Published on *The National Law Review* https://natlawreview.com

Ignorance Is Not Bliss: Knowing When to Issue a Litigation Hold

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Has your company adopted a records management and document retention program that will pass legal muster? Does your company have a protocol in place to ensure that a litigation hold is issued at the right time and to track compliance after the hold is issued? If not, a recent federal court decision serves as a stark reminder that employers must issue **litigation holds** on a timely basis and track compliance with the directives found in the hold. In ***Green v. Blitz U.S.A., Inc.*** (E.D. Tex. 2011), the court sanctioned the defendant in a products liability case when it learned, more than two years after the case had closed, that the defendant declined to issue a litigation hold and destroyed potentially relevant documents.

In *Green*, the jury returned a verdict in favor of the defendant, but discovery in a related case later revealed that the defendant had failed to produce a number of relevant documents. Further inquiry revealed that the defendant had never issued a litigation hold, had placed a self-confessed "computer illiterate" in charge of its document retention efforts, had declined to conduct an electronic word search for relevant e-mails and had failed to suspend its standard document destruction policy. In addition to imposing a $250,000 sanction, the court also required the defendant to provide a copy of the court's order and opinion to every plaintiff in every lawsuit pending against it in the past two years, and to file a copy with its first responsive pleading in every new lawsuit for the next five years.

Although employers and attorneys have become increasingly familiar with the duty to preserve relevant evidence, *Green* demonstrates that some companies continue to get it wrong. It is increasingly important to understand what events will likely trigger the duty to preserve in the context of an employment-related dispute, and what types of documents must be protected.

Triggering Events

An employer has a duty to preserve documents when it knows or should know that evidence is relevant to a current or future legal action. This duty arises automatically when an employer reasonably anticipates litigation. An employer can reasonably anticipate litigation when it receives notice that it is party to a legal or administrative proceeding. *See, e.g., J**ones v. Bremen High Sch. Dist.** 228*, No. 08-CV-3548, 2010 WL 2106640, at *6 (N.D. Ill. May 25, 2010) ("Defendant clearly had a duty to preserve documents relevant to plaintiff's claims when it received notice of plaintiff's EEOC charges."); ***Mosaid Tech. Inc. v. Samsung Electronics Co.***, 348 F. Supp. 2d 332, 336 (D.N.J.

2004) ("[T]he duty to preserve exists as of the time the party knows or reasonably should know litigation is foreseeable. At the latest, in this case, that time was . . . when [the plaintiff] filed and served the complaint.").

An employer may also have a duty to preserve evidence before any formal proceeding has begun. For example, some courts hold that an employer can reasonably anticipate litigation when it receives a letter threatening potential legal action and requesting the preservation of relevant information. *See, e.g.,* ***D'Onofrio v. SFZ Sports Group, Inc.*****,** No. 06-687, 2010 WL 3324964, at *7–8 (D.D.C. Aug. 24, 2010) (holding that the employer had a duty to preserve relevant evidence when it received a letter from the plaintiff stating that she intended to initiate litigation, and requesting that electronically stored information be preserved); ***Sampson v. City of Cambridge*****,** 251 F.R.D. 172, 181 (D. Md. 2008) (stating that "[i]t is clear that the defendant had a duty to preserve relevant evidence . . . when plaintiff's counsel sent the letter to defendant requesting the preservation of relevant evidence, including electronic documents. At that time, although litigation had not yet begun, defendant reasonably should have known that the evidence described in the letter 'may be relevant to anticipated litigation.'")

An employer may even have a duty to preserve relevant evidence, based simply on the totality of the circumstances. In one case, a federal court in Connecticut upheld a $2.6 million jury verdict and held that it was proper to instruct the jury to draw an adverse inference against the employer for failing to suspend its standard document destruction policy three months *before* the plaintiff filed the complaint. The court reasoned that several factors demonstrated that the employer could have reasonably anticipated litigation well before the complaint was filed, including: the nature and severity of the plaintiff's injury, the employer's pre-litigation retention of a medical expert and claims manager to evaluate the scope of the plaintiff's injury, and the use of video surveillance to monitor the plaintiff's activities. While the court declined to cite a single triggering event, it concluded that the totality of the circumstances indicated the employer had a duty to preserve documents at the time it destroyed certain reports.

These cases make clear that employers should routinely evaluate what events trigger the duty to preserve. Moreover, simply issuing a litigation hold or asking employees to preserve documents, without actively monitoring compliance, is insufficient to avoid legal liability. Employers should develop a standardized process to identify triggering events and ensure that key players understand their preservation obligations. Many employers, for example, issue a legal hold and require recipients to certify in writing that they have identified all relevant information. Other employers periodically circulate legal holds to notify new employees and remind existing employees of the ongoing duty to preserve. In light of the potential sanctions that can be imposed on noncompliant companies, it is essential that employers implement a standardized process for issuing legal holds and ensuring compliance.

Types of Documents to Preserve

As a general rule, an employer need not preserve "every shred of paper, every e-mail or electronic document, and every backup tape." ***Zubulake v. UBS Warburg LLC***, 220 F.R.D. 212, 217 (S.D.N.Y. 2003). Rather, an employer need only preserve "unique, relevant evidence that might be useful to an adversary." *Id*. The scope of this duty will vary depending on the nature of the claim, but information must be preserved that an employer knows or should know is relevant to the action, is reasonably calculated to lead to the discovery of admissible evidence, is reasonably likely to be requested during discovery, or is the subject of a pending discovery request. This includes electronic and hard copy documents that are in existence at the time the duty attaches, and all relevant

documents created thereafter.

Typically, in an employment discrimination case, an employer must preserve the claimant's personnel file, e-mail account for the time in question, and correspondence to and from supervisors and other key players, including human resources professionals involved in the adverse employment action. The employer should also preserve information related to potential comparators. This may include employees who worked in the same position as the claimant, reported to the same supervisor or were subject to the same type of treatment or adverse action. Information related to the nature, timing and resolution of any other recent discrimination claims filed against the employer should also be preserved.

There is no one-size-fits-all approach to issuing legal holds, and applying the duty to preserve to real-world situations often presents a challenge.

National Law Review, Volume I, Number 137