

A photograph of several keys of various shapes and sizes, including a large key with a circular ring and a smaller key with a notched end, resting on a dark, cracked wooden surface. The text is overlaid on the center of the image.

Legal Hold Considerations & Best Practices

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Legal Hold Defined

Legal hold, commonly referred to as **litigation hold**, is a written directive advising custodians of certain company documents and electronically-stored information (electronic data) to preserve potentially relevant evidence for current and/or future litigation. These formal, written requests are designed to trigger the obligation to preserve relevant evidence, and to suspend routine document retention/destruction policies and implement a legal hold on all evidence which may be relevant to current and future litigation.



A hold may also be applied to conduct an internal investigation, fulfill the requirements of a freedom of information request, or to meet the needs of a regulatory inquiry.

Be Prepared for The Legal Hold Request

Once a legal hold notice has been formally received, the following narrative outlines some basic considerations for dealing with legal hold scenarios from an electronic data perspective:

- ☑ Once a litigation/legal hold notice is received from either the complainant's attorney or your firm's attorney, speed is of the essence. Place a high priority on responding to electronic data preservation requests, and in communicating the suspension of routine document retention/destruction practices to all relevant staff. It is important to note that it is not a recommended practice to send a blanket, all-employees notice for each legal hold notice; only communicate the notice to those employees that require it.
- ☑ Be sure you understand what is in scope of the legal hold notice. The scope of a legal hold will be driven by the documents and electronic data which are relevant to the facts and circumstances likely to be at issue in current or future litigation. The type of evidence which will be deemed relevant will, of course, depend on the specific facts. Fortunately, the courts have recognized the duty to preserve potential evidence is not unlimited and does not require you to "preserve every shred of paper, every e-mail or electronic document, and every backup tape". However, determining what information may be relevant is not always easy and you must consult with your attorney to determine what sort of information is likely to be relevant to the current and/or future litigation. You should refrain from accepting any generic request that requires your organization to preserve "relevant" evidence without being provided specific, practical guidance on what that means in the context of the claim.
- ☑ When discussing with your attorney what is in scope for the legal hold, ensure your attorney understands what kind of electronic data you store within or outside of your company's technology environment. Talk about what it is, where and how it is stored, who has access, and the original and backed up electronic data retention policies and practices. Consider such data elements as email, calendar entries, contacts and task

lists. However, you should also consider cell phones and smartphones, text messages, voice-mail messages, backup tapes or repositories, hard drives, thumb drives or external drives, office laptops, social networking sites, home computers that access the office network, etc. Again, get detailed direction on all the data sources that need to be preserved so you can fulfill the obligation to best of your ability.

**Question:**

Is a legal hold request limited to just the files on my computer?

Answer:

No. The scope can be very broad and extend well beyond you and your computer. Consider the following:

- *Local files on a workstation (desktop PC or laptop)*
- *Files on networked drives*
- *Communication and attachments in email*
- *Files on home a computer*
- *Resources in a PDA, tablet, or mobile phone*
- *Non-text files such as videos, photos, voice mail, IM logs, social media conversations, recorded web conferences/hangouts, etc.*
- *Analog documents such as log books, work books, note pads, post-it notes, letters, etc.*

Legal Hold and Associated Data Retention Best Practices





There are many measures that can be taken to ensure that when a legal hold request is submitted, you have the means and the actual data to provide your attorney or the assigned representative of your firm. The following discusses the various options you may have to retain data for an extended period for both legal hold and other business purposes.

It is important to note that each business and their respective decision makers have differing opinions on what electronic data (e.g. emails and other relevant documents) needs to be retained, and for how long. While publicly traded companies may have more regulatory guidelines to consider, every company (public or private) should look beyond the minimum requirements and determine what its own business needs are.



Establishing an internal committee comprised of both business and IT stakeholders is a great idea, and will ensure that your legal hold and data retention strategies are sound and manageable

The graphic below defines these relevant data management terms to better navigate the material in the following sections:

|  Retention |  Archiving |  Legal Hold |  eDiscovery |
|--|--|--|--|
| <p>Data Retention, also referred to at times as Records Retention, is the continued storage of an organization’s data for regulatory/compliance and other business needs.</p> | <p>Data Archiving is the process of moving data that is no longer actively used to a separate storage device for long-term retention for future reference or regulatory compliance.</p> | <p>Legal hold is a process used to preserve all forms of relevant information due to current or anticipated litigation, audit, government investigation or other matter to preserve evidence.</p> | <p>eDiscovery refers to any process in which electronic data is sought, located, secured, and searched with the intent of using it as evidence in a civil or criminal legal case.</p> |

Email

While it is not the only component of electronic evidence that is part of a typical legal hold request, email is typically the most common and, arguably, the most important piece of evidence at times; depending on the nature of the potential litigation in question. As such, there is a fair amount of information to share about the considerations and best practices surrounding the handling and retention of email from a legal hold perspective.

- If you do not currently have any policies or processes in place to retain, archive or hold email for discovery or legal hold, now is the time – before a formal request is made – to put a comprehensive plan in place.
- Email can be retained and leveraged for legal hold purposes in many ways. You must understand and analyze your email environment (e.g. number of active vs. inactive users, amount and age of data, etc.) to determine which one(s) are appropriate for your organization. The following assumes that the email system in place is MS Exchange 2010 and above, and references the use of a separate hosted spam filter solution:
 - In-House MS Exchange:**
 - Email Retention:** Email retention is possible and can be configured based upon the actual retention needs determined by the business. The main consideration beyond the actual retention requirements is the storage needs, costs and administration considerations.
 - Email Archiving:** Archive and retention policies are possible, but require an Enterprise Client Access License (CAL), which
 - Email Archiving:** Archive and retention policies are possible but require an Enterprise Client Access License (CAL), which may be an additional cost depending on what kind of licensing is in place. It also requires the use of additional and sufficient local storage as the email environment is being hosted in-house.

- **Legal Hold:** Mailboxes can be put in a legal hold state; however, this feature does require an Enterprise Client Access License (CAL), which may be an additional cost depending on what kind of licensing is in place.
- **eDiscovery:** Multiple-mailbox searches are possible with proper setup and configuration. This feature will only search production and archive mailboxes and will not include PST files.
- **Office 365/Exchange Online:**
 - **Email Retention:** Email retention is possible and can be configured based upon the actual retention needs determined by the business. The main consideration beyond the actual retention requirements is space limitation of the Office 365 plan subscription being used (i.e. 50 GB limit in the Business Essentials plan).
 - **Email Archiving:** Archiving is available with all Office 365 plans that include Exchange Online. The Business Essentials plan includes 50 GB space total for production and archive mailboxes, and the E3 plan includes unlimited archiving.
 - **Legal Hold:** Mailboxes can be put in a legal hold state; however, depending on the subscription plan, storage may be limited. The Business Essentials plan includes 50 GB space total for production and archive mailboxes. E3 plan includes unlimited archiving.
 - **eDiscovery:** Criteria-based searches can be run across multiple mailboxes. The discovery search results can be previewed, copied, exported and placed on hold if necessary.
- **Hosted Spam Filter:**
 - Many hosted solutions, such as Mimecast, can be used as an external supplement to on-premise or hosted Exchange. You will need to check the capability of your specific solution. The below offers options based upon Mimecast's current offering.
 - **Email Retention:** Within Mimecast, email retention for all email accounts is possible and is unlimited from the time the monthly subscription is implemented, assuming that the Email Archiving feature has been purchased.
 - **Email Archiving:** Mimecast offers full archiving (at an additional subscription cost) of both inbound and outbound email from the time it is implemented with unlimited retention. Existing email can be ingested into the archive after archiving is activated at an additional cost per account per month.
 - **Legal Hold:** If the archiving subscription is in place, Mimecast allows email archives to be put on legal hold with no limitation.
 - **eDiscovery:** Within Mimecast, criteria-based searches can be run across all archived content. Results can be previewed, copied, exported and placed on hold if necessary

**Question:**

Is your company's data retention policy enough to satisfy the requirements for a legal hold notice?

Answer:

No. You should not rely on your document retention policy only and assume that it will cover all your legal hold notice responsibilities. Even if your retention policy states that all data will be retained forever, it is still critical to the legal hold notice that you inform all relevant parties that they cannot destroy any data, and that they have a legal obligation to preserve it.

General Data

Beyond email data, there are many other types of data that can be included in a legal hold notice. The same basic data management methods discussed above may still apply when considering a legal hold strategy – retention, archiving and e-Discovery – however the options are numerous and are largely dependent on the company's specific business needs; except for legal hold, which explicitly requires the preservation of all current and future data as defined in the notice.

- ☑ Your company's data retention policy is not an all-encompassing answer to any legal hold notices that surface. The relevant employees that are deemed in-scope for the legal hold notice must still be directly informed to preserve any current or future data to ensure that any evidence is adequately retained and available for litigation purposes.
- ☑ The assumption that any in-scope data preservation needs are covered by the company's current data retention, data archiving or data backup mechanisms is a risky one and should be mitigated by a detailed review of those practices, along with what data is or is not available for legal hold purposes once the notice has been delivered and needs to be acted upon.



No one data handling strategy will cover all legal hold needs; the collective approach to data management is an opportunity to best cover as many business and legal hold needs on an ongoing basis

☑ Beyond other legitimate business needs, the following data management and protection approaches can certainly help with any potential legal hold notices that materialize in the future:

- **Data Retention:** This generally covers all other business data, both active and inactive, that does not qualify as email data that was discussed above. The business must inventory and classify all other business data to determine what is required to be retained and for how long. The data retention policy and program for your company may consider legal hold concerns, however it should not be implemented solely for that purpose. Your company's data retention strategy should take all business-related considerations (i.e. your industry's regulatory requirements) into account when developing the appropriate standards.

Whether using local, on-premise (i.e. a local file server and/or a Storage Attached Network, or SAN, device) or cloud-based services (i.e. Microsoft's OneDrive, Amazon's Cloud Drive, Dropbox, Box, Google Drive, etc.) for storage, you should consider the cost and accessibility of your data in case you do need to use it for legal hold or general business purposes. For example, many companies are sold on the idea of long-term, very low-cost storage of files in the cloud for data they may rarely need; however, upon downloading that data, they may realize some potentially exorbitant fees to do so.

- **Data Archiving:** As you now know, data archiving is the preservation of a collection of data that is not being actively used, or that is unlikely to change going forward. Some considerations for data archiving include, but are not limited to, the following:
 - What kind of data do you have? Is the data active or rarely used?
 - How will you access that data when you need it? Does it need to be quickly and easily retrieved when needed?
 - How will you determine when data should be archived, how and how often will you move the data from its normal production location to its archived location?
 - What technology(ies) will be used to house/store that data?
- **Legal Hold:** As defined above, legal hold is a process used to preserve all forms of relevant information due to current or anticipated litigation, audit, government investigation or other matter to preserve evidence. If historical data does not exist for whatever reason (i.e. sound data retention, archiving and backup solutions were not in place), the preservation of current and future data is imperative when faced with a legal hold notice.
- **eDiscovery:** Virtually every form of electronic data is in play in eDiscovery. While identifying, and preserving the company's data is one challenge, it is quite another large hurdle to find it and collect it for someone to analyze. Different data sources have different levels of accessibility and present different collection challenges. The legal, business and IT teams will need to work closely together to develop the unique data collection requirements for each individual legal hold notice.

The following are collection approaches that may be used in any one legal hold notice:

- Employee self-collection, whereby the employee finds and submits the requested data
 - IT collection, whereby the IT team (who historically may know the most about the location and overall taxonomy of the data) goes out and uses a variety of manual and tool-based collection activities to find and submit the requested data
 - 3rd-party collection, whereby a contracted, 3rd-party subject matter expert is called in the find and submit the requested data
 - Automated collection, whereby a centralized, enterprise-wide data collection tool has been implemented to automatically find the requested data that is ultimately submitted by a member of the IT or business team
- **Data Backups:** Backups are typically used to protect a company’s data due to accidental loss of user data, database corruption, hardware failures, etc. The term “lazy man’s approach to data retention” is often used when referring to companies who employ backups as their primary data retention approach.

Backups should not be considered the only viable, primary legal hold options in your legal hold strategy. Backup solutions, whether they are local or hosted/cloud solutions, offer no formal data retention, archiving, legal hold or eDiscovery solutions. Many companies keep backup tapes or backup datasets for a pre-determined period, and either overwrite or delete the data that falls outside of the backup retention. As such, data that is retained via backup media may only be a point-in-time representation of the company’s data and may not be the most effective means to retain data for legal hold purposes.

Employing a sound backup and backup retention approach can be very helpful in filling in some data gaps that may crop up during a legal hold eDiscovery process. Consider developing a strategy that first and foremost meets your business needs and provides the necessary data protection of the more likely scenarios outlined above, such as accidental loss of user data. Consider adding many daily, weekly, monthly and yearly retention criteria to your backup strategy to ensure protection of your active data, and to round out your total legal hold strategy.



Plan ahead! Work with the relevant legal, business and IT resources to develop a comprehensive legal hold strategy to ensure you are ready if/when the time comes to address a legal hold notice.

About Iron Key Group

Iron Key Group was established in 2010 as an organization that helps IT and business executives to maximize the return for every IT dollar invested within their respective organizations. We find that many extremely bright and capable IT managers and executives excel at the more technical aspect of their roles, but struggle with the critical business skills that are necessary to make their teams truly successful.

Managing change, establishing clear and attainable goals, organizational leadership, talent development, financial and budget management, establishing strong relationships with other elements of the business, providing better service to their customers, and personal and professional growth for their team members are some of the areas that our current and prospective customers are asking for expert assistance with.

Contact us today for a complimentary initial consultation: (631) 901-6955.