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Step 4 for Legal Holds: Implementation

This is the fourth article of a series aimed at helping organizations discharge their duty to preserve ESI

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This is the fourth installment in a series of articles aimed at helping organizations implement an effective written litigation hold. This article covers step four: implementing a legal hold.

Implementing a legal hold starts with the delivery of a litigation hold notice, which initiates the preservation of ESI and other documents necessary for litigation or investigation. The organization may take an automated or a manual approach to the implementation.

In the manual approach, the hold notice gives custodians direct instructions for the preservation methods and describes under what circumstances the preservation should take place. The automated approach refers to changes made on information systems that alter relevant settings to suspend deletion of information like e-mail messages. An automated approach also can include automatically making copies of relevant documents before they are destroyed or deleted. Although automation is helpful, no organization can ensure complete and accurate litigation hold preservation without human oversight and some form of manual implementation of a litigation hold.

MECHANICS OF THE LITIGATION HOLD NOTICE

If available, in-house counsel should issue any necessary litigation hold notices. If several lawyers are employed by the organization, then the best candidate is the attorney who oversees litigation. If there are no in-house counsel, then outside counsel may oversee the process. In the absence of outside counsel, a group or individual with authority should issue the notice. There are no specific requirements aside from a willingness to efficiently manage the process and the authority to command respect and attention when the notice is distributed.

The notice should be distributed to every person who could possibly possess relevant information. Courts have, with increasing frequency, required the sender to request confirmation receipts for a notice of a litigation hold from recipients.

Should the entire organization be informed about the litigation hold or just the people involved in the specific case? In every case the hold notice should be sent to the legal, audit, compliance, and records management departments, as well as impacted and relevant lines of business and relevant third-party vendors (especially IT-related services). In addition, you should send the notice and obtain a confirmation receipt from the IT manager and his or her direct supervisors, as well as information services for archive retrieval (if it's not the same as IT). Employees, vendors, and agents who may have, or acquire, information relating to the claim should also receive the hold notice.

A database must be kept to track all hold notice activities including who received the hold notices and the confirmation of their receipt. The best candidates to maintain this database would come from the legal, compliance, or governance departments, or any group with similar authority and accountability.

If there is no formal database, a simple spreadsheet can be used, which should include the following information on the hold notice: matter name, date issued, recipients, receipt confirmations, dates of follow-up interviews, dates of notices sent that modified the original hold notices, date the hold is released, and the cost of the litigation hold and

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FORMAT FOR LITIGATION HOLD NOTICES

The litigation hold itself needs to be written. A written hold provides the strongest evidence that a litigation hold was put in place by an organization. Once this notice is written, electronic communication is preferable to distribute it and collect the acknowledgements of its receipt by individuals. It is best to give hold notices both verbally and in writing to key people.

Generally, the hold notice should include the following information: name and contact information of the person implementing the hold; name and tracking number of the relevant matter; bold-faced warning of the importance of the hold; reminder of the penalties for noncompliance; reason to issue the hold (e.g., court order, lawsuit); reason the recipient is getting the notice; description of the scope of the hold or lawsuit in layman's terms; subject matter covered by the hold; broad definition of types of data to be preserved; clear guidelines for the segregation and preservation of retained records; dates of data to be preserved; notice that the legal hold supersedes any previous retention policies; reminder that the hold refers to both past and present documents; clarification that the hold relates to all media (paper, electronic, etc.); instructions for the recipient to notify the sender or a named individual with relevant information; caution against any alteration of records; reference to relevant policy language; and a separate document that outlines each custodian's personal responsibilities that includes the contact information of someone to receive any questions and comments.

On the whole, the notice must make it clear to all individuals that they must cease from deleting, destroying, and overwriting any ESI that may be contained on computers, cell phones, PDAs, flash drives, etc. It should suspend all IT activities that may clean out old data to make room for new data (commonly known as *wiping*).

Currently, litigation hold notices are protected by the attorney-client privilege in most jurisdictions, but be aware that it may come under scrutiny in court.

COORDINATING WITH THE IT DEPARTMENT

The IT department must be actively engaged in the implementation of litigation holds. The IT department has the most knowledge pertinent to the creation, storage, and destruction of ESI. This is very important because there are several differences between paper records and ESI. Some of the differences include the fact that it is impossible to identify the what, where, and how of ESI without the help of IT. The volume and method of storage of electronic data can be daunting. In addition, the routine operation of electronic devices and computers can include routine deletion. Failure to suspend this clean-up process can result in improper destruction of evidence. These pitfalls are best avoided by actively engaging the IT department.

It is the responsibility of the organization to determine all possible sources of data relevant to the litigation hold. The sources are expanding as technology becomes more portable and personal. It is best to err on the side of including too much data rather than too little.

*John Isaza, partner at **Howett Isaza Law Group**, and John Jablonski, partner at **Goldberg Segalla**, are authors of "Seven Steps for Legal Holds of ESI and Other Documents" (ARMA International 2009).*

::::RESOURCES::::

Step 1 for Legal Holds: Trigger Events

Step 2 for Legal Holds: Analyze the Trigger Event

Step 3 for Legal Holds: Define the Scope.

Legal Holds and Trigger Events blog by John Jablonski, and contributor John Isaza, is devoted to tracking cases, articles, commentary and trends involving legal holds and trigger events

Book Review: '7 Steps for Legal Holds'

The book "**7 Steps for Legal Holds of ESI and Other Documents**" (ARMA International 2009) contains an interview checklist for key players, as well as a checklist for IT considerations to help organizations enforce the effectiveness of their litigation holds. It also contains key areas to search for ESI and sample legal hold procedures. The book can be purchased from ARMA Internation for special price of $67.00 until March 15; regular price for non-members is $100.00.

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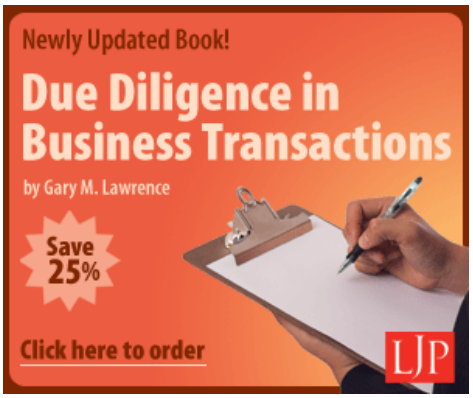

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