

To Have and To Hold:

Understanding Litigation Holds

Tara M. Bright
Tbright@poynerspruill.com

Poyner Spruill^{LLP}

These materials have been prepared by Poyner Spruill LLP for informational purposes only and are not legal advice. This information is not intended to create, and receipt of it does not constitute, a lawyer-client relationship. © Poyner Spruill LLP





What best describes your involvement with litigation holds?

- a) I regularly create and distribute litigation holds
- b) I occasionally create and distribute litigation holds
- c) I have received a litigation hold
- d) I have had no involvement with litigation holds



Back to Basics

1. What is a litigation hold?
 - a. An instruction or direction requiring employees of a company to preserve, and refrain from destroying or modifying, specific records and information
 - b. Records are written, drawn, printed, recorded, or electronic information created, received, or transmitted in the ordinary course of business
 - i. Physical documents (agreements, drafts, letters, handwritten reports, hard copy documents)
 - ii. Electronic files (internal database, cloud-based applications, emails with attachments, instant messages, social media postings)
 1. Includes associated data (metadata from workplace collaboration platforms)
 - iii. Audio and video records (voicemail, voice memos, photographs, surveillance footage)



Back to Basics

2. When should a litigation hold be triggered?
 - a. Immediately upon learning of the company's duty to preserve evidence: when you reasonably anticipate litigation
 - b. When a lawsuit or investigation is pending or reasonably anticipated that one would be brought
 - i. Receipt of notice of lawsuit
 1. Complaint
 2. Demand/Threaten to Sue Letter
 3. Cease and Desist Letter
 - ii. Receipt of notice of pending litigation
 1. Non-Party Subpoena for Documents/Testimony
 - iii. Receipt of notice of investigation from a U.S. Regulator
 - iv. When documenting an incident or accident under internal procedures
 - v. When notifying liability insurer or risk management
 - vi. When considering initiating legal action affirmatively

Back to Basics



3. Who should receive a litigation hold?

- a. Any employee the Legal Department determines may have relevant records
 - i. Review documents or papers associated with the lawsuit or investigation
 - ii. Identify other relevant parties via interviews with company personnel
 - iii. Analyze time sheets
 - iv. Review and retain surveillance footage



Back to Basics

4. Why are litigation holds so important?
 - a. If properly generated and followed, they ensure the preservation of information/documents relevant to an existing or expected:
 - i. Lawsuit/Government Investigation
 1. Comply with court-ordered production obligations
 2. Defend against accusations
 3. Initiate counterclaims
 - ii. Internal Investigation
 - iii. *Zubulake vs. UBS Warburg LLC*

Back to Basics



- b. If not properly generated and followed, carry dire consequences:
 - i. Monetary penalties
 - 1. Legal fees
 - 2. Regulatory violations
 - ii. Court-Ordered Sanctions
 - 1. Preclusion of Evidence
 - 2. Adverse Jury Instructions
 - 3. Dismissal
 - 4. Strike Defenses
 - 5. Default Judgment



The Details

1. What should the litigation hold notice cover?
 - b. It should inform employees of their duty to identify, locate, and preserve information that may be relevant to the specific litigation or investigation.
 - a. Must include:
 - i. Clear description of relevant information
 - ii. The relevant date range
 - iii. Non-exhaustive list of various types of documents that must be preserved
 - iv. The name of a designated contact person
 - v. Procedures on how to handle relevant records when identified
 - vi. Explicit instructions not to destroy or modify records
 - vii. Key deadlines
 - viii. Explanation that the duty to preserve is continuing and does not end until further notice

The Details



What kind of language should be included:

Explicit Instructions and Scope of Relevant Documents:

The company is taking steps to identify all paper documents, physical items, and electronic documents and data that may be relevant to the [Litigation/Investigation/Audit]. As part of this process, you must preserve and safeguard, and must not alter, delete, destroy, or discard, any paper documents, physical items, or electronic documents and data you have relating to the [Litigation/Investigation/Audit] for the period [RELEVANT TIME PERIOD], including but not limited to: RELEVANT DOCUMENTS & DOCUMENT TYPES

The Details



What kind of language should be included:

Types of Documents:

Relevant paper documents include correspondence, handwritten notes, telephone logs, calendars, and other business records. If you are unsure about whether certain documents and data are relevant, you should preserve them.

You must take affirmative steps to preserve, and suspend any deletion, overwriting, modification, or other destruction of all relevant electronic documents and data under your control. Electronic data includes correspondence, telephone logs, and other business records, such as emails including [Outlook PST/Lotus Notes NSF/[OTHER EMAIL FILE]] files, voicemails, recordings of conference calls or videoconferences, text messages, instant messages (IMs), ephemeral messaging apps, calendars, word processing files, [OTHER FILE TYPES,] spreadsheets, PDFs, JPEGs, PowerPoint presentations, Access[, / and] Oracle [and other] databases [, including [DATABASES]], cloud-based storage, wearable technology, Internet of Things (IoT) devices, workplace collaboration tools, temporary internet files, cookies, .ZIP files, and all other forms of electronic information, wherever it resides, including the Internet. You must preserve this information in its current form, without moving any electronic information or changing any related metadata (for example, a document's creation or last access date).

The Details



What kind of language should be included:

Explanation that duty is continuing until further notice:

This Notice and the directions it contains [supersedes/supplements] any other litigation hold policies, memoranda, or instructions. You must continue to apply the directions contained in this Notice until you receive written notice from [the Law Department/[NAME OF DEPARTMENT]] that it is no longer in effect

The Details



What kind of language should be included:

Contact for questions:

[You received this Notice because you may possess information relevant to the [Litigation/Investigation/Audit]. However, you may not otherwise be involved with the [Litigation/Investigation/Audit].] If you have any questions about this Notice or the scope of your responsibility to preserve paper documents, physical items, and electronic documents and data, please contact [me/[NAME]] [in [the Law Department/[NAME OF DEPARTMENT]]] by phone at [PHONE NUMBER] or by email at [EMAIL ADDRESS]



Best Practices To Implement to Avoid Pitfalls

1. Assemble a team to oversee the hold
 - a. Team Responsibilities:
 - i. Determine what potentially relevant information is available
 - ii. Determine who maintains or has access to the information
 - iii. Determine the form of the information
 - iv. Determine how to cost-efficiently preserve the information.
 - b. Team Members:
 - i. Key employees from the departments affected by the litigation or investigation
 - ii. Employees from the IT and records departments
 - iii. In-House counsel
 - iv. Outside counsel

Best Practices To Implement to Avoid Pitfalls



2. Develop a plan to implement the hold
 - a. Identify key players and custodians of relevant records (witnesses, support staff, former employees)
 - b. Identify relevant time period
 - c. Identify the types of records and materials, including ESI and paper documents, that must be preserved
 - d. Outline the data storage architecture and where relevant records live (network servers, employee offices and email folders, employee handheld devices)
 - e. Identify whether third parties have relevant information and whether or not to notify external individuals or entities (parent company, contractors, cloud providers, off-site storage facilities, former employees)



Best Practices To Implement to Avoid Pitfalls

3. Issue and properly distribute the hold
 - a. Identify and store ESI and paper files of flight-risk employees prior to distributing
 - b. Issue notice in writing to all individuals who may have relevant material
 - i. Current employees
 - ii. Employees who plan to depart (temporary staff, interns)
 - iii. Employees who are on leave
 - iv. IT personnel (internal and outsourced)
 - v. Third parties under company's control (consultants, agents, affiliates)

Best Practices To Implement to Avoid Pitfalls



4. Ensure compliance with the hold
 - a. Require recipients to acknowledge receipt via written confirmation
 - b. Suspend automated archival and destruction of electronic records
 - c. Ensure document retention policy identifies prioritization of hold
 - d. Maintain contact information from any departing employees



Best Practices To Implement to Avoid Pitfalls

5. Modify the hold as necessary
 - a. When new issues arise
 - b. When new locations are identified
 - c. When additional employees are identified

Best Practices To Implement to Avoid Pitfalls



6. Distribute reminder notices about the hold
 - a. Set automatic reminders to send all of the original recipients an updated litigation hold notice
 - i. Review the scope and language
 - ii. Add new employees to recipients list
 - iii. Ensure key language;
 - i. The litigation hold regarding x remains in effect
 - ii. You must continue to adhere to the hold and safeguard all related documents and data until you receive written notice indicating otherwise
 - iii. Failure to retain records, whether intentional or unintentional, will result in a violation of company policy and may result in severe penalties/termination
 - iv. If you know of individuals with relevant materials, contact



Best Practices To Implement to Avoid Pitfalls

7. Lift the hold when it is no longer required
 - a. When?
 - i. Upon termination of litigation
 - ii. Upon notice from outside counsel that specific records do not need to be preserved or produced
 - b. How?
 - i. Provide formal notice of a return to the normal document retention policy to all recipients and IT personnel
 - ii. Lift all restrictions on altering, deleting, destroying the documents/data, but ensure the lift only applies to specific litigation (“You must continue to apply the directions contained in other [litigation/legal] hold notices you may be subject to, which remain in effect until you receive written notice that each is no longer in effect”)



Searching for
answers to
your questions?

p.s.

tbright@poyners.com