

9.02 Records and Information Management

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RIM

Most credit unions are aware that certain records need to be retained for a certain period of time.

But are credit unions aware of some of the other issues with records and information management (litigation holds, statute of limitations, etc.)?

WALMART CASE

- In Connecticut, a Walmart was preparing for a grand opening.
- Snowstorm delayed the opening, so Walmart contact their local vendors – but they missed the fish guy.
- Guy delivers fish, isn't looking where he is going slips and falls. Gets up in agony and says "I'll sue!"
- Walmart duly makes a record of the event with their side of the story.
- Two years later, Walmart duly destroys the record.

TWO PROBLEMS

Walmart did not have a policy regarding accident records

Although it was their custom to destroy those records after two years, Walmart could not produce a policy showing two years was the retention schedule.

Statute of Limitations in Connecticut was three years for personal injury

The fish guy had three years to file the suit; the suit against Walmart was filed just a few days before the statute ran out.

THE RULING

Because Walmart did not have a policy regarding destruction of those accident records, the judge instructed the jury that Walmart's inability to produce the accident record not only made it inadmissible evidence, *but that Walmart's failure to produce the record could be used by the jury to infer Walmart had something to hide.*

Obviously, fish guy wins and wins big.

THE DISCRIMINATION CASE

Civil procedure law was changed by *Zubalake v. UBS*.

Zubalake charged that she was denied promotion at UBS because she was a woman.

UBS responded that she was denied because she was a bad employee.

Zubalake goes into the discovery process (to find evidence) and asks for all relevant emails.

THE COMPUTER ATE MY HOMEWORK

UBS finds all sorts of emails regarding issues with Zubulake's performance; but gosh dangit they just can't seem to find a couple of critical emails Zubulake said would bolster her case. UBS was having "computer problems" and couldn't produce those records. After all, they didn't start retaining evidence until the lawsuit was actually filed.

NO FURY LIKE A JUDGE SCORNED

The judge blew up, and instructed the jury the same way the judge in the Walmart case did – namely that the failure to produce those emails could be used by the jury to infer that UBS had something to hide.

The jury agreed that UBS was trying to hide, and issued a \$29,000,000 verdict against UBS. Much of the money was due to punitive damages because the jury felt that UBS was trying to hide their actions.

CHANGING THE LAW

Since those cases, federal rules of civil procedure have been changed. If a party knows of or is reasonably apprised that a lawsuit will be filed against it, it must start retaining all relevant records immediately.

This means that if someone says they will sue, the organization had better make sure that relevant records are preserved and not destroyed.

INTERPRETATION

While not uniform across the nation, courts are starting to interpret records retention as part of evidence law, and will generally look at relevant records in the following way:

If a party is negligent and destroys records that are part of evidence of a lawsuit, but did so under a records retention policy, the court may still instruct the jury to infer against the party. However, there will be no sanctions.

If a party is well aware of the lawsuit and is grossly negligent in the destruction of records because there is no policy, the jury will be instructed against the party but sanctions may or may not be imposed. (Walmart – no policy)

If a party intentionally destroys evidence, there will be sanctions, possible jail time, and adverse jury instructions. (UBS)

LITIGATION HOLD

Because the language of the law now states that parties must begin retaining relevant records, all credit unions should have a policy setting forth employee responsibilities:

If an employee learns –

A government investigation of the Company has been commenced or is reasonably anticipated; or

Litigation has been filed or is reasonably anticipated; or

The organization has been served with a subpoena or other request for information; or

Other circumstances where the preservation of documents may be required,

The employee must report those circumstances immediately to management. Depending on the circumstances, not all of the above situations will warrant a litigation hold. Upon receipt of such notification, management will investigate and then determine whether a litigation hold is appropriate.

PROCESS

If a litigation hold is appropriate, the hold notice should be issued as soon as practical by management. The notice should identify the data that are subject to the litigation hold and advise all employees not to delete, overwrite, or otherwise alter or destroy any records (paper or electronic) that may contain information that is reasonably related to the identified subject matter. The notice should also make clear that this obligation applies to records that currently exist or are created in the future.

Meetings should be held and recorded to ensure employees are aware of their responsibilities in the matter.

RECORD DESTRUCTION

Record destruction requires that there be a policy, and evidence that policy is adhered to. Even if an organization has a policy, if that policy is not followed the organization may be held to be grossly negligent or even to have intentionally destroyed evidence.

Courts will always come down on the side of preservation if it is a close call.

The toughest part is deciding when a party is “reasonably apprised of litigation.” The short answer is whenever an employee hears someone threaten to sue, management should get with the attorneys and determine if in fact it is time to issue a litigation hold.

SUBJECT MATTER IS CRITICAL

From a court's perspective, it does not matter whether the information is retained in an email, a paper document, a word document, etc. What matters is the information the record contains and whether it is relevant to the case at hand.

So even if the record retention policy says to destroy all emails within 30 days, if those emails are possibly relevant to threatened litigation.

CONCLUSION

Best bet is to have lots of documentation supporting a strong records retention and direction policy. If litigation is threatened, preserve those records regardless of format and document the procedures followed by staff.