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What Is a "Legal Hold," How Does It Differ From a Records Retention Policy and Why Is It Important?

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Up to this point, we have discussed how and why you establish and follow a records retention policy under routine circumstances. In addition to the reasons we already mentioned, there are many basic business reasons why you need to find documents. Simply put, you cannot run your business effectively without them.

But what happens when trouble starts to brew? An employee threatens to sue the company on the grounds of race discrimination. A contractor alleges you stacked trades and caused delays that had a negative impact on his company's ability to work the project in a cost-effective manner.

Having an existing records retention policy can be an important means of defending against these types of claims. Regardless of whether you have an existing document management policy, when trouble starts, the rules require you to issue what is called a "legal hold." This is done upon identifying the reasonable potential for litigation. A legal hold is a formal notice to all affected personnel in your company of the legal obligation to preserve documents and information, and, in some cases, the duty to suspend regularly scheduled document destruction practices.

The principle behind a legal hold is the judicial system's desire to have all relevant evidence presented to the court or jury so that a decision can be fairly reached. Having a records retention policy in place and properly followed before a legal hold is issued helps to satisfy the court that the company has kept all of the relevant documents.

Several issues must be addressed when considering a legal hold, including:

- When must a legal hold be established?
- What must be preserved?
- Who is affected? Is it the entire company, or just a division or group of employees?
- Is the legal hold being followed correctly?
- Do I need to expand the reach of the legal hold?
- How long does the legal hold have to remain in effect?
- Are there any implications for the technology resources of the company?

The failure to follow a legal hold can give rise to monetary sanctions and possibly even ultimate liability if the court finds that documents or information were intentionally destroyed. The "spoliation of evidence" has become a very costly and time-consuming aspect of many lawsuits, distracting the court's attention from the true merits of a dispute. Having a records retention policy and then issuing a legal hold is becoming a necessary means of doing business.