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The ROI of Legal Hold Software (And the Risks of Not Having It)

How to avoid the hidden costs of manual legal hold management and take full advantage of an automated solution.



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Understanding the legal hold process and its associated risks

A legal hold is the process an organization employs when it learns of impending litigation, an audit, or an investigation. The company is obliged to preserve relevant records, data, and documents, and once this process has been triggered, a court expects corporate counsel to take reasonable actions to comply.

The legal hold process boils down to three phases:

1. Communication to custodians
2. Location & preservation of relevant data & documentation
3. Ensuring your process is defensible

Once a company reasonably anticipates litigation, a court expects it to, at the very minimum, ensure that physical documents or any electronically stored information (ESI) aren't deleted, destroyed, or made unavailable.

Struggling to manage legal hold complexity?

Enterprises facing multiple litigation and regulatory matters at the same time can struggle to effectively handle all the elements involved in the legal hold process.

To preserve evidence, they need to issue a legal hold at the **right time**, to the **right personnel**, specifying the **right types of data or materials** to be preserved. The hold also must include precise and clear language that lays out the exact responsibilities of these custodians for preserving that data, and must keep prompting them to ensure they're following through on that preservation.

All of this demands a repeatable and effective process. But traditional, manual legal hold processes are, as with most labor-intensive workflows, prone to human error, inaccuracy, and delay - not to mention, their sheer cost.

In this guide, we'll lay out the 4 key ROI-driving benefits of embracing a purpose-built, software-as-a-service (SaaS) legal hold solution (along with 4 risks of sticking with a traditional, manual process). Let's kick off with a look at the risks associated with an outdated (or otherwise inefficient) legal hold process.

The impact of a poorly-executed legal hold process on litigation or regulatory scrutiny? It can be disastrous for the company.

Risk #1: The costs and sanctions of failing to comply

If a legal hold isn't properly executed, negative outcomes can arrive on more than one front: There's the possibility of losing the case being litigated, and of judicial sanctions being imposed for not having made a "reasonable" effort to comply.

A court may punish a party for spoliation of evidence connected to noncompliance, but penalties can extend beyond financial costs. A court may compel discovery, or enter a judgment for the opposing party.

Or, it may choose to issue adverse jury instructions as a sanction: take *O'Berry v. Turner* back in 2016, for example, when a federal judge in Georgia found that the defendant's data preservation efforts had been "minimal," and instructed the jury that they could presume the missing evidence would have been damaging to the defendant's case.

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RISK #1: THE COSTS AND SANCTIONS

A few noteworthy examples of how failed legal hold processes have impacted corporations involved in litigation in the past?

Deleting data earned a \$3MM penalty

Plantronics held training sessions, issued reminders about compliance, and informed employees to preserve relevant information when it was first notified of its antitrust lawsuit. Yet, one executive still deleted over 40% of his emails and even urged others to follow suit, resulting in the loss of thousands of emails. Despite Plantronics' efforts to preserve and then recover this data, a federal judge imposed \$3 million in sanctions on the company.¹

A \$4.3BN pileup for Volkswagen

Volkswagen pled guilty in 2017 to charges it had, notoriously, attempted to deceive U.S. emissions regulators, resulting in \$4.3 billion in penalties. One of the three counts it pled guilty to? Obstruction of justice, owing to a litigation hold that was bungled by in-house counsel. One of the mistakes? Multiple employees understood their legal team's data preservation instructions to be actually suggesting the destruction of these materials, leading to at least 40 of them destroying documents.²

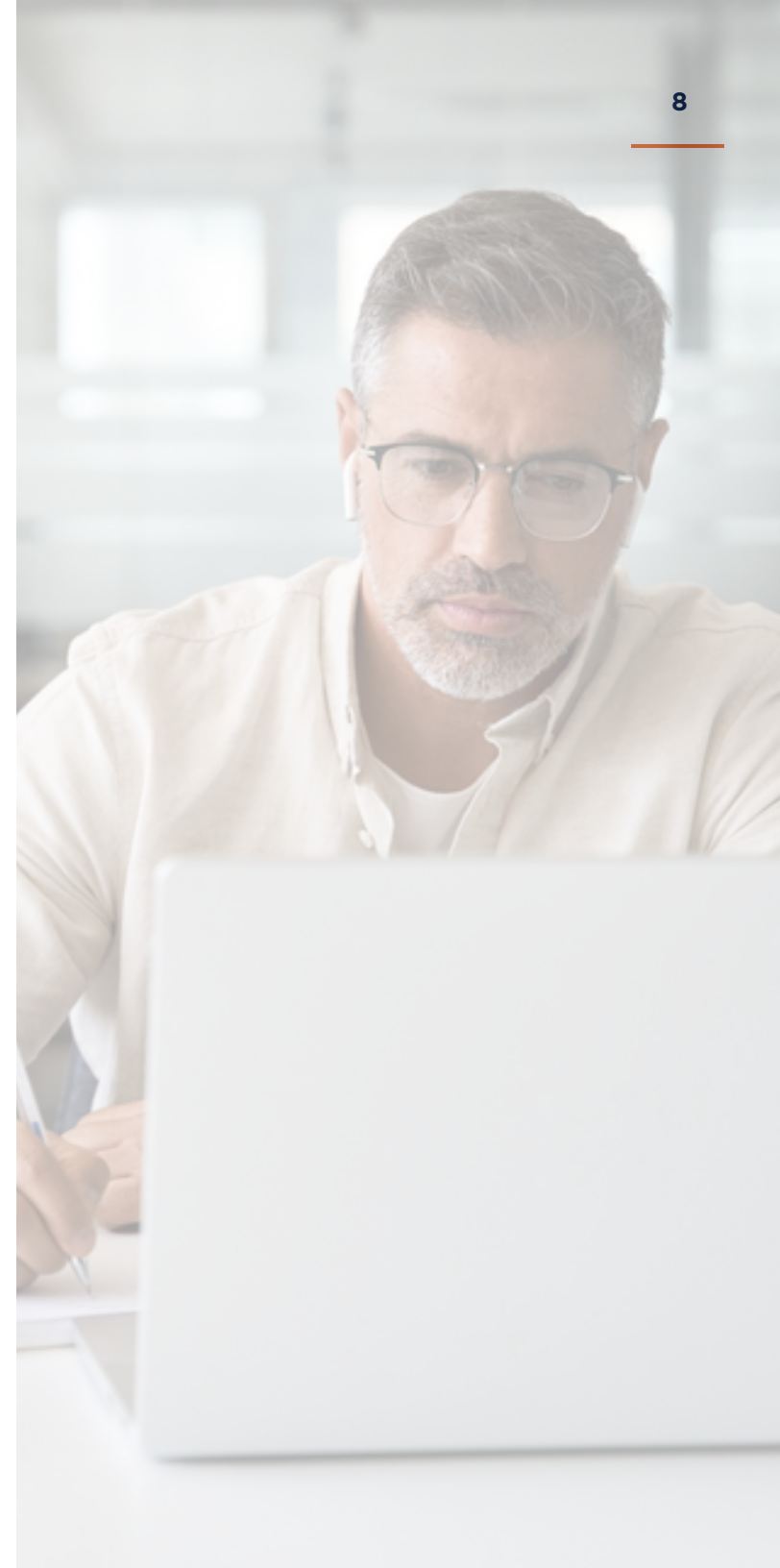


How “sloppiness” slapped HarperCollins Christian

During the course of a lawsuit against the religious publishing division of HarperCollins, a Special Master and a Magistrate Judge both found the defendant had exhibited “willful blindness” during the hold process, was “casual and careless,” and showed “paralysis, or even purposeful sluggishness” with its commitment to defensible collection and search being “at best, perfunctory.” Over 750,000 emails and attachments from the relevant time period hadn’t been preserved, among other materials. In 2019, HarperCollins Christian Publishers was found liable for fraud after almost 7 years of litigation for spoliation and failure to disclose evidence. The jury awarded EPAC Technologies, Inc., a leading high-technology manufacturer and printer, \$12 million in punitive damages on top of more than \$3 million in compensatory damages for fraud and breach of contract. ³

A near miss for two tech giants

In *Apple Inc.v. Samsung Electronics Co., Ltd.*, multiple delays in implementing legal holds nearly resulted in the court giving the jury adverse inference instructions against both companies.



Risk #2: Not reaching the right custodians

If you've managed to (generally) ascertain where the material might be you need to preserve under a legal hold, you then have to deliver proper instructions to the people who'll be responsible for that preservation – its custodians. Here, though, we again run up against the shortfalls of a manual legal hold system.

Often, a legal department can only make informed guesses about who's responsible for relevant ESI or physical documents. That's almost exponentially more difficult if they're part of a large corporation or global enterprise where in-house legal staffers have to identify potential custodians in far-flung offices.

In many cases, they will have never had prior contact with those employees or their managers, so they're faced with untangling organizational knots to pinpoint the appropriate custodians.

Another level of difficulty presents itself when relevant data is scattered among potentially hundreds, even thousands of possible custodians. The task of simply identifying who's an actual eligible custodian can become a huge time-sink for a legal department, rife with rabbit holes and dead ends.

The solution? [An SaaS legal hold solution that integrates cleanly with your HR and enterprise platform databases](#) via APIs/direct connectors. These allow the software to sync directly with these databases. The benefits to your legal team include:

- Access to data and devices so they can do early case assessments and collect relevant data.
- The ability to suspend routine deletion tasks that could compromise key data.
- Significant acceleration in the identification phase of your hold process.
- Increased chances of targeting the right custodians straightaway and eliciting timely responses and attestation.
- It won't require IT assistance (or only minimal involvement).



Risk #3: Custodians in noncompliance

Perhaps you've sent out a legal hold message from a member of your Legal Ops team. Then followed it up with one from an in-house lawyer. Or even, in the most urgent imaginable circumstance, from your General Counsel. Yet the response from the target custodian(s)? Non-existent.

Sometimes, custodians simply don't spot the notifications you send or delay responding. Or if they're not the right people to contact in the first place (see risk #2), they might even ignore them or skip replying because there's plenty of other work on their plate. In that case, they're leaving you in the dark about the fact they're the wrong party to contact in the first place, so you squander even more vital time in follow-ups.

Getting 100% compliance from every person responsible for preserving data or documents relevant to that hold? It's absolutely imperative.

And as we mentioned earlier, when custodians number in the hundreds or even thousands, tracking compliance and doing proper follow-ups or escalations using traditional means becomes even more difficult. This adds a degree of inaccuracy to the process that may not bear up under scrutiny from the court or opposing counsel.

What's the answer? It's not **A**) marching to their office and camping on their doorstep, or **B**) throwing the problem to higher-ups (using the same labor-intensive processes, let's remember), which may fruitlessly consume their time, too.

Automated reminders and escalations are a key feature of SaaS legal hold management solutions:

- They simplify and expedite the instruction and attestation process while adding greater accuracy by replacing spreadsheets or other manual means of custodial tracking with automated reminders.
- Custodians receive both initial notifications and the follow-ups you set to ensure you're getting compliance within your timeline.
- If a recipient doesn't comply, the issue can be automatically escalated to their superiors. But by automating the initial custodian notification process, this becomes more avoidable.



Risk #4: Vendor fees for ESI collection & Processing

A poorly executed legal hold can drive up e-discovery costs. How? Once you've identified relevant ESI, the next task is collecting and processing ("culling") it to eliminate any data or material that's irrelevant, and storing it for review.

To accomplish this, in-house legal departments often turn to **outside vendors, forensic consultants, or even their own IT departments**. But if identification mistakes have been made during the legal hold process – such as failing to identify all relevant data – it can entail additional collection and processing costs.

Collection and processing costs can mount up in a hurry in the first place, since many vendors charge on a per-hour or per-device basis for their work.

Here's an elementary example that's on the lower end of the scale, for a single relatively modest matter:

Collection fee/rate: \$125/hour

Hours required: 100 hours

Total: \$12,500.00

Now extrapolate that to multiple matters, or to more complex matters involving many more devices across a large corporate environment – and then figure in the additional costs caused by a subpar legal hold process.



An additional vendor cost? This data needs to be loaded into a document review tool. This, too, often gets outsourced, and vendors typically charge by the gigabyte for both processing and loading the data. That can cost approximately \$150-250 for processing each gigabyte, and another \$50-100 per gigabyte for loading into the review tool. Again: imagine the cost if there are tens of thousands, or possibly millions of documents associated with an individual matter, and a deficient legal hold process results in still more vendor work needing to be done.

With a SaaS legal hold tool, these extra costs can be **limited or eliminated**:
By correctly identifying the right types of data, the legal hold process ensures the collection and processing phase is more accurate and complete, preventing additional fees and overages.

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The ROI of LegalHold Software

Driver #1: Better Integration & Collaboration

In a fair-sized (or even small) in-house legal department, there's a constant flurry of matters to be managed and tasks to be executed. Outside of the legal department, different corporate units and groups are naturally consumed with running their own complex operations.

But to reduce the risk of accidental spoliation, it's imperative that cross-functional units and teams **across the entire enterprise** are aware of legal holds and the specific data or assets they're aiming to identify. Using manual, conventional approaches to coordinate this and achieve the right results? It's practically impossible.

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As we pointed out in Reason #2, a SaaS legal hold solution that's integrated with an HR or enterprise database can quickly and accurately identify the right custodians for particular data and materials. But the **benefits of cross-platform/product integration** can extend even further if a legal hold tool is connected with systems for matter management, content and asset management, email, global directories, and more:

- Better, automated communication greatly improves data preservation, while maximizing efficiency and savings.
- Legal holds can be launched from within integrated matter management, rather than separately.
- Custodian and data preservation status can be centrally monitored and reported.

One *other* key benefit?

- Improving communication, collaboration, and responsiveness between the legal department and other corporate teams builds partnership – and **elevating the stature of Legal** within the organization.



ROI Driver #2: Eliminate Custodian Interview Costs

The legal hold process is built on effective engagement with key custodians of potentially relevant data or documents. Once the necessary data has been identified, part of the process regarding locating that data involves interviewing potential custodians to assess exactly which data, documents, and records need to be preserved, and where those items reside: in emails, on a disk drive, in a mobile device, or even in text messages or social media posts.

Traditionally, it falls to the legal department to either conduct in-person interviews with these custodians to ascertain where this information is held or, frequently, to delegate the job to outside counsel.



The price of compliance can get steep, even in this very conservative example:

Outside counsel rate:	\$225/hour
Hours per interview:	4 hours
Number of interviews:	20 custodians
Total:	\$18,000.00

Automating this process using a SaaS legal hold solution can spare a legal department much of the cost involved in this part of the process. How?

- Using drag-and-drop interfaces, an in-house legal team can design customized, self-guiding questionnaires for custodians, leveraging templates incorporating legal best practices and court-vetted questions.
- The simple and clear design of a good web-based questionnaire means custodians can respond quickly and accurately, obviating the need for sit-downs with attorneys.
- As discussed previously, automated reminders and escalations can maximize compliance, too.
- A quality SaaS solution will instantly generate audit-worthy reports on the legal hold process so you can take the right measure to make it stand up to scrutiny in court.



ROI-driver #3: a smarter, more secure process

Why does this matter? There's an unnerving truism at work here: *If it's out of your sight, it's out of your control.*

Traditional legal hold processes are inherently saddled with a lack of visibility and control, of course. That can result in issues like (among others) incomplete compliance and attestation, structural inefficiency and waste, and failures to locate the right information that might be construed by a court as evasion or bad faith.

The legal hold process is so foundational to the corporate legal process, and to protecting the enterprise, that it's arguably the process that's most in need of monitoring and management by an in-house legal team.

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An enterprise that's facing multiple litigations and regulatory challenges at once has to deal with a complex web of matters and their associated tasks. This can prove an overwhelming and error-fraught job if they're relying on outmoded manual methods, yet visibility and reporting become even more vital when legal holds multiply in number.

Issuing a legal hold at the right time, to the right people, for the right data, is **far more feasible with a SaaS solution**, where every step of the process and every participant are subject to centralized monitoring, control, and reporting.

Moreover, with SaaS, the lessons gleaned from auditing execution of one legal hold process can then be embedded in the next, with further refinement in every subsequent iteration. So, your digitized and automated legal hold process can quickly become optimized in terms of efficiency and defensibility.



ROI-driver #4: indispensable agility

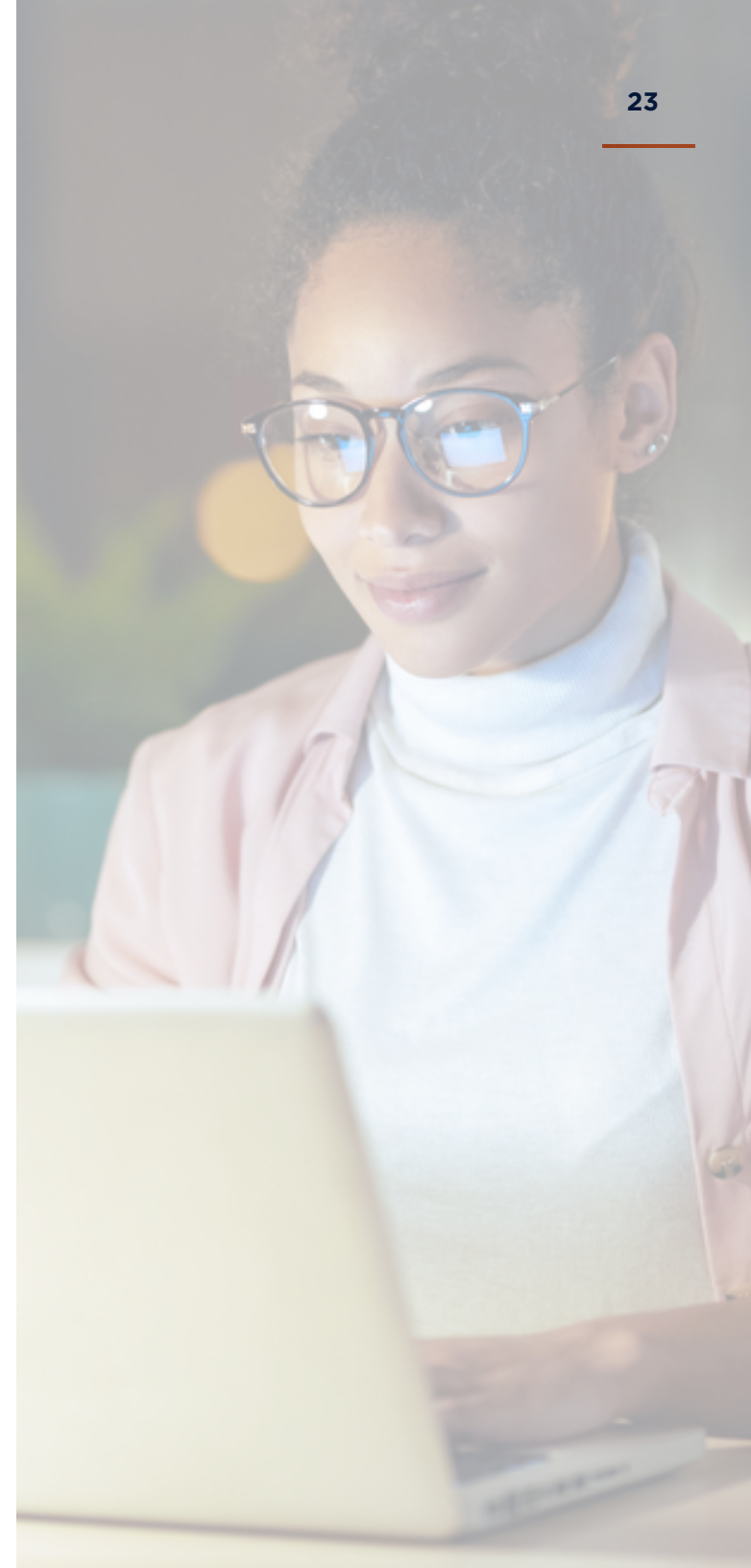
A cliché response to cloud-based data systems by many lawyers was, once upon a time, that the data they trafficked in is proprietary and extremely sensitive, and would be put at risk by being stored anywhere but on-premise.

But that is no longer the case in today's world. A 2022 study by the ABA found that **70%** of respondents reported that they used cloud computing, up from 60% in 2021. And for solo lawyers, cloud users moved from 52% to **84%** in just one year.⁴

Security and confidentiality were the top concern among non-cloud users.

The benefits of SaaS solutions have convinced many in-house legal teams and law firms alike to shift perspective, coming to embrace a host of benefits like:

- Easy browser-based access from anywhere: **68%**
- 24/7 availability: **67%**
- Low cost of entry and predictable monthly expense: **59%**
- Quick adoption and implementation: **49%**
- Robust data back-up and recovery: **47%**
- Elimination of IT & software management requirements: **40%**
- Better security than they could provide themselves: **32%**



Beyond these, the strengths of SaaS for legal teams implementing legal holds also include:

- **Data and documents won't be mislaid or lost** once saved to the cloud.
- **Secure encryption** and the advent of blockchain-based tools have satisfied confidentiality concerns.

Together, these make a SaaS solution **the most effective means of managing sensitive litigation data**, including any that's been collected during the course of a legal hold.

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The merits of purpose-built solutions

The same 2022 ABA survey found, however, that many lawyers were resorting to platforms like Dropbox (66%) or Microsoft 365 (59%) as their cloud-based solutions for data and document management.

Needless to say, these platforms fall short of meeting the demands of a legal hold process, for reasons we've already detailed: automatic notifications, integration with HR/enterprise databases, and so on.

It's why the best SaaS tool for executing efficient, defensible legal holds is a **purpose-built solution** designed expressly around the demands of that particular process.



Summary

Nobody believes the pace of change, whether in technology or business, is going to slow down anytime soon – if ever. Developments such as the imposition of the G.D.P.R. show how the evolution of legal demands now extend far beyond the boardroom or the courtroom, as General Counsels are increasingly tasked with risk management and other concerns.

In such a shifting legal and regulatory milieu, traditional processes only keep a legal department back on its heels. They condemn in-house legal teams and Legal Operations staff to being reactive, rather than proactive – and their reactivity can be sluggish and inadequate to meet the expectations of the courts.

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A SaaS legal hold solution provides flexibility and agility that **empower legal departments to be proactive** in executing legal holds. Furthermore, legal hold solutions that integrate with matter management improve overall attorney portfolio management, increase visibility into all aspects of a matter from a single source of truth, enabling assessment and quick execution of a legal hold **earlier** in the matter lifecycle - reducing litigation risk and ultimately improving legal outcomes.

Yet software, no matter how advanced, should still be only **one** component of a legal hold strategy. This must also include contingency planning and in-place personnel who are trained and ready to minimize disruption and take a proactive stance when the company is involved in a lawsuit or regulatory request requiring it to collect, cull and produce data quickly and efficiently.



In-house legal departments that maintain traditional, manual legal hold management processes? They're overlooking an enormous opportunity to improve the efficiency, accuracy, and speed of executing legal holds.

Adopting a SaaS solution to what's an increasingly complicated and essential function brings multiple benefits. First, it can be a boon to the bottom-line efficiency of the legal department, which is ever-more important to the C-suite. And – just as significantly – an SaaS legal hold tool helps better fulfill the mission of in-house counsel, which is to protect the corporation and mitigate risk and potential damages, whether financial or reputational.

For any corporate legal department headed into a future where judges and regulators are making constant changes to what's considered defensible and appropriate in legal holds, the responsible option for keeping pace? To implement a SaaS legal hold management solution – not at some yet-to-be-determined future date, but as soon as possible.

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About Mitratesch

Mitratesch is a proven global technology partner for corporate legal professionals who seek out and maximize opportunities to raise productivity, control expense and mitigate risk by deepening organizational alignment, increasing visibility and spurring collaboration across the enterprise.

With Mitratesch's proven portfolio of end-to-end solutions, operational best practices spread throughout the enterprise, standardizing processes and accelerating time-to-value. By unlocking every opportunity to drive progress and improve outcomes, we're helping legal teams rise to the challenge of serving the evolving needs of the modern, dynamic enterprise.

For more info, visit: www.mitratesch.com

MITRATESCH

CONTACT US

info@mitratesch.com

www.mitratesch.com

Mitratesch US

+1 (512) 382.7322

Mitratesch EMEA

+44 (0) 1628.600.900

Mitratesch AUS

+61 (0)3.9521.7077