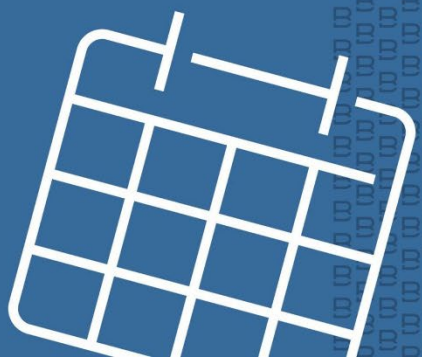
The Work Week

News from the Bassford Remele Labor & Employment Practice Group



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You Receive a Litigation Hold Notice: Now What?

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It often begins with a letter. An attorney for a current or former employee, a government agency, or opposing counsel writes to notify your company that a dispute is anticipated and that all potentially relevant information must be preserved. The steps you take in the days that follow can have a lasting effect on the outcome of the matter. This week, we address what employers should know about litigation hold notices, when the duty to preserve evidence arises, and the actions to take as soon as a notice is received.

What Is a Litigation Hold Notice?

Generally, a litigation hold notice is a written directive telling employers, companies, or individuals to stop deleting or altering information that may be relevant to a dispute, and to preserve and maintain that information. It most often comes in the form of a letter.

A hold notice is not a lawsuit, but it does signal your obligation to protect potentially relevant information, including information that would ordinarily be discarded under your routine records retention practices.

When Does the Duty to Preserve Arise?

The duty to preserve does not wait for a letter. It arises whenever a party knows or should know that litigation is reasonably foreseeable. That standard has two halves.

Obvious triggers (knows). Some events leave no doubt that a dispute is coming:

- A demand letter or other contact from an attorney.
- A charge from the EEOC or the Minnesota Department of Human Rights.
- A subpoena or service of a lawsuit.

Less obvious triggers (should know). Other events do not announce themselves as legal claims, but a reasonable employer would see potential litigation on the horizon:

- Serious workplace injuries or incidents.
- Certain internal complaints.

Do not wait for formal paperwork before taking preservation seriously when a serious incident or complaint comes in. You should also note that the duty is ongoing. It does not end once the initial documents are gathered. For example, new relevant information created after the trigger date, such as new emails, messages, and records, may also be covered.

You Received a Litigation Hold: Now What?

A prompt, organized response is the best protection and we recommend the following steps:

1. **Loop in counsel.** Contact your attorney right away. Counsel can help you interpret the notice, decide how far your obligations extend, and document your response.
2. **Understand the substance of the notice.** Read it closely and identify at least three things: the matter at issue, the scope of what you are being asked to preserve, and the sources where that information may live.
3. **Promptly notify record custodians.** Tell the people who control your records, starting with IT, so that automatic deletion, system purges, and device wipes are suspended. Routine practices that are harmless on an ordinary day can become a problem once a hold is in place.
4. **Investigate.** Do not assume the notice has told you everything. Look beyond the named party: other supervisors, coworkers, and departments may hold relevant information. Think beyond emails, too. Teams and Slack messages and electronic files are the obvious places to look, but relevant information may also exist in text messages, personal devices, and other systems your employees use to do their work. Also think beyond electronic information. Do your employees take handwritten notes? Those may be covered too.

What Is at Stake: Sanctions for Failing to Preserve.

If evidence is lost or destroyed after the duty to preserve has arisen, courts have a range of remedies available. Depending on the circumstances, they include:

1. An adverse inference, meaning a jury instruction that the missing evidence would have been unfavorable to the party that lost it.
2. Exclusion of expert testimony and related evidence.
3. Accepting facts as established or striking pleadings.

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4. An award of attorneys' fees and costs.

5. Criminal sanctions and professional discipline, in cases of willful destruction.

The lighter end of that list can still be costly or decisive. An adverse inference instruction can effectively hand the other side a favorable fact at trial, and a fee award can shift the other side's cost of litigating the preservation dispute to you.

The Bottom Line

Preservation is far easier, and far cheaper, to get right at the beginning than to repair later. Know the triggers, recognize that the duty can arise before a formal notice shows up, and when one does arrive, call your counsel, notify your custodians, and look broadly for where relevant information lives. If you have questions about a hold notice you have received, or about whether the duty to preserve has already been triggered, the Bassford Remele Labor and Employment Law team is here to help.

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