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SPECIAL FEATURE

Paper, e-record retention and the 'litigation hold'

By William E. Hannum III

In the words of Kenny Rogers, "The secret to surviving is knowing what to throw away and knowing what to keep."

One thing that an employer should never gamble with is the preservation of documents and information that are relevant to actual or pending litigation. An employer must identify, locate and preserve relevant records whenever it is involved in litigation *or reasonably anticipates litigation*.

This obligation is known as a "litigation hold." If an employer fails to effectively implement a litigation hold, whether willfully or negligently, the employer can be subject to harsh sanctions.

In the flurry of activity required when responding to a complaint or a demand letter, the litigation hold is often put on the back burner. Likewise, employers often fail to issue a litigation hold when a more subtle threat of litigation triggers the obligation.

But two recent cases out of Massachusetts and New York serve as harsh reminders that parties face severe sanctions if they take a "careless and indifferent" approach to identifying and preserving records for litigation.

Accordingly, employers are encouraged to follow the steps outlined below. That means issuing a litigation hold at the right time, enlisting the participation of the right people, and preserving the appropriate records. These steps should minimize the risk of the kinds of sanctions issued in the cases summarized below.

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Severe sanctions for destruction of evidence

In *Stein, M.D. v. Clinical Data, Inc.*, a case brought in the Massachusetts Superior Court, Judge Judith Fabricant imposed severe sanctions on the plaintiff for failure to identify and preserve documents and for the intentional destruction of evidence.

The physician-plaintiff brought claims against his former employer, CDI, for, among other things, breach of his employment agreement. CDI contended in counterclaims that, among other things, Stein violated his employment agreement by consulting for CDI's competitors, both during and after his termination.

Although Stein initiated the litigation and CDI propounded numerous discovery requests, Stein failed to identify and preserve relevant e-mails. A forensic examination of Stein's computer revealed that seven months after he filed suit, Stein installed on his personal computer a shredding program to automatically erase deleted e-mails every seven days.

Several months later, the exam found, Stein took steps to wipe the computer clean of everything that remained on it that would be relevant to the litigation.

The court reasoned that Stein knew, long before he began to delete his e-mails, that those e-mails would be potentially relevant to the litigation. Thus, the court ruled that Stein had a duty to preserve them.

The court further found that Stein's conduct imposed an unnecessary burden on judicial resources and substantial unnecessary costs on CDI, while significantly prejudicing CDI's position in the litigation.

As a result, the court dismissed all of Stein's affirmative claims and ordered Stein to pay all of CDI's costs associated with its efforts to obtain the relevant e-mails (which included attorneys' fees and expert fees and amounted to approximately $243,000).

Fabricant also warned that the court would instruct the jury that it may infer from Stein's conduct that additional relevant materials existed but were not recovered or produced, and that such materials would have provided evidence of facts contrary to Stein's position.

Gross negligence

Similarly, in *Pension Committee of the University of Montreal Pension Plan v. Banc of America Securities, LLC*, a case brought in the U.S. District Court for the Southern District of New York, Judge Shira Scheindlin imposed severe sanctions on a party that took a "careless and indifferent" approach to its litigation hold.

Scheindlin, the author of the seminal *Zubulake* decisions regarding electronic discovery, warned: "By now, it should be abundantly clear that the duty to preserve means what it says and that a failure to preserve records — paper or electronic — and to search in the right places for those records, will inevitably result in the spoliation of evidence."

Although the plaintiffs in *Pension Committee* initiated litigation in February 2004, they failed to issue written litigation hold notices until 2007. Scheindlin reasoned that this failure "constitutes gross negligence because it is likely to result in destruction of relevant information."

Likewise, Judge Scheindlin reasoned that the failure to identify all of the "key players" (including parties named in the complaint, demand letter or other relevant communications or discovery) and to ensure that their electronic and paper records are preserved constitutes gross negligence.

Scheindlin ordered severe sanctions against the offending plaintiffs, including an order that they pay the defendants' costs and attorneys' fees associated with bringing the discovery motion, as well as the expenses incurred to develop the facts surrounding the discovery misconduct.

She also gave an adverse jury instruction, which would permit the jury to presume that the lost evidence was relevant and would have been favorable to the defendants.

Steps to a successful litigation hold

To avoid harsh sanctions, employers should follow these steps to preserve records for litigation.

• Implement a record and retention destruction policy

Even before an employer is faced with litigation or potential litigation, an employer should have record retention and destruction policies in place. These policies should clearly set forth which documents and information are to be retained, and which are not, and when they are to be destroyed.

As a federal court in Utah recently stated: "An organization should have reasonable policies and procedures for managing its information and records. The absence of a coherent document retention policy is a pertinent factor to consider when evaluating sanctions. Information management policies are not a dark or novel art." *Phillip M. Adams & Assoc., LLC v. Dell*, 621 F. Supp. 2d 1173 (D. Utah 2009) (internal quotations and citations omitted).

An effective record retention policy will provide for the systematic review, retention and destruction of documents received or created in the course of business and should address issues such as how long data will be retained, where, and in what form, as well as how it will be secured, how and when it will be destroyed, and who in the organization is responsible for implementing and auditing the policy.

Later, when a litigation hold must be issued, these policies and procedures will need to be suspended, to some extent, and thus will provide the framework for implementing the litigation hold.

• Issue the litigation hold early and often

Clearly, an employer must issue a litigation hold whenever a party initiates litigation, or when a demand letter is sent or received.

However, there are also many other times when an employer may reasonably anticipate litigation. In these and many other situations where there is no complaint or "lawyer letter," the employer may reasonably anticipate litigation. In those circumstances, out of an abundance of caution, the employer should consider issuing a litigation hold to minimize the risk of the kinds of sanctions described above.

It is important to remember that a litigation hold is a *process* — not a one-time event. Effectively issuing a litigation hold requires, among other things, regularly re-issuing the written litigation hold memoranda to alert new employees to their obligations to preserve documents and to remind existing employees of their ongoing obligations.

• Ensure preservation of relevant records

Simply relying on employees to search and collect records is not sufficient; the employer should involve its counsel in supervising, monitoring and documenting the preservation and collection efforts.

In this regard, the documents and records made subject to the litigation hold need to be described with care, and the process of collecting those documents and records needs to be actively managed. Counsel can help to ensure that the necessary steps are taken.

• Communicating with all key players

The employer should confer with its information technology personnel to determine system-wide backup procedures and document destruction policies.

In addition, counsel must be sure to identify and communicate with all "key players" to ensure that their electronic and paper records are collected and preserved.

"Key players" will vary depending on the litigation, but generally include individuals who are either named as parties or identified in the complaint, demand letter or other relevant communications or discovery.

Key players will often include *former* employees or third parties over whom the employer can exert some form of control. As part of this process, the employer's counsel needs to understand the retention practices of all key players to ensure that relevant records are not modified, deleted or destroyed.

• The broad scope of the litigation hold

A litigation hold should identify the type of documents that need to be collected and preserved.

Terms such as "documents" and "records" must be interpreted broadly to include information or communications recorded in any medium. Documents and records should include, among other things, e-mail, information on any personal digital assistant (PDA), spreadsheets, calendars, letters, reports, drafts of records, magnetic tapes and zip drives.

Any questions that an employer may have about the relevance of a particular document, file, e-mail or other electronic data compilation should be resolved in favor of preservation and retention.

• Develop, educate and train

A litigation hold is a rigorous process. Employers should develop both document retention and destruction policies and liti0gation hold protocols to follow when a duty to preserve arises.

These protocols should include, among other things, notifying counsel, identifying and educating key players, and issuing written litigation hold memoranda.

Employers should then train in-house counsel, human resources personnel and management personnel regarding these policies and procedures.

Given the high stakes involved — including dismissal of claims, substantial attorneys' fees and adverse inference instructions to the jury — employers should implement appropriate record retention and litigation hold policies and consult with experienced counsel when issuing (and re-issuing) a litigation hold. NEIH