

Managing Electronically Stored Information

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With the increase in social media use by companies of all sizes, it is time again to revisit the requirements for storage and retention of electronic information (ESI). Courts and administrative agencies have become less patient with businesses that destroy ESI, whether intentionally or not, when there is the potential for litigation. Organizations have faced severe sanctions, such as dismissal of a lawsuit or defense, or stiff monetary penalties, for even inadvertent destruction, particularly of e-mails. Courts are also now requiring counsel to advise their clients regarding "litigation hold" and to take steps to ensure clients are complying with the hold.

What Is ESI?

Electronically Stored Information (ESI) includes documents (such as word documents or excel spreadsheets), records (such as payroll records or employment records), e-mail, texts, social media pages (such as Facebook, LinkedIn and Twitter), websites, and any other information maintained or stored in electronic format.

What Is Litigation Hold?

A litigation hold is an effort to preserve electronic information from destruction or loss as a result of the routine operation of a business's computer systems, such as routine or periodic alteration or overwriting of electronically stored information or automatic deletion of information like e-mails. In the social media context, it is preservation of websites and social media pages in the format they existed at the time the hold is started. Litigation hold also covers the intentional destruction of electronic information, such as deleting a text message or changing a Facebook page. It applies to any party, whether business or individual potentially involved in a lawsuit.

In essence, a litigation hold requires a business or individual to confer with their counsel and decide what electronic evidence might become relevant if a lawsuit is commenced and to determine how to preserve that evidence. Examples of activities include stopping automatic documents destruction programs; copying employees' hard-drives, and saving screen shots of website.

In addition to preserving their own information, potential litigants are required to alert their vendors and require them to institute litigation holds as well.

When Does the Obligation to Preserve Arise?

A business is required to implement a litigation hold to preserve evidence when there is pending, imminent or reasonably foreseeable litigation. This means that an employer has an obligation to institute a litigation hold when an internal employee complaint is filed or when a complaint is filed with a state or federal agency. Businesses should implement the hold when there is a dispute about a product being shipped, the meaning of a term in an agreement, or any other time relations sour. In

addition, organizations should consider a litigation hold any time they receive legal process (summons, complaint, subpoena, etc.) or a letter from an attorney.

What Businesses Should Do Now

Before litigation begins is the time to conduct an ESI audit of your business. Businesses should seek to answer the following questions:

- 1) What electronically stored information does my business have?
- 2) In what format and where is it stored?
- 3) What is our process for preserving/destroying that information?
- 4) If someone leaves our company, how do we determine whether or not to preserve their electronically stored information? Who makes this determination? Where is undestroyed information stored?
- 5) What is our document destruction policy? How can we stop document destruction if needed? Who has that authority?
- 6) What is our litigation hold policy?
- 7) Do we have vendors we need to contact and coordinate with? Who will do this? How will it be done?

Wise businesses will have in place a plan to implement a “litigation hold” for ESI at the earliest possible time. The plan should include storage of social media pages, websites, and other electronic advertising. Often, it will involve co-ordination with Information Technology employees, personnel, and legal counsel.