

You've Been Sued: Now What?

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Being served with a lawsuit is frustrating, and sometimes nerve-racking, even for seasoned in-house counsel. Having a plan in place to quickly and appropriately address new lawsuits can ease the stress of being sued.

Although no two suits are identical, we provide a checklist of general best practices to follow when your company faces new litigation. These steps will help to ensure critical deadlines are not missed and your company is quickly in the best position to defend itself. While we have focused on federal lawsuits, most states will have similar requirements, albeit with different specifics like differing due dates for specific actions.

Carefully review the complaint and confirm the date of service (and in which Court the complaint was filed).

- Contact your registered agent right away to confirm the date the lawsuit was formally served. This will allow you to calculate the response deadline, which typically is 21 days for federal complaints. See [Fed. R. Civ. P. 12\(a\)\(1\)\(A\)\(i\)](#). Response deadlines in state court and arbitrations vary.
 - Be sure to check the Court's local rules to confirm the response deadline and procedures for ensuring any extension of time to respond.
- If opposing counsel asks whether you will waive formal service, the answer generally should be yes. In federal court, waiving service allows a defendant 60 days to respond to the complaint. [Fed. R. Civ. P. 4\(d\)\(3\)](#). If a defendant refuses to waive service, the court may order the defendant to pay the costs of service and attorneys' fees associated with collecting those costs. [Fed. R. Civ. P. 4\(d\)\(2\)](#).
 - In federal court, waiving service generally waives complaints about defects in service or service of process but not personal jurisdiction, venue, or other grounds for dismissal. See [Fed. R. Civ. P. 4\(d\)\(5\)](#).

Review the docket to see whether anything beyond the Complaint has been filed.

- Sometimes in state court proceedings, courts enter uniform case management orders at the start of an action, which include various deadlines. Review the case's online docket to determine whether any case management or other orders have been entered.

Implement a document hold and send relevant custodians a preservation notice.

- To avoid arguments regarding spoliation of evidence or obstruction of justice, after receipt of a lawsuit, companies immediately should take steps to preserve relevant documents, including electronically-stored information. Work with your IT personnel or vendor to pause all routine document destruction practices and ensure key employees know not to delete or destroy relevant materials, from handwritten notes to ephemeral (e.g., Signal) messages.
- Advise recipients that the document hold notice is confidential and remind employees of their ongoing duty of loyalty to the company.

Consider preserving key testimony.

- Sometimes, recollections change as time goes on. Consider whether to preserve key testimony via an interview with, or affidavit from, key employees or witnesses.

Notify your insurer.

- Promptly notify all insurance carriers that may cover litigation expenses or contribute to a settlement. Failure to timely put insurers on notice of a claim may waive certain rights or even coverage for a claim.

Retain outside counsel and evaluate conflicts.

- Promptly retain outside counsel to thoroughly evaluate the complaint and consider next steps in the litigation.
- If a company and individual employees were sued, consider with outside counsel whether any employees need counsel separate and apart from the company's counsel to avoid conflicts of interest. It is easier to address this issue at the outset rather than wait for opposing counsel to file a motion to disqualify, potentially resulting in both the company **and** employees needing new counsel.

Consider whether you have counterclaims, crossclaims, or third-party claims.

- With counsel secured, you should consider whether you may have counterclaims, crossclaims, or claims against third parties. Such claims can be waived if not timely presented. This consideration is particularly pressing if you intend to answer the complaint rather than move to dismiss it, as counterclaims and third-party claims generally must be included with an answer. See, e.g., [Fed. R. Civ. P. 13\(a\)\(1\), \(g\); 19\(a\); 20\(a\)](#).

Begin consideration of potential expert witnesses

- Early retention of expert witnesses can help focus and guide discovery and, in nuanced fields, helps to ensure opposing counsel does not retain and therefore conflict out all preeminent

experts.

- Retain experts on a consulting basis early on to protect the privilege. As the case progresses, consider whether to designate the expert or his or her colleague as a testifying expert. Testifying experts are invaluable in breaking down complex concepts for juries – and lawyers!

Facing litigation may seem overwhelming, but considering a thoughtful response to a complaint, getting an early start on preserving and collecting evidence, and avoiding waiving insurance coverage or even claims against others will position your company for success and avoid unnecessary complications or setbacks as the case progresses. Foley is here to help you address the short and long-term impacts in the wake of regulatory changes and litigation concerns. We have the resources to help you navigate these and other important legal considerations related to business operations and industry-specific issues.

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