CARLTON FIELDS

Duties Involving The Preservation Of Electronically Stored Information

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Let's set the scene: You receive a letter from an attorney that you have never heard of, concerning an incident that you were not aware of, involving one of your company's products. The letter does not threaten immediate legal action but informs you that the product allegedly injured someone and that the injured person has retained legal counsel. What should you do? Does the letter trigger any obligation to preserve records, including emails or other electronically stored information? Does your company have a written records retention policy? Didn't you just read an article disparaging Company X for destroying electronic documents? What if instead of opening a letter, you had opened a civil complaint, naming your company as the defendant? Does that change your responsibility concerning your company's records retention policy? **Electronic Discovery Background:** Today, cases can be won or lost based on electronic discovery. At a minimum, failure to preserve electronic evidence provides plaintiffs (or potential plaintiffs) with the ability to steer the court away from scrutiny on the merits and may severely shift the balance of litigation leverage. Electronic discovery is the discovery of "electronically stored information" such as emails, voicemails, spreadsheets, or other documents stored in electronic form (including information or records stored in computers, servers, CDs, flash drives, computer backup tapes, cell phones, iPads, etc.) and the process involved in identifying, preserving, collecting, processing and producing it in litigation (or other legal proceedings). Numerous cases have either settled for more than they were worth or gained notoriety in the press because of damaging emails written by the defendants' employees. A potentially even worse fate awaits those parties that either affirmatively destroy or negligently fail to take steps to preserve electronically stored information. Affirmative document destruction conjures up the image of people willfully feeding papers and CDs through a shredder. By contrast, the negligent destruction of evidence results from inadvertent destruction or loss, such as failing to interrupt the routine purging of electronic documents, like emails, pursuant to a document retention policy. If your company fails to preserve evidence -- even before a lawsuit is initiated -- this failure can lead to serious legal consequences, including monetary sanctions, awards of attorneys'

fees, entering of default judgments, dismissal of claims or defenses, or having an "adverse inference" instruction provided to the jury. In such an instruction, the court will inform the jurors that they can infer from the destruction of records that the information in the records would have been adverse to the party destroying the records. On top of the potential legal consequences, allegations of spoliation can have devastating effects for a company via the media and public opinion. This article will review when a duty to preserve electronically stored information arises and at a minimum, what you should do to preserve documents when facing or threatened with the possibility of litigation. First, what are your company's records preservation obligations? Unfortunately, there is no simple answer. For parties litigating in federal court, the Federal Rules of Civil Procedure contain specific rules governing electronic records and discovery. For those sued in state court, some state courts follow the Federal Rules, other states have adopted their own rules, and still others simply rely on random court decisions on the subject. Making matters even more confusing, if the duty to preserve electronically stored information can start prior to being served with a complaint, how do you know what court you are being sued in and thus what record retention laws apply? The law continues to emerge in this area in an effort to develop coherent principles. That said, as a general rule, a party has an obligation to take reasonable, good faith steps to preserve electronic records and information that can be reasonably foreseen as discoverable in litigation once the duty to preserve attaches. When does the duty to preserve attach? It clearly attaches once litigation has been initiated, that is, once a complaint has been filed. More importantly, however, it is also generally regarded as attaching once litigation is threatened or a claim is "reasonably anticipated." What is "reasonably anticipated" has been the subject of a number of judicial opinions and is determined on a case-by-case basis. Generally, what has come out of those opinions is that courts will likely define reasonable anticipation of litigation as the time when a party should know that litigation is probable.
Actions To Be Taken: Once the duty to preserve has attached, there are a number of steps a company should take to ensure compliance with general electronic discovery obligations and to avoid the electronic discovery problems described above. **Step 1: Evaluate** – Before you can collect review and produce relevant documents, you must first identify what types of material may be relevant to the impending lawsuit. Therefore, you should start with (1) an evaluation of what material may be substantively relevant and (2) a technical evaluation of the media (email, CDs, flash drives, etc.) such information may be stored on. Conducting such substantive and technical evaluations first will go a long way toward collecting the correct documents and avoiding claims of spoliation. **Step 2: Preserve** – After identifying the potentially relevant material, you must take action to ensure that the relevant electronically stored information is not altered or destroyed. Such preservation is typically accomplished through a "litigation hold" process customized to the claims and circumstances of the lawsuit at issue. A litigation hold is a stipulation requiring company employees to preserve all data that may relate to the lawsuit. It is a repeatable, documented process for satisfying the company's duty to preserve information for litigation, with the goal being to establish a process to identify, locate, preserve, retrieve and (ultimately) produce potential relevant information. The litigation hold will usually require both "negative" and "positive" actions of your business' affected employees. For example, a litigation hold will likely mandate that specified employees refrain from deleting emails. It

may also require affirmative action such as suspending the recycling of any backup tapes and interrupting any automatic programs that delete emails. Therefore, the substance of the litigation hold must be adequately communicated to the relevant employees. From the top down, the company should instruct employees likely to have discoverable information not to destroy anything that may relate to the subject matter of the potential lawsuit. Such notice should identify the various types of business records typically created by the organization/department and use terms that will be clearly intelligible to those expected to implement the litigation hold. Managers must be held responsible for conveying to the employees the requirements for preserving evidence. It should be noted that it is not sufficient simply to send the litigation hold notice to the relevant employees or managers. Steps must be taken to ensure that the notice was received and compliance is taking place. Periodic follow-up should be done to ensure continual compliance. **Step 3: Collect** – As discussed above, preservation can be accomplished by simply storing (and not deleting) the electronically stored information, without actually collecting it. However, prompt collection can help preserve such information by getting it into a central repository to avoid the risk of unintended deletion. Companies with the appropriate means and resources may choose to undertake the collection of such information on their own. However, depending on the case size, complexity, and imminent risk of document destruction, collection may need to be done under or carried out by a qualified third-party vendor. **Step 4: Process & Produce** – Keeping in mind that your duty to preserve is likely larger than your duty to produce, the next step is to review the collected information for relevancy, responsiveness and privilege (attorney-client and attorney work product). This processing is followed by producing the responsive, non-privileged documents to the other parties involved in the lawsuit. Typically, your in-house or outside counsel should participate in, and direct, this process. In conclusion, the preservation requirements surrounding electronically stored information can be quite challenging. Determining when the duty arises can be gray at best and the implementation of the four step process discussed above can be difficult. The execution of a litigation hold process can be quite taxing on storage administrators. Moreover, backup tapes often contain large quantities of electronic information that most organizations regularly erase, which can routinely provide plaintiffs' counsel with fuel for their motion for sanctions. However, taking time to critically evaluate the claims and implement a litigation hold early in the process will go a long way toward protecting your company in both courts of law and public opinion. *This article was republished, with permission, from SGMA In Brief.*