

INSIGHTS

S.D.N.Y. Issues Spoliation Sanctions Against Foot Locker

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The sanctions recently levied against Foot Locker serve as a potent reminder that understanding data and document preservation requirements is imperative. A New York federal judge issued sanctions against Foot Locker last week for negligently failing to issue and implement a legal hold. Judge Katherine B. Forrest, United States District Court for the Southern District of New York, ordered an adverse inference instruction saying that the shoe retailer's destruction of as many as 141 boxes of evidence amounted to the negligent destruction of documents that would have been relevant to the plaintiff's claims.

Geoffrey Osberg, a former Foot Locker employee, sued the company on February 23, 2007. He claimed that the company violated the Employee Retirement Income Security Act ("ERISA") by converting its "defined benefit" pension plan to a "cash balance" retirement plan such that employees earned no benefits for a period time without advising them of the consequences of the conversion. Prior to the instant suit, though, Osberg had filed two similar lawsuits related to Foot Locker's retirement plan. Despite advice from its outside counsel and in contravention of its own legal hold policies, Foot Locker inadvertently issued no legal hold notice in response to any of the lawsuits.

The District Court ruled that Foot Locker should have issued a legal hold in July 2006, when Osberg brought his first claim against Foot Locker. Although the company notified third parties of the lawsuits and made efforts to collect existing documents from existing Foot Locker personnel, it made no efforts to preserve documents or prevent the routine destruction of data until October 2009. Contrary to Foot Locker's assertions, documents that it subsequently produced during discovery demonstrated that certain potentially relevant documents were lost or destroyed between June 2006 and October 2009, the period during which no legal hold was in place.

Foot Locker joins the multitude of companies that have been subject to the growing movement of spoliation sanctions. To avoid such claims, companies should understand their responsibilities when a duty to preserve evidence arises. Spoliation claims and other damaging consequences relating to the destruction of evidence are trending in both the civil and criminal arenas.

An obligation to preserve evidence arises when anyone anticipates being a party—or currently is a party—to a lawsuit, legal proceeding, or governmental investigation. *Fujitsu Ltd. v. Fed. Express Corp.*, 247 F.3d 423, 436 (2d Cir. 2001). When such a duty arises, a party must not destroy unique, relevant evidence that might be useful to an adversary. *Zubulake v. UBS Warburg LLC*, 220 F.R.D. 212, 217 (S.D.N.Y. 2003). If a party breaches this duty, it could be

subject to a spoliation claim, which is the destruction or significant alteration of evidence, or the failure to preserve property for another's use as evidence in pending or reasonably foreseeable litigation. *West v. Goodyear Tire & Rubber Co.*, 167 F.3d 776, 779 (2d Cir. 1999).

Spoliation claims can be avoided—or more easily overcome—by understanding the basic legal duties and best practices associated with preservation obligations and by following these guidelines:

Guideline 1: Draft, publish, implement, and consistently follow a legal hold policy.

Guideline 2: When it is foreseeable you will be a party to a legal proceeding or governmental investigation, initiate and document reasonable and good faith efforts, taken as soon as practicable, to identify and notify custodians likely to possess relevant information.

Guideline 3: The legal hold notice should be written and clearly communicate the scope of the preservation obligations; provide custodians with instructions on how to undertake preservation efforts, including points of contact to field any questions; and require confirmation that the recipient has reviewed the legal hold notice, understands the associated preservation responsibilities, and agrees to carry out his or her obligations.

Guideline 4: Initiate document and data collection early, with an eye toward preservation. Do not overlook shared network space, social media, cloud data, personal data sources (such as mobile devices and personal computers), and other non-traditional sources of data.

Guideline 5: Compliance with a legal hold should be regularly monitored, including re-issuing legal hold reminders or updates.

Sanctions for spoliation—now more than ever relating to electronically stored information (ESI)—continue to make headlines. Yet, parties that demonstrate sound procedures, a preference toward action, and transparency have avoided serious spoliation sanctions and been afforded the opportunity to focus on the underlying claims and defenses at hand.