

RESOURCE GUIDE

The IT Handbook: Legal Hold and Collection

A practical guide for information technology professionals who want to learn more about the duties and risks associated with the legal hold and collection process, and work more effectively with their corporate legal department.



TABLE OF CONTENTS

<i>Introduction</i>	
1. <i>What Is a Legal Hold?</i>	3
2. <i>Key Steps in the Legal Hold Process</i>	5
3. <i>What Is the Role of IT in the Process?</i>	6
4. <i>What Is the Role of Legal in the Process?</i>	7
5. <i>The Mechanics of Collection and Preservation</i>	8
6. <i>Using Technology to Manage Legal Holds</i>	11
7. <i>Tips for Better Collaboration between Legal and IT</i>	12

Why a Handbook for IT

When litigation looms, a corporation has a duty to identify and preserve relevant data that may be evidence to the specific litigation. The purpose is to avoid the intentional or inadvertent destruction of relevant evidence that might be used at trial. We call this process a “legal hold” or sometimes a “litigation hold.”

Most handbooks on legal holds are written for lawyers and other legal professionals. However, lawyers and their staff—who have ultimate responsibility over the process—rely heavily on IT to execute many of the activities associated with a legal hold. This creates a burden on IT, makes the process inefficient and may put legal, IT or the organization at risk if legal obligations aren’t met.

Our goal in this short handbook for IT professionals is to help you understand your company’s obligations surrounding a hold, the process for executing a hold and the respective roles played by IT and the legal department.

Throughout the handbook, we aim to provide practical tips for more effective collaboration between IT and legal that lessens the burden on IT and makes the process more efficient.

1

What Is a Legal Hold?

Our judicial system is rooted in the belief that parties to litigation should share documents and other information prior to trial. In support of that proposition, each party has a duty to identify, locate and preserve potentially relevant information including electronic files, paper documents and other tangible evidence.


This duty to preserve evidence may arise even before suit is filed or the information is otherwise requested. In 2003, a federal judge set out the rule for what has become known as a “legal hold” or sometimes a “litigation hold.”

Once a party reasonably anticipates litigation, it must suspend its routine document retention/destruction policy and put in place a “legal hold.”

A legal hold is a process through which the company meets its preservation obligations. It typically consists of issuing notices to key individuals telling them to preserve relevant data, a direction to suspend routine data deletion and in many cases involves your efforts to collect or preserve data.

Failure to issue or properly conduct a legal hold can lead to fines or even more serious sanctions like dismissal of claims or defenses.

Due to their critical role in the legal hold process, IT staff members need to understand the company's legal obligation to ensure that relevant data is preserved and collected in a defensible matter.



*A legal hold is a process that an organization uses to **preserve all forms of relevant information** when litigation is reasonably anticipated.*

Legal Hold Terminology for IT

Here are some key terms for IT professionals to know:

Chain-of-Custody: This refers to maintaining a log or documentation for all data gathered throughout the life of a case. It typically includes the name of the person who received the evidence, date, time and place of collection or receipt, name of custodian, description of data obtained and description of data collection procedures. Complete and accurate logging procedures will help ensure that data can be authenticated in court.

Custodian: This is a legal term and refers to an individual who manages or otherwise controls a certain type of data, e.g., an email box or Office files. You are typically seen as the custodian for your mail account as well as any and all documents you create and store on your computer, other work devices or the network.

Data: For legal hold purposes, data means any type of information including email, electronic files, databases and social network information along with paper documents and other tangible evidence.

Data Collection: This means extracting potentially relevant data from its native source.

Data Steward: A data steward is typically an IT or records management person who has control over data. A data steward may control other people's data if he/she can control deletion and backup processes.

ESI: This is what lawyers refer to as "electronically stored information." It includes all data stored electronically including email, electronic files, databases, social network information, etc. ESI refers to a subset of data.

Key Custodians: These are custodians who have data that may be relevant to the legal issues that led to the legal hold. Often, they will be witnesses in the process, but in some cases, they may have access to (or control of) data that is or will be requested.

Legal Hold: A process through which a company meets its obligation to preserve and collect potential evidence for trial.

Legal Hold Notice: A message, usually written, directing one or more individuals to suspend deletion efforts and preserve relevant data.

Metadata: This is "data" about the data that provides context information for ESI. In some cases, metadata can be useful evidence. For example, in a document created on a computer, metadata consists of certain information that is automatically created (e.g., who created the document, when it was created, how long the user worked on the document, who edited it and when it was last edited, etc.). In email, metadata provides information on who it was from, to whom it was sent, who was copied or blind copied, etc.

Preservation: This means storing data in a form where it can be retrieved later if needed for a legal proceeding. This can be inside the company's servers or on secure external/cloud servers.

2

Key Steps in the Legal Hold Process

Below are key actions that must be taken in implementing the hold:

- 1 **Identify key custodians and data stewards.** The first step in a legal hold is to identify custodians and other data stewards such as IT and records management personnel, division managers, the legal department itself and others within the organization who might have knowledge or data relating to the anticipated litigation.
- 2 **Issue a hold notice.** Once key people subject to the hold have been identified, the next step is to notify each person and direct him/her to stop deleting documents that relate to the issues in the hold. For individual custodians, the notice would direct them to not delete email and other documents in their possession. For IT personnel, the message would direct them to suspend any routine document/destruction policy that might affect data subject to the hold.
- 3 **Secure an acknowledgement of the hold notice from key custodians.** Acknowledgement by each custodian that he/she has received the notice helps ensure that each custodian is aware of his/her preservation obligations.
- 4 **Send periodic reminders about the hold.** Legal holds last as long as the litigation lasts. Many matters can take years to resolve. It's good practice to send periodic updates (e.g., quarterly) to custodians and IT personnel so they know the hold is still in effect.
- 5 **Document the process.** Failing to document legal hold efforts is the surest way for a judge to consider sanctions against your organization for failing to take reasonable steps. Make sure the process is documented in case efforts around legal hold notices are later questioned. This includes the understanding of the claim, how employees were identified for the hold, who acknowledged it and what other actions took place and when.

3


What Is the Role of IT in the Process?

Now that the basic steps of a legal hold process have been outlined, what is the role of IT in helping lawyers fulfill the company's legal obligations?

Counsel are ultimately responsible for supervising the legal hold process, but IT teams know the company's systems, networks and servers better than any other department in the organization. Thus, lawyers and other legal department staff rely heavily on IT to execute many of the mechanics of a legal hold. As part of the "first response" team, the IT department must ensure that the mechanics of preservation happen correctly.

Working with counsel and other legal staff, IT should lead most aspects of the following:

- 1 Identify custodians and other data stewards who might have knowledge or data relating to the anticipated litigation, and/or are subject to the hold.
- 2 Identify data sources, implicated systems and data types.
- 3 Ensure automated IT tasks are managed appropriate to preservation needs. This means IT must ensure auto "housekeeping" mechanisms are suspended (as required and is reasonable), including normal data retention/deletion schedules.
- 4 Gather (collect) and preserve data from systems and custodians. Lawyers should work with IT personnel to develop a reasonable data collection protocol, ensure chain-of-custody for all collected and preserved data, execute data gathering tasks, and document all actions with reporting and audit trails to show good faith efforts in executing the legal hold.



*It is critical that everyone view themselves as part of a larger legal and IT team **working together to help the company meet its legal obligations.***

4

What Is the Role of Legal in the Process?

Increasingly, courts require legal counsel, whether internal or external, to supervise the hold and collection process and to certify that reasonable steps were taken to meet these obligations.

If you are part of the IT group, know that counsel may need to understand how data is managed and the steps you are taking to collect data. As part of attorney supervision requirements, counsel may expect to be able to monitor live progress of each collection and other activities. (This is discussed in the section “Using Technology to Manage Legal Holds.”) Even routine processes need to be shared with counsel who may have to defend your or your team’s actions to the court.

IT personnel can expect counsel to:

- 1 Issue the legal hold as early as possible, instructing key employee data stewards to not delete or otherwise alter relevant data.
- 2 Establish a process to track responses, compliance and answers to data surveys.
- 3 Interview data stewards and key custodians both to advise them with respect to the duty to preserve and to learn what they know about the events in the matter or investigation.
- 4 Confirm automated IT tasks—such as routine deletions—are managed appropriately for preservation needs.
- 5 Instruct employees to produce relevant files, and take steps to ensure data is being collected and preserved in a legally defensible manner.

Counsel plays a critical role in the legal hold process starting with determining when a hold should be put in place. It is counsel’s job to define the issues involved in the litigation or regulatory investigation and to help translate them into terms IT and key custodians can understand and apply.

5

The Mechanics of Collection and Preservation

Legal holds are judicial requirements imposed by courts and regulators. Courts typically are concerned with issues like these:

- *When did a party's duty to preserve evidence arise?*
- *How quickly did the legal department issue litigation hold notices?*
- *Was the hold notice written clearly and did it describe the data to be preserved properly?*
- *What did recipients of the litigation hold notice do or say in response to the notice?*
- *What further steps were taken to preserve evidence both at the time of the hold notice and in the months or years since?*

Here are the key steps to consider in formulating your legal hold process:

- 1 Notify key custodians and data stewards about the need to preserve and not delete data. Make sure they acknowledge your instructions in writing if possible.
- 2 When collecting, maintain the integrity of the data to avoid information loss including the files themselves and metadata about the files.
- 3 Keep logs to maintain a "chain of custody" for all collected files and metadata.
- 4 Follow a process, including using commercial software where appropriate, to track and report on the progress of hold and collection efforts.
- 5 Maintain the hold until instructed otherwise by the legal department. When a hold is released, the data under hold can again be managed in accordance with company retention policies.

Ultimately, remember that the hold and collection process is disruptive to custodians and data stewards. Take care to time your efforts to fit the needs of your employees. Going further, balance is key to your success. Collecting too broadly makes the process more expensive and is not required. Preserving too little brings the risk that you may miss relevant data.

Good faith efforts are the key. *Can you show that your organization made reasonable efforts to preserve relevant evidence in anticipation of litigation?*

Fortunately, there are well-regarded software platforms, such as Catalyst's Insight Legal Hold and Collect, to track hold communications, responses, questions, acknowledgements and even collection efforts. While early products required local installation and management, modern hold software can be delivered securely from the cloud. Not only are costs lower; you no longer have to assign IT staff to manage it or go through endless rounds of testing when upgrades are released. Mature software also runs in the background so as not to disrupt employees.

Sometimes the simplest route to demonstrating reasonableness is to use legal hold and preservation software to track notices, acknowledgement and collection efforts. Automated reports and audit logs can show beyond peradventure that reasonable steps were taken at the right time to meet legal hold obligations.

Collecting from Enterprise Systems Including Office 365

IT is often asked to collect key custodian data from one or more enterprise systems. To ensure that this process runs smoothly and that the right data is preserved, legal and IT need to work together from beginning to end. Has IT suspended routine deletion programs properly? Is relevant data stored in a secure place (whether in place or archived elsewhere) such that the data cannot be inadvertently overwritten?

Typically, legal hold functionality offered in enterprise systems is geared toward the IT side of the process. Few meet the full range of legal hold needs such as integrating with HR, Active Directory or other company identification systems, managing notices, facilitating questionnaires, tracking responses and providing reporting on custodian status, matter details, the state of preserved data and departed employee data.

Many companies are moving to the public cloud, and are using Microsoft or Google to manage email and other productivity-related files. They do not yet offer fully functioning legal hold and collection, so IT often relies on third party solutions to fill the gaps.



Commonly Overlooked Data Sources

Each day new systems come online that may contain data that should be included in a legal hold and preservation. Here are a few examples to consider:

- *Collaboration platforms with chat and video sessions*
- *Outside social forum data (LinkedIn, Facebook, Twitter, YouTube)*
- *Document management and sharing systems (SharePoint, Box, Dropbox)*
- *Other cloud and legacy sources (Google Apps, WebMail)*
- *Line of business applications that may be implicated systems based on issues in the case (e.g., an antitrust matter may require CRM collection from Salesforce and a FINRA case may require preserving Bloomberg Chat data)*
- *Employees' personal devices that also may be used for company business*

Microsoft Office 365 Security & Compliance Center for Legal Hold

O365 Security & Compliance Center offers legal hold and preservation capabilities, but there are limits:

- 1 Employee notification and acknowledgement compliance processes are missing.
- 2 There are no employee-facing or legal administrator designed workflows.
- 3 IT must execute tasks in disjointed steps that can result in high latency.
- 4 Preservation is limited only to email.

By using mature legal hold and collection software with O365, your organization will be in a strong, legally defensible position while limiting cost and IT energy. Benefits include:

- 1 No need to buy higher-tier O365 licenses (no E5 needed).
- 2 Ensures synchronization between IT and legal processes.
- 3 Delivers employee-facing and legal administrator workflows.
- 4 Fixes the disjointed, batch processes native to O365.
- 5 Avoids O365 issues of latency and slow UI response.
- 6 Legal holds and preservation are not only limited to O365 email.
- 7 Eliminates manual tasks required by IT when relying solely on O365 legal hold functionality.

6

Using Technology to Manage Legal Holds

For years, legal departments relied on manual methods to track legal hold notices and collection efforts. Email and spreadsheets were the main tools to track hold progress. When questions later arose, sometimes years later, many found that memories had faded or key employees had moved on.

The right software platform, such as Insight Legal Hold and Collect, can help both legal and IT manage holds more efficiently and cost-effectively by automating processes, give legal the ability to drive more collection activities and reduce reliance on IT for day-to-day execution and, importantly, lessen custodian disruption.

Mature software can also prevent IT professionals from needing to testify—by automatically enforcing the use of a known and defensible process and workflow, creating audit trails and automating metadata preservation.

Key Features of Defensible Legal Hold Software

Legal teams typically look to IT to vet technology solutions. Here are core functions to look for:

- 1 **Legal hold management.** Send and track notifications, set automated reminders and meet legal hold requirements.
- 2 **IT system integration.** Integrate with IT systems to connect with internal email and HR systems to select custodians from different departments or locations.
- 3 **Employee questionnaires.** Notify and survey key employees to gather important information and identify relevant data sources and documents.
- 4 **Direct collection.** Collect from custodians located across the globe or directly from enterprise mail, drives or storage networks.
- 5 **Promote or preserve.** Promote relevant documents for review and production or archive them in a low-cost preservation repository until needed.

7

Tips for Better Collaboration between Legal and IT

Here are 10 ways legal and IT professionals can work together to better manage legal holds.

- 1 Start by meeting to discuss the nature of the litigation or investigation in nonlegal terms. Make sure everyone on the team understands what is relevant and what data needs to be preserved to meet preservation obligations.
- 2 Develop a clear, straightforward, written plan outlining issues, key custodians (witnesses), data stewards and the location of all relevant data including ESI.
- 3 Determine where relevant data may be located. Consider nontraditional IT sources like cell phones, social media, instant messaging and cloud repositories.
- 4 Create a plain-language written hold notice to be sent to key custodians and data stewards. Make sure the entire team understands the hold messages.
- 5 Develop a collection strategy and timetable to collect data managed by IT, individual custodians and other data stewards.
- 6 Make sure that routine (or automated) deletion processes are stopped with respect to relevant data for the legal hold.
- 7 Consider using specialized, commercial software to manage the legal hold process as a substitute for email, spreadsheets or Word documents. An ideal system will help manage collection as well as notification.
- 8 Set a regular monitoring and update schedule so legal can make sure data is being preserved (including new data) and IT will know that the hold is continuing.
- 9 Communicate with outside counsel to make sure data requirements have not changed as the case or investigation develops.
- 10 Prepare a hold release process (when litigation has ended) with clear instructions to both individual custodians and data stewards on the interplay between released data and other data preservation obligations (e.g., HIPAA, SEC or Internal Revenue requirements).

To succeed, legal and IT professionals have to communicate and work together from initiation of the hold until it is released after trial or settlement.

About Catalyst

Catalyst helps corporations and their counsel achieve better outcomes in large-scale discovery and regulatory compliance. We deliver expertise and integrated end-to-end technology—our award-winning Insight E-Discovery Platform, legal hold and business analytics—to help clients lower spend, become more efficient and take control of matters.

Contact Catalyst Today *for Your Discovery Needs* catalystsecure.com | 877.557.4273

