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Preparing for the Inevitable: Legal Holds

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Litigation is an unfortunate inevitability in the long term care industry. How well your company weathers that storm often depends on your preparation, and one of the most vital parts of your litigation response plan is your company's legal hold. But when is a legal hold necessary and how do you approach its four common phases – reporting, scoping, communicating and releasing?

The Importance of a Legal Hold

A legal hold – a directive (usually written) that advises company personnel that documents and electronically-stored information (ESI) relating to litigation must be preserved as potentially relevant evidence – is an essential first step in any litigation matter. Not only must a legal hold be implemented for all active litigation matters, but it also must be considered when a company receives notice that litigation is a "reasonable possibility." When determining what constitutes that reasonable possibility, a court typically has the benefit of hindsight. Therefore, a company must be extremely cautious about preserving potential evidence after receiving any notice, no matter how informal, of the likelihood of litigation.

The goal of a legal hold is to alert company personnel that anything relating to the claims in the potential lawsuit must be retained until the matter's conclusion. One common retention pitfall is ESI, which may be deleted by the routine operation of the information technology (IT) systems. For example, when a nurse leaves a facility for other employment, policies and procedures may cause email or information stored on a local hard drive to be deleted. To protect against this, we recommend taking affirmative steps to ensure that ESI is preserved, including suspension of routine deletion policies.

Failure to comply with a legal hold can result in serious consequences. Should information be destroyed after a company has notice that the information was potentially relevant to a dispute, the opposing party may claim destruction of evidence – *spoliation* – and argue for damaging relief, such as evidentiary sanctions, monetary fines or default judgment. These court-imposed spoliation sanctions can be detrimental to even the strongest defense on the merits. For this reason, an effective legal hold is a crucial litigation response.

Your legal hold should have four steps: (1) reporting the hold; (2) scoping the hold; (3) communicating with employees; and (4) releasing the hold.

1. Report

A legal hold begins when the triggering event is *reported*. By its nature, a legal hold must be implemented for known litigation (or regulatory event). But equally as important is a legal hold triggered by reasonably foreseeable or anticipated litigation, such as when:

- The opposing party (or their counsel) has shown a tendency to pursue legal actions and has requested information;
- The communications from the potential claimant threaten to sue; or

- The communications from the potential claimant request that the receiving party retain records and information relating to the potential claim.

When factors such as these make litigation a reasonable likelihood, the company, its inside and outside counsel, and its frontline business personnel must be aware of the legal hold responsibility. Organizations should provide proper training and communication channels for reporting and escalating litigation events.

2. Scope

A legal hold must then be *scoped* and tailored to a specific company's profile. This process depends in large part on the company's IT architecture and information governance (IG) practices – for instance, whether emails are retained for a short period of time or indefinitely. Scoping may require forensic imaging, smartphone captures or other technical implementations of the hold. IT and records management should review the litigation hold to determine what information must be retained, where relevant information may be stored and how the company's normal operating procedures must be altered during the hold.

3. Communicate

The legal hold should then be *communicated* to the "custodians," employees or record-keepers who have potential evidence in their possession or care. This includes employees actually involved in the case (e.g., potential witnesses or key players) as well as those who may have access to relevant evidence. For example, the IT department or records management personnel may need to start suspension of any information governance that would result in evidence disposal.

The communication must be clear and comprehensive. A legal hold notice should give instructions and enough background on the matter such that the frontline employee will have an understanding of what should be identified and preserved. Moreover, the method of communication must reflect the realities of the IT/IG practices of the organization as well as the business climate: sometimes a legal hold notice "cascades" from a supervisor, and other times it is sent by outside counsel to the custodians for verification. Regardless of the method of communication, the legal hold must be reasonably matched to the business environment and the severity of the event.

4. Release

After the litigation event has concluded, the company may *release* the hold. This process requires periodic review and tracking of outstanding holds and a mechanism to release information subject to stale holds. Keep in mind that although documents may no longer be needed for litigation, your company may still need to preserve them in order to comply with industry regulations or applicable laws. The company should give a final notice to custodians detailing what information can be deleted and what information should be preserved.

Conclusion

While a litigation hold takes time and effort to implement successfully, it can help your company preserve positive evidence, avoid harmful sanctions and alleviate an already stressful situation. Creating processes for employing an effective litigation hold is the first step toward preparing for the inevitable.