

Litigation Holds Guidelines

Background

The law has long required all parties to preserve evidence that may be relevant to a dispute, even before a lawsuit is filed. Because much communication is now electronic, the courts have adapted the requirement to preserve evidence specifically to apply to electronic information. The courts have also ruled that the doctrine of “litigation holds” applies equally to electronic and hard copy information.

Litigation Holds

The courts require a party to preserve evidence – i.e., implement a litigation hold on information likely to become relevant in a dispute -- in the following circumstances:

- When a demand to preserve evidence is received, whether litigation is filed or not
- When litigation is served
- When a court issues a preservation order
- When litigation is “reasonably foreseeable”

The last situation is the most challenging, as there is no bright line, and the determination of whether to implement a hold requires the exercise of judgment. Disputes do not always result in litigation. There is a duty to preserve evidence only when the problem is not likely to be independently resolved. The following list illustrates situations where litigation may be reasonably foreseeable. Each situation must be evaluated on a case-by-case basis:

- Where there is a major accident or injury
- When a police report is filed
- When a claim is filed with a government agency
- When a third party seeks indemnification
- When an employee is terminated
- When an independent investigation corroborates a claim
- When there are multiple claims about the same set of circumstances
- When a whistleblower or whistleblower retaliation claim is filed
- When a claimant threatens litigation
- When CSU plans to file suit

When a litigation hold is required, the destruction of documents and information under a document retention schedule must be suspended. The value, nature or scope of the dispute is irrelevant to the requirement of a litigation hold.

Consequences for Failure to Implement a Litigation Hold

The courts have imposed the following sanctions on the parties from whom information is sought for failure to appropriately implement a litigation hold:

- Sanctions, including attorneys’ fees and costs
- Preclusion from introducing evidence at trial
- Instructions to the jury to draw an adverse inference from unavailable evidence
- Dismissal or default judgment