

LITIGATION

Top Four Ways Smart Companies Mitigate Litigation Risk

Do you worry about what would happen if that one “smoking gun” got into the hands of your adversary? Have your employees been educated on the “do’s” and “don’ts” of drafting documents, particularly e-mails?

Does your document retention policy provide your employees with instructions on how to handle inadvertently deleted e-mails?

Is your company spokesperson up to speed on the potential tensions between various business practices, and does she or he have the appropriate tools to align these competing interests in preparation for any public engagement to ward off accusations of corporate hypocrisy?

Litigation is a fact of corporate life, and even the most careful companies will have to endure difficult legal challenges. Most companies think about the ‘litigation record’ only after litigation has started. This is a mistake. In today’s world, every potentially relevant letter, memo, note, e-mail, text or tweet is subject to disclosure when suit is filed. Smart companies get ahead of the curve by thinking about how their documents and witnesses will hold up when the inevitable happens. They make critical changes to their business processes to ensure that when problems arise, they are maximally prepared.

The fact is that even very careful, well-managed companies will confront litigation at some point, often without warning. Here are four ways smart companies can act now to mitigate litigation risk:

1. Early Assessment

Identify your organization’s business strengths and weaknesses before problems arise. Pre-empt future legal challenges by investigating and assessing your business and litigation tensions. This requires your team to develop an integrated approach that considers all aspects of your company’s interests and activities before building out your litigation strategies. Also, identify potential witnesses, especially those employees whose job responsibilities include those areas of weakness your company may face in litigation. Conducting a preliminary review of those witnesses’ files is also essential to this decision process. Thinking now about who will speak for the company when problems arise is a great way to minimize later disruption and risk. Not every person is cut out for witness work, so cull through your company’s roster for potential candidates and interview them for background information and experience at the company. Make a preliminary assessment as to which candidates are committed to learning the tools necessary to organize and deliver powerful arguments for your company.

2. Spotlight Strengths

Anchor your company’s strengths into your business practices and core narrative (e.g., mission statements). This will ensure that when litigation hits, your strengths are the anchors – or starting point of view – for the court and jurors. For example, in a case of alleged failure to warn of the dangers of a product, a critical leveraging point might be to reinforce the theme that the public was aware of the risks of a product. Developing a narrative in advance of litigation that details the company’s approach to risk and its efforts to advise the public about it can be a key leveraging point that will draw jurors away from focusing on what the company could have done differently to make a safer product. Even before

problems arise, a company should focus on how to deliver an effective, credible narrative that's structured on a company's strengths.

3. Accountability

An essential ingredient to flawless execution is a framework that addresses an organization's weaknesses. Getting in front of your weaknesses by ownership and accountability empowers you to remove performance barriers and gain credibility in both business and litigation. The public wants to hear *some* explanation of an organization's problems and solutions. Educating your employees of the potential challenges to your business practices and the consequences they may raise in litigation is key to mitigating litigation risk.

4. Cohesive Strategy

The most successful teams are those who take the time to prepare a framework (built on items 1-3 above) and execute their strategy across a unified front. In the context of litigation, problems can be displayed in a very public manner. Creating a cohesive environment before litigation hits and a strategy for anticipating and ameliorating problems is critical to limiting risk and loss. Align business and litigation strategies by focusing on the interests of the entire enterprise. Nothing is more detrimental to the "face of the company" than when plaintiffs succeed in pointing out a company's own inconsistencies (whether in its internal business practices or public statements). Remember almost every letter, memo, note, e-mail or text is subject to disclosure and becomes part of the litigation record. A company's narrative in response to pending, and even anticipated claims, must be cohesive across all departments in all contexts and must deliver a message that aligns with the company's anchors. These anchors then become safe harbors for your employees to rely on in both business practices as well as litigation.

What else can smart companies do?

- Conduct a review of written employment policies to highlight key issues and potential risks
- Identify your key players in each department or business unit who will serve as the voice of that department's strengths and weaknesses
- Coordinate regular meetings with your key players to communicate risks and common strengths
- Start working with a subject matter expert who will educate your work force on smart business practices and implement an enterprise-wide program that will mitigate litigation risk

The takeaway: early preparation is crucial for long-term benefits. If you would like to learn more about what actions your company can take to mitigate litigation risk, please contact Jackie Segel at Goodwin (617) 570-1797, jsegel@goodwinlaw.com.