Discovery insights

Five questions on legal holds
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A legal hold sounds like something lawyers would handle for the most part. However, when an internal edict comes down to preserve information because litigation looks likely, counsel is likely to have some companions in the process. Employees throughout the organization, and even external contractors, could be designated as custodians, charged to keep data and physical evidence intact. A custodian could be a bank loan officer, an assembly line supervisor, or a sales office manager. Careful attention to detail is required and not following instructions fully and on a timely basis could lead a custodian to inadvertently destroy or lose information pertinent to a legal hold which could prove costly. Consideration of the following legal hold-related questions involving people, technology, and processes can help organizations be prepared should a trip to the courthouse appear imminent.

What are the implications of custodial non-compliance, and what are steps organizations may take to elevate employee compliance with the legal hold process? Serious consequences for non-compliance exist when a legal hold is in effect. One is potentially substantial financial penalties for custodial lapses. For example, other cases have likewise produced fines in the millions of dollars for custodial lapses, failure to produce held data, and deliberately withholding case evidence.

Reputational damage is another concern. Failure to preserve litigation-relevant information could call a company’s trustworthiness into question, potentially damaging relationships with vendor/ partners, customers, regulators, and even employees.

Organizations that lack a clear process for preserving data can face critical decisions under the pressure of pending litigation. What data should be subject to legal hold? Which people should be custodians? In extreme cases, the inability to answer these and other related questions can necessitate a legal hold on all employees, a manual, time-consuming process that can lead to large scale over-preservation of data.

An important step to address these and other issues is increased awareness of what legal holds entail. Potential ways to do this include online training for employees and contractors, including testing and annual attestations that they understand the process and are ready to perform data preservation duties. Clearly written enterprise-wide legal hold policies and well-defined processes for data retention can help guide custodial actions in the event of a legal hold notice. They can also assist in reducing the risk of over-preservation of data that is not relevant.

What are some capabilities and limitations of today’s cloud-based platforms? Cloud platforms are more and more integral to data management in many organizations, and a legal hold may well involve cloud-stored data. The search and indexing methodologies of a cloud platform are important factors to consider in preparation to track and report on legal hold data.

Broadly speaking, cloud-based platforms typically do not provide the end-to-end management and tracking capabilities of a dedicated legal hold solution. Their limited functionality and features could become more than an operational issue should legal hold processes need to be defended in the courtroom. Regional data protection requirements, such as those in the European Union (EU), can further complicate legal hold management.

A dedicated legal hold solution can provide three significant advantages over functionality typically available in cloud platforms: a solid reporting module that allows for efficient customization; a robust audit trail mechanism that defensibly tracks each step of a legal hold process; and dedicated connectors to email, text message, and other data archives that help enable automated legal hold management.

Which leading practices should be considered in designing an effective legal hold workflow? A discrete step that can provide significant benefit is to establish a custodian status-change mechanism. If a custodian leaves the organization, the legal department needs to be notified of the departure. The person assuming the vacated position will become the custodian and subject to the legal hold. A module in an integrated legal hold solution can track changes in the status of custodians in existing roles and captures the assumption of duties by new custodians.

An end-to-end legal hold solution can also help reduce manual processes. As noted above, the solution can provide linkage to backend data archives, enabling automated preservation of emails and other custodian data. An integrated solution can also help tame cascading holds in which individuals can be subject to multiple legal holds, some legal holds may overlap, and others that may lapse.

What are potential cross-border challenges corporations could face with legal holds? The primary challenge includes differences in the time-period and scope of pretrial legal hold preservation. It is much wider and demanding in the US than in other countries, especially those in Europe. For example, EU states require that personal data be deleted after the purpose of collection has been accomplished. Within the US, a party should take reasonable and good faith actions to identify, locate, and preserve information that is likely to be relevant to reasonably anticipated, threatened, or pending litigation.

As a result, organizations often need different approaches to global data preservation due to the absence of standardized global legal hold requirements and inconsistent local privacy laws and retention policies and procedures. While the concepts of reasonableness and proportionality define the scope of an organization’s preservation policy in the United States, these concepts may not be applicable in a non-US jurisdiction and could cause a violation of privacy laws.

For example, under General Data Protection Regulation (GDPR) recently implemented by the EU states, the extraction and processing of “personal data,” including emails inherently conflict with standard US discovery and litigation practices, whereas US court system expects litigants will retain information that may be relevant to a reasonably anticipated litigation. Additionally, as part of legal hold, if companies were to collect emails from EU residents (which include personal data), then storing and providing this data to an opponent or a third-party in litigation could put an organization under violation of GDPR.

What are recent trends in managing the end-to-end legal hold process effectively? New tools and technologies are available in the marketplace to manage the end-to-end legal hold process and it is clear the marketplace is embracing digital tools to take control of legal hold management and preservation. Recent advancements have led to development of the connectors noted earlier that link front-end legal hold tools with back-end email archives and other data sources.

As more litigants and organizations understand technology and preservation leading practices, they are likely to challenge processes that fail to meet minimum legal hold requirements. In response, many organizations are conducting self-evaluations or engaging outside specialists to review their existing processes and identify potential gaps compared to their peers. Organizations are also investing in employee training in how legal holds function and how to maintain compliance.

Our take
As legal actions carrying fines and penalties for inefficient legal hold processes increase, so does the need for organizations to implement a defensible legal hold process and support it with the necessary tools and technologies. Companies and their legal teams can be effectively prepared to meet this growing need by conducting a program assessment to help them understand the current state, establish a desired future state, and identify and measure gaps. Also, identifying opportunities for improvement of the legal hold process is another important consideration. A risk-based approach to remediation can yield beneficial results in a relatively short timeframe.

Finally, considering a solution that automates the legal hold process from end to end can help reduce manual dependencies, provide robust audit trails, and enable thorough tracking and reporting mechanisms. An important part of that process is developing a “target operating model,” which can help map the journey to end-to-end legal hold management.