The Tyranny of the Litigation Hold

By Richard Reice

In the past, restrictive covenant disputes often began with a boilerplate cease-and-desist letter from an aggrieved former employer. The letter usually began: "We have been retained by…and it has come to our attention…" and then reminded the former employee and perhaps his or her new employer of the former employee's non-solicitation, confidentiality, and non-compete agreements. The letter often ended with a demand that the employee cease all breaching conduct and a never-accepted invitation to "feel free" to contact the sender "should you have any questions." More often than not, such letters were ignored and thrown away.

Today, when most of our information is stored on disc drives and servers, not drawers and filing cabinets, cease-and-desist letters arrive with a set of lengthy and detailed instructions on how to initiate a "litigation hold" to preserve all evidence relating to hiring, employment, and commercial activities. The chilling effect of these letters—which are often aimed at individuals with little legal expertise—is considerable. Now, instead of circularly filing a cease-and-desist letter, the recipient is faced with a litigation-like obligation to locate and safeguard relevant documents and the often unwelcome prospect that internal documents related to recruiting and hiring may one day be open to scrutiny by others. Thus, instead of hiring an employee who can hit the ground running, the new employer is faced with multiple complications. Most employers don't like complications.

The Duty to Preserve

The duty to preserve documents that may be relevant to a probable litigation started with a series of discovery-related decisions in the Southern District of New York case *Zubulake v. UBS Warburgh LLC*.[1] In addressing the plaintiff's discovery requests relating to certain digital files and UBS's spoliation (destruction) of certain backup tapes, Judge Shira A. Scheindlin ("Judge Scheindlin") articulated several standards that have become the norm across the country. In her decision, Judge Scheindlin explained that "[o]nce a party reasonably anticipates litigation, it must suspend its routine document retention/destruction policy and put in place a 'litigation hold' to ensure the preservation of relevant documents."[2] In a later related decision, Judge Scheindlin explained that this requires counsel to communicate directly with the "key players" in the litigation regarding their preservation duties and issue periodic reminders.[3] Counsel should also "instruct all employees to produce electronic copies of their relevant active files" and "make sure that all backup media which the party is required to retain is identified and stored in a safe place."[4]

Failure to preserve documents in the face of probable litigation can result in spoliation sanctions that could have a severe impact on one's case. In New York, a party may be sanctioned if the other side can show that evidence (regardless of form) was not maintained and that (1) the spoliating party had an obligation to preserve the evidence; (2) the evidence was destroyed with a culpable state of mind; and (3) the lost evidence was relevant to the other side's claim or defense.[5] Sanctions can include an adverse inference or even a judgment against the spoliating party.[6]

What to Do?

If an individual or a company receives a cease-and-desist or a demand letter that threatens legal action, it is likely that they are now under an affirmative obligation to initiate a litigation hold. What are the issues to be sensitive to? First, the recipient of a cease-and-desist letter should understand whether a duty to preserve evidence has been triggered. Was the letter actually threatening litigation or just a "friendly" reminder about the terms of a restrictive covenant? A duty to preserve arises under the former; under the latter, where litigation is possible but not necessarily probable, the recipient's counsel should review case law in the relevant jurisdiction to understand the scope of any obligation to preserve.

Second, the recipient needs to consider what information to preserve. To begin with, relevant evidence likely includes all documents relating to the employee's sourcing, hiring, job duties, documents (electronic and hard copy) brought over from his former employer, the hard drives on the new hire's computers (both at home and at the office) and PDAs, and emails generated by the employee and the employer that relate to the employee's job duties. This obligation is ongoing until the requirement to preserve no longer exits. Relevant documents should be preserved in their native format, be it hardcopy or electronic.

Third, how long must the recipient preserve relevant evidence? The duty to preserve does not last forever, but it may well last the duration of the restrictive covenant and a reasonable period of time thereafter. If some sort of arrangement is reached with the former employer and the threat of litigation is lifted, then the duty to preserve would be lifted as well. Of course, if the cease-and-desist letter turns into actual litigation, then the relevant evidence should be preserved for the duration of the case.

Conclusion

Zubulake has spread like wildfire through local, state and federal courts and has resulted in new rules regarding electronic discovery. In restrictive covenant cases, former employers are using it to put teeth to their cease-and-desist letters. No longer just words on page, the letters now require action that may cost money, disrupt the normal operations of a business, and make that new hire—who

may have come with some risk already—even more problematic.

Endnotes

1. 02 Civ. 1243 (SAS).
2. *Zubulake v. UBS Warburgh LLC*, 220 F.R.D. 212, 218 (S.D.N.Y. 2003).
3. *Zubulake v. UBS Warburgh LLC*, 229 F.R.D. 422, 433-34 (S.D.N.Y. 2004)
4. *Id*. at 434.
5. *Zubulake*, 220 F.R.D. at 219.
6. *See Ortega v. City of New York*, 9 N..3d 69, 76, 845 N.Y.S.2d 773, 776 (2007).

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