

So Your Business Received a Demand Letter, Now What?

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If your business has received a demand letter, I have some good news for you: Your business has not been sued (yet). However, a lawsuit could be in your business's near future.

A demand letter often precedes a lawsuit and usually represents an opposing party's desire to resolve a dispute before involving the court system. A demand letter likely will include an alleged series of facts, followed by potential legal claims, and a demand for specific action or payment in response to the alleged claims. Your business should consider the following when deciding how to

respond to a demand letter. These considerations may determine whether the demand evolves into an actual lawsuit.

Objectives

Because litigation can be draining on your business's resources, it's important to know your business's goals before deciding how to respond to a demand letter. Depending on the circumstances, your business may adopt a strategy that is pro- or anti-settlement. For example, if your business is on the verge of being acquired, it may be in its best interest to resolve the dispute as quickly as possible. In contrast, the demand letter may represent an escalation in an ongoing dispute between your business and the demanding party, who has now involved counsel to resolve the matter. As such, the demand letter may represent an inevitable next step in a lawsuit your business has been expecting. All of these factors could impact your business's objectives.

Location, Location, Location

It's never too early to start considering how location may affect a prospective lawsuit. The location where a lawsuit is filed and tried will impact costs, timing, and most likely the law firm your business decides to hire. If the demand letter involves an alleged breach of contract, the contract may identify a specific location where lawsuits to enforce the contract must be filed.

A demand letter may even state where an opposing party intends to file a lawsuit. But the demanding party's selected location may not necessarily be controlling. For example, your lawyer may determine that your business should not be subject to suit outside of North Carolina. Your attorney also may advise that federal court or North Carolina's Business Court would be the more appropriate forum for a particular lawsuit. Knowing your business's location and forum options for a potential lawsuit may influence your response to a demand letter.

Budget and Costs

Knowing the possible locations for a prospective lawsuit should help your business better evaluate costs. If the party threatening suit is located in California and your business is in North Carolina, you must be prepared to incur significant travel expenses. Even if the lawsuit is filed in North Carolina, attorneys likely will need to travel to California to depose witnesses

involved in the case.

When evaluating costs, it's also important to think about any company-held insurance policies that may defray those costs. These policies may require your business to notify the insurer upon receipt of a demand letter.

If the demand letter involves a contract dispute, the contract may have a provision that allows for recovery of attorneys' fees and costs. But remember, these provisions are usually double-edged swords. While your business may be able to recover attorneys' fees if it prevails in the lawsuit, your business also may be responsible for the demanding party's fees if instead that party wins the lawsuit.

Most importantly, a demand letter may represent the least expensive means to resolve a business dispute. As such, it's worth considering what your business is willing to spend to make the dispute go away. Litigation often lasts years, and once it begins, parties typically are driven further into their corners, making resolution difficult until significant legal expenses are incurred. By sending a demand letter, the demanding party is strongly hinting that it's not super gung-ho on filing a lawsuit. If your business isn't eager for a legal battle either, it may be worthwhile to work with the demanding party to resolve the dispute outside of court.

Hiring an Attorney

While an attorney certainly can help guide your business through the issues addressed in the three previous sections, if your business does not already have a trusted legal advisor, it's worthwhile to consider those issues before hiring an attorney. Your business's goals and budget and the prospective location of the lawsuit likely will influence which law firm you decide to hire.

Regardless of whether your business's objective is to pursue early resolution or prepare for a lawsuit, legal counsel is important when responding to a demand letter. Attorneys can help businesses avoid making seemingly innocuous statements in a response letter which could create significant legal issues down the road. While a demand letter may spark a visceral, knee-jerk reaction, emotions should be excluded from any response letter on the chance that such communications could later be used in court. An attorney also can advise your business on the protections afforded to settlement communications under Federal Rule of Evidence 408 so that responses to a demand letter are less likely to be used as evidence at trial.

Even if your business plans to make a settlement offer in response to a demand letter without the aid of legal counsel, settlement communications may fall apart and the opposing party's demand may turn into a lawsuit. North Carolina requires businesses to be represented by an attorney in court. So at some point, hiring an attorney may be inevitable.

One of the benefits of hiring an attorney after receiving a demand letter is the protection afforded to communications with an attorney. For example, if after receiving a demand letter your business requests that every employee write down everything they know about the possible case, all of those notes may be discoverable by the opposing party during litigation. In contrast, if your business hires an attorney, that attorney can interview relevant employees and management about the matter and then those communications should be protected by the attorney–client privilege or work-product doctrine.

Attorneys also can help your business determine counterclaims that may be asserted in response to a demand letter. For example, maybe your business has received a demand letter claiming breach of a contract by your business's refusal to pay for services worth \$50,000. If your business has refused to pay because the work performed under the contract was faulty, and your business suffered damages as a result, then not only can your business defend the claim, but it can also counterclaim to recover the damages it suffered as a result of the opposing party's breach of the contract. Notably, counterclaims can be quite useful as leverage in pre-lawsuit settlement negotiations.

Preservation of Evidence

Once your business has notice of a possible lawsuit, it likely has a duty to preserve evidence which could be related to the lawsuit, whether the demand letter from the claiming party addresses that issue or not. The amount of evidence in need of preservation can be fairly daunting. Your business probably has information that may be relevant to a lawsuit stored on office computers, laptops, cell phones, tablets, email accounts, internal drives, and cloud accounts, not to mention paper files, handwritten notes, and more. All of this needs to be preserved. If this information is deleted, lost, or destroyed after receipt of a demand letter, a court may issue an adverse ruling related to the spoliation of this evidence. This is another instance where attorney guidance can help your business after it receives a demand letter.

Conclusion

Some lawyers file lawsuits without first trying to resolve a dispute through a demand letter, leaving an unsuspecting business immediately embroiled in litigation. In contrast, a business in receipt of a demand letter has an opportunity to avoid a lawsuit altogether or at least prepare for an upcoming lawsuit. While receiving a demand letter may not be the best news for your business, at least your business hasn't been sued (yet).

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