

Litigation Hold Procedures

A *litigation hold* is the process used to preserve documents and data that may be relevant to litigation. “One of the principal rules is that whenever litigation is reasonably anticipated, threatened or pending against an organization, that organization has a duty to preserve relevant information.”¹

<i>Reasons for litigation hold.</i>	
<p>Potential threats – or “triggers” - of litigation need to be identified. Such triggers can include:</p>	<ul style="list-style-type: none"> • Receipt of a summons or complaint. • Filing of an EEOC charge. • Formal notice of investigation. • Receipt of a subpoena. • Verbal communication of intent to sue. • Receipt of a written demand letter.
<i>Placing a litigation hold.</i>	
<p>When deciding on whether or not to place a litigation hold, the following should be considered.²</p> <p>(This list is not all-inclusive.)</p>	<ul style="list-style-type: none"> • The nature and specificity of the complaint or threat; • The party making the claim; • The position of the party making the claim; • The business relationship between the accused and accusing parties; • Whether the threat is direct, implied or inferred; • Whether the party making the claim is known to be aggressive or litigious; • Whether a party who would assert a claim is aware of the claim; • The strength, scope, or value of a potential claim; • The likelihood that data relating to a claim will be lost or destroyed; • The significance of the data to the known or reasonably anticipated issues; • Whether the company has learned of similar claims; • The experience of the industry; • Whether the relevant records are being retained for some other reason; and • Press and/or industry coverage of the issue either directly pertaining to the client, or of complaints brought against someone similarly situated in the industry.

¹ The Sedona Conference® Commentary on Legal Holds: The Trigger and the Process. 2007.

² Ibid.

<i>Identifying information.</i>	
<p>Identify, locate and maintain the relevant information.</p> <p>(This list is not all-inclusive.)</p>	<ul style="list-style-type: none"> • File cabinets and documents in an office. • E-mails (including those archived, sent, in the trash bin, or desktop recycle bin). • Personal computers, thumb drives and PDAs. • Departmental laptop, computer, thumb drives and PDAs. • Personal desk files. • Other sources of information in possession of third parties, but are actually within the control of the organization: <ul style="list-style-type: none"> ○ Outsourced service providers. ○ Storage facilities providers. ○ Application Service Providers (ASPs).
<i>Effectiveness of a litigation hold.</i>	
<p>A litigation hold is most effective when it:³</p>	<ul style="list-style-type: none"> • Identifies the persons who are likely to have relevant information and communicates a preservation notice to those persons; • Communicates the preservation notice in a manner that ensures the recipients will receive actual, comprehensible and effective notice of the requirement to preserve information; • Is in written form; • Clearly defines what information is to be preserved and how the preservation is to be undertaken; • Is periodically reviewed and, when necessary, reissued in either its original or an amended form.
<i>Litigation hold notice.</i>	
<p>Documentation of a litigation hold notice may include:⁴</p>	<ul style="list-style-type: none"> • The date and by whom the hold was initiated and possibly the triggering event; • The initial scope of information, custodians, courses, and systems involved; • Subsequent scope changes as new custodians or data are identified or initial sources are eliminated; • Notices and reminders sent, confirmations of compliance received (if any), and handling of exceptions; • Descriptions as to the collection protocol, persons contacted, and the date information was collected; • Notes from any interviews conducted with employees to determine additional sources of information; and • Master list of custodians and systems involved in the preservation effort.

³ The Sedona Conference® Commentary on Legal Holds: The Trigger and the Process. 2007.

⁴ Ibid.

Monitoring litigation holds.

Litigation holds should be monitored in order to:

- Track and audit compliance with the litigation hold notice and the maintenance of relevant information.

Release of litigation holds.

Litigation holds can be released once it has been determined that:

- It is no longer necessary.
- A cross-check has been completed to ensure that the relevant information is not required for any other ongoing litigation.

Once the litigation hold has been released, an audit should be completed to ensure that information is not unnecessarily retained.