

# *Preservation of Electronic and Mobile Data*

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# *Retention Policies*

- One of the foundational policies that will assist with records preservation and collection is having a records retention policy that is known, understood and followed by your employees

# *Purpose of Retention Policies*

- Making sure you are keeping records for the legally required amount of time
- Ensuring that you have documents to support business decisions, including HR decisions
- To make sure you are not retaining records for too long
- Creates a defensible position in litigation or threat of litigation

# *Definition of a Record Retention Policy*

- Record Retention Policy: a written policy that ensures that the necessary records and documents are protected and maintained for the amount of time that they are necessary for the company and legally required

# *Examples of Records Typically Included*

- Email
- HR related documents
- IRS and tax related documents
- Finance related documents (including AP, AR, and banking documents)
- Corporate records (including minutes)
- Contracts

# *Implementation of Retention Policy*

- Best to use a team approach in drafting and implementation to get buy in
- Someone from IT must be involved to implement policy in terms of both retention and deletion
- Employees should be trained on the policy
- Periodically review policy to make sure it still makes sense for your business and complies with current laws and regulations

## *When Will Preservation of Data be Relevant to You?*

- Suspect a charge to be filed by employee or former employee;
- Investigating problematic employee.

Involve your attorney in preservation to avoid future spoliation or sanctions

# *Complying with Duty to Preserve*

- Compliance with the duty to preserve and to produce ESI (and other information) is a continuing process that involves several steps, including:
  - Identifying ESI and hard copy documents that are within the scope of discovery;
  - Issuing a written litigation hold;
  - Ensuring IT/IS has taken necessary steps so ESI is not overwritten or deleted.



# *When is Duty to Preserve Triggered?*

- When a threat of claim, lawsuit, or investigation is reasonably foreseeable;
- If bringing the action or have knowledge of being a target;
- If defending against the action, then at the *latest* when a complaint is served.

# *Litigation Holds – The First Step in Preserving Data – Important Terms*

- Legal Hold/Litigation Hold
  - Litigation Hold - after a lawsuit has been filed, the process during which a person or entity has a preservation obligation
  - Legal hold - used to signify that a preservation obligation may arise in a non or pre-litigation context (such as government investigation, audit, etc.)
  - will be issued to your company employees, IT department, and opposing parties either in anticipation of litigation or during the course of litigation;
  - make sure that discoverable information is not deleted or destroyed during the pendency of the matter.

## *Litigation Holds – The First Step in Preserving Data – Important Terms*

- Discoverable information – information that is relevant to the parties' claims and defenses and proportional to the needs of the case.

# *What Goes Into a Litigation Hold?*

- Collaborative process in drafting the letter. Attorneys will need to talk with key custodians or IT in order to determine what data is available and relevant;
- No specific legal requirement for what goes into the notification;
- Effective legal holds will clearly establish the specific ESI or paper documents that need to be preserved using names, dates, and underlying issues;
- Will have a contact person for the recipient to reach out to with any questions.

# *Litigation Hold*

- Timely Prepared and Submitted;
- Communicated through effective channel;
- Issued by person with clout;
- Sent to all necessary custodians;
- Communicates gravity and accountability;
- Supplies context re: claim or litigation by providing the custodian with information about the situation;

# *Litigation Hold*

- Offers clear, practical guidance regarding tasks, actions and deadlines;
- Sensibly scopes sources and forms;
- Identifies mechanism and contact for questions regarding litigation hold;
- Incorporates an acknowledgement of the litigation hold;
- There is timely follow up and refresh of the litigation hold.

# *What is on “Hold” in a Legal Hold?*

## **Records and Documents**

Some examples include:

- Electronic files;
- Databases;
- Email;
- Appointment books, diaries, and calendars;
- Audio and video recordings, including voicemail;
- Microsoft Office Documents (Word, Excel, PowerPoint);

# *What is on “Hold” in a Legal Hold?*

- Text Messages;
- Internet Chats;
- Handwritten notes and messages;
- Online postings on social media sites, such as Facebook and Twitter;
- Paper files.



# *Litigation Hold Letters*

- Typically sent in the form of a letter or memo, either via email or hard copy;
- Should have acknowledgement section that provides the custodian has read the litigation hold notice and agrees to comply with its contents;
- The acknowledgement should be returned to point person (HR) or lawyer.

# *Litigation Hold Implementation*

- Company should assemble a team or point person to oversee the litigation hold processes;
- Team should include key employees from the business units affected by the litigation or investigation, IT employees, in-house and outside counsel;
- Team should coordinate to determine what potential information is available, who maintains and has access to the information, what form the info is available, and how to preserve it.

# *Preservation*

- Safer to preserve more narrowly under new rules
- Reasonable and good faith effort
- Understand your electronic systems and have document retention policies in place
- Get agreement with other side about scope of preservation
- Purpose is to fulfill your legal obligations and make sure relevant ESI is protected from deletion or modification

# *Preservation*

- Data is fluid and is constantly being created, sent, received, edited, moved, and deleted
- Once a litigation hold is received, any normal ESI destruction procedures should be suspended
- If you determine that data has been deleted, inform counsel immediately to determine if it can be replicated or has been preserved in another location

# *Determining Location of Relevant Information*

- Relevant information may exist in paper or electronic formats, and may exist in many places, including:
  - Employee files and workspaces
  - Document warehouses
  - Emails and other types of correspondence
  - Voicemails
  - Text messages, Tweets, and instant messages
  - Computer hard drives
  - External hard drives (including memory sticks or universal serial bus (USB) drives)
  - Backup tapes
  - Digital copiers
  - Databases
  - Outsourced locations
  - Hand-held devices, such as cell phones, smartphones, and tablets
  - Social media sites
  - Cookies and other types of temporary internet files

# *Types of Mobile Data*

- Contacts
- Call logs
- Voicemails
- Texts
- Chats/messages
- Email
- Internet browsing history
- GPS location data
- Calendar
- Photos
- Videos
- App data
- Notes
- Other files

# *Spoliation Risk*

- Limited storage capacity
- System upgrades
- Auto-delete options
- Consumer upgrades
- Loss
- Breakage



# *Employment Litigation*

- In employment disputes, this is the relevant evidence that the parties are going to want to preserve:
  - Emails received or sent by employee and co-workers and supervisors
  - Electronic calendars and meeting notices
  - Mobile communications including texts and instant messages
  - Internet traffic history
  - Company intranet posts
  - Employee handbooks and policies (current and historic)
  - Personnel databases
  - Payroll and time sheets
  - Attendance records and building access history
  - Information about similarly situated employees
  - Information related to previous claims



# *Prepare for Litigation*

- Creation of a data map to understand location, storage and deletion of ESI;
- Develop and implement written record retention policies. A written policy can demonstrate to a court that preservation and destruction of ESI has a business purpose;
- Train employees on your record retention policies as well as best practices for electronic correspondence.

## *Ongoing Duty to Enforce and Update Litigation Holds*

- Obligation to renew and reevaluate hold during litigation;
- Hold may be updated and reissued periodically to include any ESI and other information that becomes relevant but may not have been included in previous versions of the hold notice.

# *Preservation and Retention Tips*

- Document retention and deletion policies implemented and practiced;
- Know where your company's data and documents exist;
- Have a list of current and former employees;
- Know what happens to employees data after they leave.

## *Rule 37(e) Failure to Preserve ESI*

- If data has been deleted inform counsel immediately to avoid sanctions.
- Federal Rule of Civil Procedure 37(e), effective December 1, 2015 provides guidance and uniformity for sanctions.

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## *Rule 37(e) Failure to Preserve ESI*

If electronically stored information that should have been preserved in the anticipation of conduct of litigation is lost because a party failed to take reasonable steps to preserve it, and it cannot be restored or replaced through additional discovery, the court:

(1) upon finding prejudice to another party from loss of the information, may order measures no greater than necessary to cure the prejudice; or

(2) only upon finding that the party acted with the intent to deprive another party of the information's use in the litigation may:

(A) presume that the lost information was unfavorable to the party;

(B) instruct the jury that it may or must presume the information was unfavorable to the party; or

(C) dismiss the action or enter a default judgment.

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# Rule 37(e) Flowchart



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