Litigation's Ultimate Guide to the Legal Hold Process

Stay one step ahead of litigation or audits with tried-and-true best practices for legal hold management.

Empower. Automate. Elevate.

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A [legal hold,](#) or a notification sent from an organization's legal team to call for the preservation of documentation and data in light of on-going litigation, can be the difference between compliance and complete trial disaster. Triggered by criminal charges, subpoenas, audits and a variety of other legal situations, legal holds are designed to prevent the destruction or alteration of possible evidence – an important step to get right if you want to avoid legal, financial, or reputational penalties.

Once a company reasonably anticipates litigation, a court expects it to – at the very least – ensure that physical documents or any electronically stored information (ESI) won't be deleted, destroyed, or made unavailable. This can be done by:

1. Communicating the legal hold parameters to your stakeholders (or custodians)

2. Securely preserving all relevant data and documentation in a centralized location (with robust permission settings)

3. Ensuring that your legal hold process is defensible and repeatable

Introduction:
The modern legal hold

An effective legal hold process is a bit like insurance — if you don't invest in it now, you're sure to need it later (and not having it could be costly). In this guide, we will review how you can be best prepared for issuing (or receiving) a litigation hold with some data preservation do's and don'ts, tips for keeping your custodians informed, and a look at the latest automated legal hold technology.

Data preservations do's and don'ts

The first step in preserving data is to understand the dispute at hand and its nature so you can clearly identify the information required. Once the information is identified, you can take the necessary steps to preserve it.

As you begin the legal hold process, it's important to ensure you are working closely with your counsel to establish defensible and repeatable best practices. Keep the following do's and don'ts as a generalized starting point.

Do:

- ✅ Monitor your collection progress

- ✅ Monitor custodians on active legal holds who leave the company or are terminated

- ✅ Continuously remind custodians of their duty to preserve information

- ✅ Escalate custodians who do not acknowledge their duty to preserve

- ✅ Ensure your legal hold process is defensible by:

  - Keeping a record of which data and documents need to be preserved and why

  - Having a clear list of who should be involved in the preservation process and what their responsibilities are

  - Maintaining easy access to preserved data whenever you need it

- ✅ Integrate your legal hold tool with systems for matter management, content and asset management, email, global directories, and more for seamless collaboration and escalation

Don't:

- ❌ Draft legal holds filled with jargon, lingo, or unnecessary verbiage

- ❌ Store documents and data across disparate systems

- ❌ Rely on manual tracking and spreadsheets for evidence preservation

- ❌ Forget about third parties

A TIP FROM THE EXPERTS:

Legal ops plays a critical role in implementing and managing the processes, solutions, and technology that drive an effective legal hold process. Having the right applications in-house enables consistent support and predictable workflow.

How to navigate custodianship

Your custodians will be anyone possessing relevant evidence or data to the dispute, audit, or case in question — and it's your responsibility to inform them of their preservation obligations in a timely, straightforward manner.

Here are some best practices for navigating custodianship:

1. **Distinguish custodians from silent custodians**. A silent custodian is still a part of the legal hold and data preservation process, but when you issue the notice, they will not receive an email to their inbox like someone who has departed the company.

2. **Keep an updated list of custodians** who may frequently be involved in a hold due to their positions (and share this list with your IT team in case any system updates or policies need to be put in place).

3. Develop a **strategy to discover all relevant information sources and applications** based on internal processes and IT architecture.

4. **Give clear parameters surrounding data management responsibilities**, like what needs to be preserved, for how long, who they can speak to about it, etc.

5. **Consider templatizing some common legal hold notices** to save time (you can categorize them by jurisdiction, event type, etc.).

A TIP FROM THE EXPERTS:

It can be difficult to identify custodians, send out your legal hold, and track attestations and updates manually — especially across a growing or distributed team. Legal hold technology integrates with your active directory so you can:

- *Automatically cease disposal of relevant data upon pending litigation*

- *Email custodians all at once (without having to track down email addresses)*

- *Preserve all evidence in a centralized database that is easily accessible for discovery*

- *Enable automatic tracking of legal hold status and custodian engagement*

- *Make results instantly reportable for immediate, reliable compliance insights.*

Tips for keeping custodians informed

To get the best results and ensure compliance throughout the legal hold process, it is important to keep custodians informed. Receiving a legal hold notice can be unsettling for anyone, but with the right approach, tracking compliance and conducting proper follow-ups or escalations can be a stress-free experience for all parties involved.

A manual approach involves sending out legal holds personally (often by email), tracking notice send dates and updates by hand, and having custodians contact the legal department for attestation. An automated process, on the other hand, does this all for you, transforming the legal hold process while improving the custodian experience with features like:

- **Automated reminders and escalations** which create best practices around messaging. Having automation expedites the instruction and attestation process greatly to ensure compliance within your timeline. It also supports ensuring custodians are well-informed about their responsibilities while under the hold with consistent and clear documentation.

- **The ability to adjust based on legal hold changes and scope.** Litigations can be lengthy, and having a software that enables custodians to re-comply when needed or update their data saves you time and money throughout the process.

- **Continuous monitoring of employee changes** to stay on top of departures of custodians during the legal hold period.

- **Integration with your HR and enterprise databases,** which allows your legal team to be notified of any departures of employees who may be involved in holds that require data preservation.

- **Customized, self-guiding questionnaires,** leveraging templates that incorporate legal best practices and court-vetted questions. This will help aggregate large volumes of responses and force consistency with what is being communicated and asked to all parties involved.

For growing companies with a vast number of employees in various geographic locations, it is impossible to track custodianship manually. A good legal hold software reduces manual processes and automates communications, tracking, collections, and searches.

Like we said before, legal hold software is a bit like insurance — if you don't invest in it now, you're sure to need it later (and not having it could be costly).

Just take a look at some of the common hidden risks of a manual legal hold process:

- Not reaching the right custodians

- Non-compliance and fines

- Evidence spoliation or lack of attestation

- Lack of visibility & control (including turnover)

- Failure to locate data sources

  - Data can be repeated in multiple places and systems (like email vs. DMS vs. ELM); it can also be in non-custodial vs. custodial places

- Managing multiple litigations/regulatory changes

- Slow reactivity to finding relevant information

- Lack of emphasis on both physical and ESI

Best practices for setting clear legal hold release expectations

When litigation is wrapped up, it is important to take the steps to release the hold by communicating to custodians that they can purge their data. Before following through with the release, it is important to ensure that important information is shared with all parties in its entirety.

Don't Forget!:

- ☐ Have a process to review open legal holds and understand triggers that release them.

- ☐ Understand your team workflow

- ☐ Establish a legal hold release notice that addresses all parties

- ☐ Specify which legal hold is being released

- ☐ Outline the purpose of releasing the hold, what it involves, and how it mitigates future liability

- ☐ Remind custodians of superseding retention schedules

- ☐ Check if custodians are subject to overlapping holds

Examples of legal hold release triggers:

- When the relevant statute of limitations has expired

- When it is no longer "reasonably foreseeable" that litigation will occur

- When litigation has been dismissed with prejudice (pending parallel lawsuits)

- When underlying litigation has been settled, judgment has been entered, or summary judgment has been granted

- If the government fails to prosecute within a reasonable time

ROI-driving factors of automated legal hold technology

Traditional, manual legal hold approaches are — as with most labor-intensive workflows — prone to human error, inaccuracy, and delay. Full compliance demands a repeatable and effective process – and an automated legal hold solution can help in 6 key ways.

Automate & Improve Communication ➔ With improved data preservation, efficiency, savings, and collaboration with other corporate teams

Integrate with Matter Management ➔ Connect holds to matters and view legal hold reporting in your matter management solution

Stay Defensible ➔ With complete auditability of all actions, escalations, and attestations

Access Robust Reporting ➔ With audit-worthy reports that stand up to scrutiny in court

Drive Efficiency ➔ Drive legal holds at the right time, to the right people, for the right data

Save Time Updating Employee Data ➔ Monitor employee changes and get automated updates in real-time

Want a closer look at 4 key ROI-driving benefits of embracing legal hold technology (and 4 risks of sticking with a traditional, manual process)?

Visit our latest eBook

THE ROI OF LEGAL HOLD SOFTWARE

Conclusion: Don't let manual processes "hold" your company back

Without an automated solution, staffers struggle to identify custodians and obtain the attestations needed to ensure defensible compliance. **Automating this process and using legal hold templates can cut the time your staff spends on managing legal holds by 75% thanks to a consistent, reportable process that also mitigates litigation risk.** It will allow you to communicate instructions to the right custodians, then automate reminders and escalations to drive timely compliance.

A best-in-class litigation hold software solution (like LegalHold) will incorporate intuitive UX and UI design for simplifying the entire process, maximizing efficiency for both the legal department and custodians. In just four easy steps, a legal team can create and manage a hold – a standardized, repeatable process reducing the risk of potential evidence being deleted, and able to stand up to judicial scrutiny as courts put more and more of an emphasis on legal hold processes.

About Mitratech

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