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Forewarned is Forearmed:

Preparing for litigation in the post-sequestration era

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Companies are seeing the effect of federal belt-tightening and sequestration in virtually all aspects of government contracting. The downturn in federal contract opportunities for small-to mid-size businesses has, unfortunately, led to a concurrent uptick in litigation. Employers are severing relationships with employees and contractors and subcontractors are increasingly at odds over performance issues, as well as maximizing work share and contract revenues. Should your company receive either the threat of, or an actual lawsuit, you need to know what to expect and to do to aid in keeping your litigation costs under control and obtaining a favorable outcome.

The demand letter and the "litigation hold."

The prelude to a lawsuit often arrives in the form of a demand letter, often containing a one-sided version of events and a demand for a sum to be paid and/or a specific action to be undertaken by a certain date. These letters also typically contain a request that records related to the event or transaction be preserved, commonly referred to as a "litigation hold." The litigation hold has taken on an increasingly important role in the age of electronically stored information (ESI) and its receipt is not to be taken lightly. The recipient of a litigation hold is required to preserve, until further notice, all documents and records, whether in paper form or ESI, relevant to the dispute. A company must suspend its routine document destruction/retention policy, as the destruction of relevant information, can lead to adverse facts in the matter being taken as established, the prohibition of asserting defenses, monetary sanctions and even default judgment. Moreover, with the proliferation of smartphones, telecommuting from home computers, text messages, voice mail, etc., the storehouses of potentially relevant ESI is ever-expanding. So if your company receives such a letter, do not procrastinate, as relevant ESI could be deleted in the interim with the click of a mouse. Promptly disseminate the litigation hold letter to all key players in your organization, not just your IT manager, and seek the advice of counsel if you have any doubt about your obligations or the sufficiency of your response.

The lawsuit is served; discovery to follow.

Service of a lawsuit starts a clock on the period within which your company must file a written response, in the court where the case was filed. There is no uniform rule among the various courts that applies to the date by which a response must be filed, but the courts are uniform in finding parties in default that fail to timely do so. The response date could be 21, 30 or 60 days from service, depending on the jurisdiction. The clock is running and the failure to timely file a response can lead to the court holding your company in default and a finding of liability, thereby limiting the issue for trial to damages alone. Therefore it is critical, before you are sued, to have in place a procedure to be followed whenever your company receives a copy of a lawsuit. A lawsuit inadvertently sitting on the desk of your junior officer for three weeks before it was brought to the CEO's attention will not excuse default.

Although the choice to undertake litigation may be a calculated gamble, in litigation, unlike as in poker, if asked, a party must show its hand, through the process known as "discovery." This is the means by which each party discovers the facts upon which its opponent intends to rely at trial, whether in bringing or defending the case. Parties are allowed four basic forms of discovery: oral testimony, through sworn, recorded statements of witnesses in depositions, and written discovery in the form of interrogatories, document requests and requests for admission. The serving of discovery, as with the lawsuit, triggers deadlines within which to respond that differ among the jurisdictions. Failure to timely respond to discovery can also lead to severe consequences, accordingly, if your company receives discovery requests along with the lawsuit, it is critical that the discovery response date be promptly ascertained in order to protect your company's ability to fully defend itself.

Have a policy in place with regard to press inquiries.

Due to the subject matter of employment and government contracts litigation and the identity of the parties that are oftentimes involved, the lawsuits can be seen as newsworthy. Enterprising reporters may contact your officers or employees, whether seeking the company's position or to substantiate allegations of the lawsuit. Sending the right message, or no message, to the press can be especially important if the subject matter of the case is employment or discrimination-related. Therefore, advance direction should be given to all employees that, in the event of a lawsuit, there is one person designated as the primary spokesperson of the company to address media inquiries and to make official statements. Such a policy can not only avoid sending a mixed message to the public, but can head off inadvertently providing an advantage to your adversary.

Conclusion.

Litigation is an expensive and time-consuming process with a virtual minefield of deadlines from the outset to the conclusion. With awareness of what is facing your company when it is threatened with a lawsuit, and with policies and plans in place to meet the challenges, you can not only save your company time and money, but also increase your chances of success in the process.

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