

# YOU'VE BEEN SERVED WITH A SUMMONS AND COMPLAINT — WHAT NEXT?

*By Debra Bodian Bernstein*



You're about to leave your office on a Friday afternoon and the receptionist calls you. A process server has just handed her an envelope that contains a summons and complaint naming your company as a defendant. Suddenly you envision your exciting weekend plans quickly evaporating and you break into a cold sweat. Luckily, you can take a deep breath and relax, because although there are several things that should be done after you are served with a summons and complaint, they can wait until you are back from the weekend. (Service of an Order to Show Cause, on the other hand, may be a different story!)

The first thing that you should do upon your receipt of a summons and complaint is to make a note of how and when the papers were served. If they were personally delivered to you or to someone else at your office (or home), write down who was served and the date. Your receptionist and other office staff should be instructed to immediately advise you upon receipt of any summons and complaint. If the papers were received in the mail, jot down the date that the envelope was received, and whether it was by regular mail, FedEx or some other means. The manner in which the summons and complaint were served will be important in determining whether service was proper, and in calculating the timing of an answer or other response to the complaint.

In general, in New York an answer will be due either 20 days or 30 days after service of the complaint, depending on whether or not the summons and complaint were "personally" served on the defendant (i.e., in-hand service on the defendant). You should reach out to your attorney well before the time to answer has expired. However, if you are unable to do so, you should contact the plaintiff's

attorney to obtain an extension of time to answer, which should be in writing. The worst thing you can do is ignore the deadline to answer the complaint, because that would entitle the plaintiff to seek a default judgment against you – and you likely would not find out about the judgment until after it has been obtained.

Another important step to be taken upon receipt of a summons and complaint is to determine whether any of your company's insurance carriers need to be notified of the complaint. Your rights to coverage may be adversely affected if notice is not given in a timely fashion. In general, the obligation to notify your insurance carrier may arise as soon as you learn of facts that may lead to a claim being made against you.

Upon receipt of a summons and complaint – or beforehand if you anticipate that the litigation may be commenced – you should ensure that all employees with documents concerning the matter, including emails and other electronic documents, retain all of these documents, as well as all computer hard drives and PDAs in which relevant documents may exist. It is imperative that written instructions about retaining documents be issued to all employees who may have documents concerning the matter. The best time to consult with your attorney for assistance with preparing an appropriate communication is before litigation is commenced, so that a notice can immediately be sent to all employees after an action is brought against the company (or before if you anticipate that an action may be commenced).

You also need to bear in mind that if, after commencement of the action, you or your coworkers create any internal or external documents concerning the matter (including emails) or speak to third parties about the matter, these

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documents and communications – unless they are with or for your attorney – are not privileged and may be subject to disclosure in the litigation.

Finally, you should resist the urge to immediately shoot off a letter or email to the plaintiff setting forth your position or attempting to settle the matter before consulting with your attorney or serving an answer to the complaint. Unbeknownst to you, certain statements may constitute admissions that will be binding in the litigation. Although we strive to resolve cases before the litigation becomes full-blown and expensive, the timing, tenor and content of communications concerning settlement are important and could have an impact on the litigation if the matter is not resolved.

Hopefully these tips on initial steps after you've been served with a summons and complaint are helpful, and the next time that you get that call from your receptionist at 5 p.m. on Friday, the first thing you will do is relax and enjoy the weekend.

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### ***About Debra Bodian Bernstein, Counsel***

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