Lessening the pain

How policies can help you prevent, and fight, lawsuits

Interviewed by Sue Ostrowski

Every business, no matter how well it is run, faces the possibility of a lawsuit.

But there are steps you can take before that happens to position your company to prevail, says Thomas M. Hanson, a member of Dykema Gossett PLLC and head of the firm's Dallas office financial services litigation practice.

"If you're in business, litigation is not necessarily inevitable, but it is certainly a possibility," Hanson says. "Every company needs to prepare for it, just as you would prepare for other contingencies that might affect your business."

Smart Business spoke with Hanson about the policies you need to have in place and if, despite your best efforts, you are sued, the steps to take to lessen the pain.

Thomas M. Hanson
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What everyday practices can help minimize litigation costs and potential liability?

In litigation, documents generally carry the day. Most businesses utilize some type of standard form contract, such as purchase orders, sales orders, or a standard form employee/consultant agreement. Businesses need to review those forms on a regular basis to ensure they clearly lay out the terms of the contract. A manufacturing company might think, for example, that its sales order gives the buyer ten days to inspect the goods. But review the contract from the perspective of a judge who has no understanding of your industry. Will she read it the same way? If not, you should clarify the language and potentially save yourself many thousands of dollars in litigation costs, not to mention potential liability.

Significant litigation expense can also be avoided if you have a standard document retention policy. Every company should have one, particularly given the proliferation of e-mail communication. Whatever your policy — if e-mails are deleted every six months, every five years or never — it should be written down. When you get into litigation, courts are more and more interested in finding out what happened to electronic documents. If you have a standard policy and can show that a key e-mail in the case was deleted according to a standard policy, you'll be in much better shape than if you have no policy and it looks like e-mails were deleted haphazardly. Again, this simple practice can not only save you from attorneys' fees but also from potential liability.

What other steps should businesses take to protect themselves?

Another issue with standard contract terms and conditions is making sure employees are using them. Too often, there is a two-page contract; the first page has a purchase order and page two is the standard terms and conditions. But your employees may not bother to send that second page. Suddenly, the case-winning provision you were relying on may not be part of your contract at all.

Finally, proper insurance coverage can be a lifesaver if your company is sued. If you have coverage, the insurance company is not only obligated to pay damages assessed, but, even more important, it is generally obligated to defend you and pay your lawyers. It makes cases infinitely more resolvable if you have a policy that will cover all or some of the cost.

If, despite its best efforts, a business is sued, how should it approach that suit?

Again, documents are key. In particular, courts are cracking down on what happens to electronic documents after litigation commences. If your servers automatically delete e-mails at a set time period, you need to have your IT personnel stop the automated delete function for any potentially relevant electronic documents.

Take steps to collect documents that might be relevant right at the beginning, and make sure, in writing, to instruct any employee who might have relevant documents not to delete anything — not e-mails, spreadsheets or documents stored on their hard drives. If you don't, some courts may severely punish even the innocuous destruction or deletion of relevant documents. Real-life horror stories exist of courts ordering monetary sanctions of tens or hundreds of thousands of dollars or (even worse) issuing instructions allowing a jury to infer that the destroyed documents were harmful to the company's case.

Should companies consider alternatives to fighting in court?

Absolutely. There are many ways of trying to resolve a suit without going through a trial, even without invoking a formal litigation process.

Arbitration, especially for smaller disputes among smaller companies, can be a great forum. You have much more limited discovery and, generally, you'll have an arbitrator who is much more informal and will allow the parties more flexibility to try to work things out on a reasonable schedule. Also, decisions reached in arbitration can generally not be appealed, which lends more finality to a judgment that might be reached in court.

The downside is that you'll have to pay for arbitration services, but a case that might be a two-week jury trial may only be three or four days in arbitration due to the informality and the lack of dealing with a jury.

Is settlement sometimes a better option than fighting a lawsuit?

Yes. Businesspeople often take a sound, rational, economic approach to business matters until they get sued, then the gloves are off and they don't care about the expense and just want to fight it. When passion takes over and you're lashing out at the other side not because there is any long-term benefit but because you are outraged that you've been sued, you have to ask if this is the right business decision for your company. But if the answer is yes, and a principled stance is the best approach for the company's long-term success, then stick to your guns. <<

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