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Step 2 for Legal Holds: Analyze the Trigger Event

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

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Once the **first step** in implementing an effective written litigation hold is taken and a trigger event is identified, the organization needs to analyze the implications of the event. If the event, in fact, triggered the company's need to preserve evidence then a litigation hold must be issued.

The standard for when the duty to preserve evidence arises is not clearly delineated. The standard used to determine when the duty arises is a "knew or should have known" standard, as determined by a reasonably prudent person. Failure to plan ahead can have adverse effects in court. Judges may not respond favorably to a company losing or destroying a key piece of evidence in a case where a seriously injured party would lose the opportunity to recover millions in actual damages.

Following is a discussion of what is essentially a checklist of considerations in analyzing the duty to preserve.

APPOINT A COMMITTEE OR SOMEONE TO DETERMINE WHETHER A LITIGATION HOLD IS NEEDED

Each organization will be best equipped to select a person who will be responsible for determining whether a litigation hold is necessary. The most logical choice for an individual or a committee is a person or persons familiar with the company's history of litigation or investigations as well as the legally recognized trigger events. If there is an in-house legal department, this is a good choice. In the case of smaller companies that do not have in-house counsel, individuals familiar with the big picture of the organization and its operations such as a CFO, CIO or compliance officer would be logical candidates.

DO SOME FACT-FINDING TO MAKE THE DETERMINATION

After the individual, committee or both are in place to determine the necessity of a litigation hold, the next matter at hand is to gather and process information.

Gathering Information

Communication is vital. Whether an organization is very small or a multinational conglomerate, those responsible for the identification of trigger events must communicate the knowledge to the other partners, management or a superior able to put a legal hold in effect. Thus, it behooves the organization to implement procedures and policies to ensure that all members of the organization can recognize a potential trigger event and appropriately share the information.

Information Processing

After all the members of the organization become aware of their responsibility to report all potential triggers, someone within the organization will need to be in charge of processing that information and determining if any further analysis is warranted. If knowledge does not flow to the right people, then an organization could overlook what may be considered clear signs of a need for a legal hold. At minimum, a designated person should monitor situations and facts that may lead to litigation, and thus take the next necessary steps should the need for a litigation

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hold arise.

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There are three types of information processing: passive, active, and a combination process.

1. A passive process: Clear guidelines for reporting trigger events are developed and taught to the entire organization. Every person knows that any triggering events must be promptly brought to the attention of a single point person appointed by the management. When information comes to this point person, it is processed and a determination is made as to whether further analysis is necessary.

2. Active process: To more actively process information, the point person or committee monitors potential trigger events. The job of the point person may be devoted to monitoring trigger events and contending with litigation holds. Conceptually the active process is an ongoing research process in which every possible triggering event within the scope of the organization's functions is explored.

3. Combination process: implement education regarding the identification and reporting of trigger events. In addition, management monitors and regularly searches for potential trigger events.

Organizational Analysis

No matter the process by which the information is gathered, it must be analyzed. This process is known as organizational analysis because in many organizations there may not be an in-house legal department.

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There may be a certain degree of overlap between information processing and organizational analysis. Some organizations analyze information more formally by a pre-determined protocol, while other organizations rely on a judgment call when determining the existence of aÿtriggering event. No matter the approach, each analysis should be completed by a person well-versed in the recognition of trigger events.

Legal Analysis

Legal analysis should apply to any potential trigger event that passes through the filter of organizational analysis. There are some well-known trigger events, like a lawsuit, that will require little legal analysis to indicate a litigation hold. However, most types of triggering events will require some guidance and analysis by a lawyer. At a bare minimum, legal analysis should take place when a suspected trigger event lacks clear legal precedent either for or against the preservation of records. This analysis is best conducted by a lawyer with experience in this field. The lawyer will be able to explain why a legal hold is necessary or, conversely, come up with a well-reasoned legal opinion that explains why a legal hold is unnecessary in a specific case. This legal opinion may help the organization to avoid sanctions if an unexpected lawsuit eventually results.

If an organization is especially prone to litigation, a legal analysis of repeating fact patterns that lead to litigation may be possible. When such events take place, an organization may be able to rely on the past advice of the attorney. Thus, the organization may be able to issue litigation holds in standard cases without seeking legal assistance every time.

It should go without saying that organizations would be wise to allocate the largest amount of resources to the trigger events that could expose the organization to the largest risk of cost or sanctions.

WHAT TO DO IF PRESERVATION IS NOT REQUIRED

If preservation is not required, no further steps need be taken. In a "close-call" event it is important to take documented steps to show that a legal analysis was conducted and that a conclusion was reached based on sound legal reasoning. Past decisions that resulted in deeming that a hold would be unnecessary should be revisited from time to time, as circumstances change over time and an organization may find new information that would later make a hold necessary.

WHAT TO DO IF PRESERVATION IS REQUIRED

If a litigation hold is required, the organization has two choices. One is to issue the hold. The second is not to issue a hold, although this failure may result in sanctions. Generally, organizations choose to issue the litigation hold, but the cost and benefits of both courses of action should be weighed. After all analysis is done, if the organization issues a litigation hold then it should take the next step and define the scope of the legal hold.

*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.

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'

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