and not destroy (or overwrite) electronically stored information and paper documents that are relevant to current or threatened litigation.

- Although the litigation hold notice must be tailored to the facts of each particular situation, at a minimum, it should include the following:



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- Name of the matter or individual involved;
 - Warning of the importance of the hold and the consequences for not complying with it;
 - Direction not to alter or destroy information/documents;
 - Reason for the hold – e.g., legal action;
 - Reason the recipient (see below) is getting the hold notice;
 - Types of information included in the hold and the applicable time period. (Information subject to the hold could include personnel files and other employment related documents, e-mail and other forms of correspondence and electronically stored information.)
 - Instructions for preserving information/documents;
 - Suspension of any routine document retention/destruction policy;
- The hold notice should be issued to all employees reasonably likely to have information relevant to a claim – the “key players” in the matter. There could also be instances in which outside vendors would also need to be issued a hold notice.
 - The employer’s IT department should help implement litigation holds, particularly with regard to documents housed or stored in e-mail accounts, or on computers, cell phones, PDAs, or on flash drives, as well as with regard to taking control of backup tapes and stopping any automatic overwriting of electronic data.
 - Finally, employers should enforce litigation holds and, if a violation of the hold is discovered, take prompt action to remedy the violation if possible. Steps also should be taken to ensure no further violations occur, such as taking disciplinary action up to termination.

Litigation hold notices must be tailored to the facts of each case and should be reviewed by counsel knowledgeable in this area. If you have a question about litigation hold practices, Poyner Spruill attorneys are experienced in minimizing legal risks through the effective use of litigation holds and are available to assist employers with any of their needs.



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