

WHAT YOU CAN DO TO IMPLEMENT AND IMPROVE THE LITIGATION HOLD PROCESS  
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With the amendments to the Federal Rules of Civil Procedure now in effect, a bulletproof litigation hold process that addresses issuing the notifications and ensuring compliance is going to be a key component to protecting your company from possible sanctions.

#### WHAT ARE LITIGATION HOLDS?

Because the law imposes a duty to preserve evidence, as soon as litigation is reasonably anticipated, a company must immediately suspend its routine document retention and destruction policies. The company must then create and implement a "litigation hold" to ensure that relevant data is preserved. A litigation hold is a process designed to preserve all documents and data that may be relevant to the litigation. This includes both (1) information reasonably calculated to lead to the discovery of admissible evidence, and (2) information reasonably likely to be requested during discovery.

#### THE INTENT AND EXPECTATION OF THE LITIGATION HOLD

Some corporate legal departments treat a litigation hold as a one-time communication (usually an email) to employees, requesting that all information relating to specific content be held and protected for possible production in an anticipated or pending legal case. Many companies wrongly believe an email message to the employee base removes responsibility from the company. In most cases, this litigation hold email is sent to all employees and will be the only communication they ever see. This practice will not ensure all responsive email records are protected. For example, some employees could be behind in reviewing their incoming email and they may not actually read it for weeks. Some employees may be on the road and may not sync to their company email systems for days. Some employees may have reached their mailbox limit and not see the litigation hold message because their email box is refusing new email traffic. Of course, as cases often last for extended periods of time it's easy to see how even the most diligent employee could forget about a corporate communication sent months or years earlier.

A company's failure to quickly impose a litigation hold on all responsive records including email can result in court-ordered sanctions, including monetary sanctions and the imposition of adverse inference instructions relating to the information destroyed because an effective litigation hold was not put in place and refreshed in a timely manner.

#### HOW TO IMPLEMENT THE LITIGATION HOLD

##### IDENTIFY WHERE THE RELEVANT RECORDS MIGHT BE

If your company is facing or anticipating litigation, the first step should be to bring together executives from Legal, Records Management and IT to analyze the location and

accessibility of potentially relevant records. Who are the specific employees affected? What systems do they use? In what formats are the potentially relevant records stored and where are they stored? The answers to these questions will help you identify the employees, departments and systems that need to be part of the hold process.

#### IDENTIFY ALL OF THE POTENTIAL IT SYSTEMS AND HOLD PROCESS OWNERS

If you want to avoid constantly being in “fire drill” mode, you need to be proactive and identify all of the potential IT systems and hold process “owners” (e.g., database administrators, email administrators, records managers, etc.) before any legal action is on the horizon.

- If your company has a disaster recovery plan, you should take a look at that to get a start on the process of identifying IT systems and their owners.

#### INVESTIGATE TO DETERMINE WHO HAS THE INFORMATION MOST CRUCIAL TO THE LITIGATION

Once litigation is anticipated, interview the people who might be the key players, including former employees. Inventory where all the electronic and paper evidence they may have created is stored. In particular, check for home computers used for business communications, laptops, cell phones, handheld devices and voicemail systems. The litigation hold will need to be specific as to these sources of discovery because employees may not think of them when they think about their work environment.

#### WRITE YOUR LITIGATION HOLD CAREFULLY

Once you have a feel for the litigation, the potential sources of data and the key personnel, you can craft an effective hold.

- It should describe in detail the claims or potential claims involved in the litigation. Carefully think through the possible defenses and counterclaims as well and explain those.
- It should identify the categories of data and documents that you anticipate will or might be sought in the discovery process. Outside litigation counsel may be helpful in this process.
- It should specify the types of data that must be retained and the form in which they must be retained.

#### COMMUNICATE THE HOLD PROCESS AND CONFIRM COMPLIANCE

Once a litigation hold is in place, you will want to break down the process of communicating and confirming compliance into four basic categories:

#### ONSITE PHYSICAL RECORDS

- For onsite records identified as potentially relevant, the hold notification should be communicated by Legal to the business unit managers. Make sure they are also responsible for communicating back to you that the hold has gone into effect.

#### OFF-SITE (INACTIVE) PHYSICAL RECORDS

- For potentially relevant off-site physical records, Legal should communicate the hold notification to the appropriate records manager. The records manager is responsible for ensuring that the required records are put on hold. If the company uses an online record management portal, the records manager can quickly implement these hold rules. The records manager is also responsible for communicating back to Legal that the requested items have been put on hold.

#### ONLINE ELECTRONIC RECORDS

- Holds for potentially relevant electronic records (such as scanned documents and recent email correspondence) should be communicated by Legal to the IT systems administrators. The IT administrators are responsible for suspending the deletion of electronic records from the servers, and for notifying individual employees to suspend deletion of information from their PCs. Both the IT administrators and the individual employees should be required to confirm back to Legal that they have received the notification and that they have complied.

#### OFF-LINE ELECTRONIC RECORDS

- Holds for potentially relevant electronic records that are off line, such as documents stored on backup tapes, legacy tapes, disaster recovery systems and long term storage media should be communicated by Legal to the Data Center managers. The Data Center managers are required to identify the specific backup tapes and to ensure these tapes are removed from the organization's normal tape rotation process so that the tapes are not deleted or over-written. They should also be required to confirm receipt of the hold notification and that they have executed the hold.

#### SCHEDULE REGULAR REVIEWS AND RECONFIRMATIONS AS THE LITIGATION PROCESS PROGRESSES

To ensure all groups continue to comply with the hold directives for as long as necessary, Legal should request a periodic reconfirmation from the appropriate business unit manager, records managers, IT administrator and Data Center manager “owners”.

You also may need to review the hold periodically to make sure it has kept step with the litigation. When new claims are added or new parties are added, you may need to reissue the hold.

#### KEEP COPIES OF ALL CONFIRMATIONS AND RECONFIRMATIONS

By adopting and enforcing a written set of litigation hold procedures, a company sends a strong message to the Trial Judge that the company takes litigation holds seriously. This practice can soften reactions from the Court when inadvertent deletion occurs. Legal should meet with IT department on an annual basis to become familiar with the company's IT infrastructure including data producing applications and their assigned storage resources. If something does get accidentally deleted, you might be able to avoid sanctions by showing all the efforts you undertook to protect the information.

#### OBTAINING RELIEF FROM THE BURDENSOME HOLD

##### SEEK ASSISTANCE FROM LITIGATION COUNSEL FOR RELIEF FROM BURDENSOME HOLD REQUIREMENTS

Suspensions of back up systems or other systems as part of a routine litigation hold can be very disruptive and expensive to any large organization with substantial ESI to backup. In most e-discovery cases, the tapes are never needed, and so the cost of routine preservation in every case is simply not justified. Further, disaster recovery type backup tapes are not reliable and decay over time. Even when the tapes are preserved, they are always difficult to recover, data is often lost, and you are never certain that the relevant evidence can be restored.

Your outside litigation counsel may be able to obtain some relief from the duty to preserve such tapes and recovery systems. Several prominent Judges in the electronic discovery area have issued opinions holding that a company is not required to suspend the normal recycling of its backup tapes as part of a litigation hold. See, for example, *Oxford House, Inc. v. City of Topeka, Kansas*, 2007 WL 1246200 at \*4 (D.Ka. April 27, 2007); *Zubulake v. UBS Warburg LLC*, 220 F.R.D. 212, 218 (S.D.N.Y. 2003). Right now, there is no national standard, but the trend seems to be toward not extending the duty to preserve to such systems. This is something you need to discuss with your outside litigation counsel.

Until this issue is decided, your outside counsel may be able to obtain relief from these requirements by getting the opposing party to agree or by seeking a Court Order. Depending on how expensive or disruptive the suspension of these routine processes is to the business, you may want to consider taking that route.