SPRING CLEANING FOR YOUR BUSINESS: CONSIDER YOUR DOCUMENT RETENTION PRACTICES

Spring is the season for cleaning and organization—and it can also be a good time for businesses to revisit their document retention policies. For any combination of paper files, emails, and digital records, having a thoughtful business records management strategy can help reduce risk, control storage costs, and ensure compliance with legal requirements.

As you review what to keep, archive, or dispose of, consider the following key issues.

Be Mindful of Litigation Holds

If your business is involved in litigation—or reasonably anticipates litigation—you must preserve documents related to the dispute. This requirement is commonly referred to as a litigation hold.

Implementing a litigation hold often means suspending automatic deletion features on email systems, servers, cloud storage platforms, and backup systems. Courts may impose monetary sanctions or other penalties, including adverse rulings, if a party fails to take reasonable steps to preserve relevant documents or electronic records.

Understand Record Retention Requirements

Many industries are subject to federal and state record retention requirements. Businesses should ensure their document retention policies comply with any applicable laws and regulations.

For example, lenders must retain certain loan documentation, including closing disclosures, for five years under federal lending regulations. If you are unsure which requirements apply to your business, consulting legal counsel can help ensure compliance and reduce regulatory risk.

In addition to specific industry requirements, certain categories of documents must be kept for minimum periods of time by law. Many organizations (including the U.S. Chamber of Commerce) have assembled lists of laws with document retention periods.

When more than one minimum retention period could apply to a document, the longer period should be used. For example, payroll records must be kept for three years under Wisconsin law, but the IRS requires records of employment taxes to be kept for four years. A document that qualifies as both should be kept for at least four years.

Balance the Costs and Benefits of Storing Records

A well-designed document retention policy balances the benefits of keeping records with the costs of storing them.

On one hand, maintaining historical records can help resolve disputes, support regulatory compliance, and preserve institutional memory. Quickly locating important documents can save significant time and expense.

On the other hand, document storage—whether physical or electronic—comes with costs. Paper files require office space or off-site storage fees, while digital storage involves its own storage costs and requires secure systems, software, maintenance, and IT support.

Organization Saves Headaches and Preserves Usefulness

Documents are only helpful if they can be located when needed. Just like a storage room full of unlabeled paper files, digital records that are poorly organized, inconsistently named, or difficult to search provide limited value.

Businesses should implement clear file naming conventions, structured folders, and searchable systems to improve records management efficiency.

Labeling physical and electronic folders with information on when the files can be destroyed is also a best practice that can save your future self time and effort.

Consistency Is Key

The most effective approach for a business is to adopt a formal document retention policy and apply it consistently across the organization.

If a dispute arises in the future, demonstrating that documents were destroyed in accordance with a routine and consistently followed policy can help minimize discovery disputes or allegations of improper document destruction.

When in Doubt, Seek Legal Guidance

If you are unsure of the legal implications of keeping or disposing of certain documents, contact an attorney. For more information, contact Christa Wittenberg at 414-276-5000, Christa.Wittenberg@wilaw.com, or any of the attorneys at O’Neil Cannon.

DETERMINING THE CITIZENSHIP OF BUSINESSES

People forming a new business and selecting between the different entity types may be unaware of the impact the formation choice can have on future lawsuits. In particular, the citizenship of the business can be critical to determining whether a case belongs in state court or federal court when a dispute involves over $75,000. With the many considerations business owners have to weigh when forming a new entity, the effect on hypothetical litigation is unlikely to be of primary importance, but it is useful to keep in mind.

The key inquiry when determining whether a federal court has jurisdiction over many business disputes, especially contract disputes, is whether the parties are citizens of different states—that is, whether there is diversity jurisdiction. A business's citizenship for purposes of diversity jurisdiction often is *not* the same as where the business is registered, especially for limited liability companies (LLCs) and partnerships.

Corporations are citizens of both the state where it is incorporated and the state where its principal place of business is located. For an LLC, the analysis is more complicated, and depends on the citizenship of each member. For example, if an LLC has four members—two citizens of Wisconsin, one a citizen of Illinois, and one a citizen of Iowa—the LLC is a citizen of Wisconsin, Illinois, and Iowa. Occasionally, an LLC has so many members it is difficult to assess its citizenship, especially when any members are themselves LLCs or other corporate entities. Similarly, the citizenship of a partnership depends on the citizenship of each partner. That means an LLC or partnership with members or partners in multiple states may be more limited in the ability to invoke the jurisdiction of federal courts for ordinary contract disputes, because disputes with citizens of any of the same states that are not based on federal causes of action will not be within the jurisdiction of federal courts. Whether that is good or bad strategically depends in large part on the circumstances of the particular dispute.

Sometimes parties have tried to get around the complications of the citizenship analysis by appointing an agent to enforce their rights, often when there are many real parties in interest. Though cases have reached conflicting results, several courts have held that the citizenship of the agent does not control. Courts then analyze the citizenship of each represented business or individual.

For many businesses, planning for unforeseen litigation can be like planning to be struck by lightning—you never want to experience it, you can't predict it, and if you're lucky, you can avoid it. Even still, it can be useful to know what to expect if a lawsuit arises.

For more on jurisdictional issues or a variety of other legal matters, contact Christa Wittenberg at 414-276-5000 or christa.wittenberg@wilaw.com.

CAN I REALLY BE SUED THERE?

‘Can I really be sued there?’ If you have ever asked that question, you’re not alone—many defendants sued outside of their home state wonder the same thing. For example, if a small family-owned Wisconsin business is sued in a Nevada court, its owners may rightly question whether that is proper.

The answer likely depends on the jurisdiction of the court in question. Personal jurisdiction—that is, a court’s authority over parties to a lawsuit—can be broad, but it is not unlimited. Without jurisdiction over a party, the court does not have authority to decide the dispute. However, if a defendant does not challenge personal jurisdiction at the beginning of a case, that party may forfeit its right to do so, and the case may proceed anyway.

Whether a court has personal jurisdiction depends on an analysis of the United States Constitution, applicable statutes, and the many cases interpreting those sources. As a result, there is not always an easy answer to whether a given court has personal jurisdiction over a party.

In general, a court will typically have personal jurisdiction over an individual whose permanent residence is in the state where the court is located or a corporation incorporated in that state. Beyond those relatively straightforward situations, a court may still have jurisdiction over a party who has sufficient contacts with that state, which depends on many factors.

Because courts can dismiss lawsuits if they do not have personal jurisdiction over a party, this is an important consideration in the early stages of a dispute. Whether you’re contemplating bringing a lawsuit, defending a claim, or negotiating a contract and considering including a clause addressing where parties must resolve any disputes, it is important to keep the principles of personal jurisdiction in mind.

If you are faced with a lawsuit, or need an analysis of jurisdictional issues before a dispute arises, contact Christa Wittenberg at 414-276-5000 or christa.wittenberg@wilaw.com.

HEALTH CARE LAW ADVISOR ALERT: NEW

FEDERAL REGULATIONS TAKE AIM AT HEALTH CARE PROVIDER BILLING

Health care providers should be aware of new regulations the U.S. Department of Health and Human Services (HHS) and other agencies issued in July that relate to medical billing practices.

Part I of the long-awaited regulations to implement the federal No Surprises Act was published on July 13, 2021. The regulations are applicable for plan or policy years beginning on or after January 1, 2022. HHS, along with the Department of the Treasury and Department of Labor, issued rules that implement the statutory provisions in the No Surprises Act. This federal law, enacted in 2020, was discussed in an earlier blog article. The new regulations mirror the statutory provisions and provide guidance on interpreting and applying the No Surprises Act. In particular, the new regulations clarify the methodology for calculating the qualifying payment amount (QPA)—a calculation that will often be used to evaluate the amount health plans pay providers for treatment that falls under the No Surprises Act, including out-of-network emergency care. The regulations also outline requirements for certain health care providers to post and provide consumers with a notice related to balance billing restrictions, and the criteria for providers to obtain the consent necessary to balance bill for non-emergency out-of-network services.

The new regulations do not yet address the independent dispute resolution (IDR) process applicable when health plans and providers do not agree on the amount to be paid for out-of-network care that falls under the Act. This IDR process is an important aspect of the No Surprises Act, and the continued uncertainty may make it difficult for health care providers to plan for the coming year. Regulations on this topic are expected to be issued soon.

The federal government is accepting public comments through September 7, 2021, and may modify the regulations based on those comments.

The attorneys who contribute to the Health Care Law Advisor are available to assist health care providers with a variety of legal matters. Please contact us if you need assistance navigating the new regulations.

HEALTH CARE LAW ADVISOR ALERT:

VIDEOCONFERENCING CONSIDERATIONS FOR HEALTH CARE LITIGATORS

These days, litigators are routinely taking depositions and participating in hearings over Zoom or other videoconferencing apps and software. Frequently, these depositions and hearings are set up using videoconferencing systems chosen, hosted, and controlled by a court, an arbitrator, or a court reporter. There has been significant discussion and administrative guidance about the use of videoconferencing by health care providers since the pandemic began. Health care litigators should also consider the implications of video depositions or hearings on HIPAA security obligations.

Zoom reports that it is HIPAA compliant. However, these features must be requested by the subscriber, typically through a Zoom for Healthcare subscription. Microsoft Teams also reports it is capable of HIPAA compliance, as does Google Meet.

Litigators who anticipate protected health information (PHI) may be discussed or contained in documents shared through a videoconferencing platform for purposes of a deposition or hearing should inquire with the host about the type of subscription and system capabilities. Some court reporters offer special HIPAA-compliant rooms with certain features disabled.

With the rapid transition to videoconferencing to conduct a substantial amount of litigation tasks, guidance in this area is likely to continue to evolve along with videoconferencing system capabilities. Health care providers and their outside litigators should stay informed and be prepared to ask the right questions to ensure they are not overlooking HIPAA obligations.

The attorneys who contribute to the Health Care Law Advisor are available to assist health care providers with a variety of legal matters. Please contact us if you need assistance navigating the pandemic-related changes to health care litigation.

BE MINDFUL OF DEADLINES DURING COVID-19 OUTBREAK

Some court hearings and deadlines have been pushed back in response to the COVID-19 outbreak—but court functions have not stopped, and even in these challenging times, businesses and individuals should be mindful of deadlines.

One of the most important deadlines for an individual or business who has been wrongfully harmed is the deadline to file a lawsuit or initiate an arbitration proceeding. If this deadline is missed, it could result in dismissal of the claims.

In Wisconsin, jury trials have been rescheduled and deadlines to file appellate briefs have been extended. Many state circuit courts and federal district courts have also issued orders regarding deadlines in those specific courts. However, Wisconsin courts have not extended all deadlines, and neither the courts nor the legislature has addressed the filing deadlines found in contracts and statutes of limitations.

Whether in a few weeks or a few months, the public health emergency will end. In the meantime, it is important to be proactive about deadlines to avoid the risk of having a potential claim barred.

Please contact Christa Wittenberg or any other member of the Litigation Practice Group with any questions. O'Neil Cannon remains dedicated to serving its clients, even through these turbulent times.

DEBT COLLECTION SAFE HARBOR MAY NOT BE SO SAFE

Debt collectors recently received clarification on the contents of the collection letters they send on behalf of creditors: The "safe harbor" language set forth by the Seventh Circuit Court of Appeals to avoid liability under the Fair Debt Collection Practices Act is not meant to be copied and pasted into collection letters in every situation. Earlier this month, the Seventh Circuit concluded debt collectors cannot refer to late charges in collection letters sent to consumers if the creditor is prohibited from collecting late charges—even if a debt collector is quoting the safe harbor language that typically precludes FDCPA liability. Rather, debt collectors must ensure the safe harbor language is tailored to the circumstances.

The optional safe harbor language used in Wisconsin, Illinois, and Indiana includes an explanation of variable debts—that "[b]ecause of interest, late charges, and other charges that may vary from day to day, the amount due on the day you pay may be greater" than the amount listed as owed in the collection letter. This safe harbor language may allow debt collectors to avoid liability under the FDCPA because it provides a template for explaining the variable nature of some debts. In the recent case of *Boucher v. Finance System of Green Bay, Inc*., the Seventh Circuit held that this safe harbor precludes liability for inaccurately stating the amount of a variable debt regardless of which FDCPA provision that liability is based

upon. But for it to be a truly safe harbor, the debt collector must be sure that the language accurately describes the nature of the debt. In *Boucher*, the debt collector used the safe harbor language as quoted above, even though no late charges or other charges could be added to the debt. The Seventh Circuit held this violated the FDCPA because the average unsophisticated consumer would believe late charges could be added and would thus be misled about the amount or character of the debt.

For more information on debt collection laws, contact Christa Wittenberg at 414-276-5000 or christa.wittenberg@wilaw.com

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RETHINKING YOUR DOCUMENT RETENTION HABITS WHILE SPRING CLEANING?

Springtime can be a good excuse to "clean house." If you are evaluating your document retention practices this season, consider these points as you determine what to keep and what to toss:

- If you are involved in litigation or reasonably anticipate litigation, you are required to keep all documents related to the case by implementing what is referred to as a "litigation hold." This includes suspending automatic deletion features on servers or email systems. Courts can issue monetary sanctions or even enter an adverse judgment for failure to take reasonable steps to preserve documents related to litigation.
- Know and comply with all regulatory document-keeping requirements that may apply to you or your business. As just one example, lenders are currently subject to record retention requirements under federal lending laws that include keeping closing disclosures for five years. *See* 12 C.F.R. § 1026.25. If you are unsure of the governing requirements, consult an attorney.
- Weigh the costs and benefits of keeping documents. On one hand, it can be valuable to be able to dig out old documents when an unexpected problem or opportunity arises. Quickly finding key correspondence to defeat a threatened lawsuit can save money and headaches. On the other hand, storing documents—whether paper or electronic—has real costs. Paper documents take up space that may be used for more productive purposes. The storage of electronic documents and emails has costs, as well, including hardware, software, maintenance, and tech support. A good document retention policy aims to balance these competing interests.
- Documents are only useful if you know where and how to find them. Just like a storage room full of unlabeled paper files, electronic records that are haphazardly stored, poorly named, or unsearchable are of limited value.

- Consistency is key. A formal document retention policy that is reliably implemented is best. In the event of a future lawsuit or dispute, a document retention policy that was consistently followed could minimize discovery disputes over destroyed documents.

If you are unsure of the legal implications of keeping or disposing of certain documents, contact an attorney. For more information, contact Christa Wittenberg at 414-276-5000, Christa.Wittenberg@wilaw.com, or any of the other attorneys at OCHDL.

WHETHER WEBSITE PRESENCE EXPOSES PUBLISHER TO LAWSUITS IN WISCONSIN ANALYZED IN RECENT CASE

Most people would probably assume that simply maintaining a website would not expose the creator to being sued wherever the website can be viewed. Courts in this country have generally agreed, and have ruled that the mere act of operating a website that can be read within a certain state does not, by itself, give the courts of that state jurisdiction over the entity running the website.

In a recent opinion, the Wisconsin Court of Appeals affirmed this principle. In *Salfinger v. Fairfax Media Limited*, the court concluded that the mere fact that an Australian company published an article on a website, which could be accessed in Wisconsin, did not give the court jurisdiction over that company. This was true even though the plaintiff's claim was for defamation based on the content in that article. Rather, to be consistent with the Due Process Clause of the United States Constitution, there must have been some purposeful conduct within Wisconsin by the company that would make facing suit in Wisconsin foreseeable.

Even more importantly, the court also considered whether the targeted advertising on the website changed the result. Like many companies, Fairfax Media Limited used online advertising programs, such as through Google or Double Click, that placed advertisements on its website targeted to the reader based on his or her geographic location—for example, placing ads for a Wisconsin business on its website next to the article if the reader was located in Wisconsin. Ultimately, the court concluded that this still was not enough Wisconsin-related conduct to give the court jurisdiction over the publisher and expose it to being sued in Wisconsin.

The Court did note that the question of jurisdiction depends on the facts in each particular case, so it is unclear whether even one change in the circumstances, such as a company

mentioning Wisconsin in a website article, could change the result and open the company to lawsuits in Wisconsin. These questions will ultimately have to be resolved in future cases.