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RECORD RETENTION POLICY: A START TO BEING LITIGATION-READY

Almost 99% of today's information created by businesses is generated and stored electronically. The ability to easily and conveniently store large amounts of data has created a hidden liability that did not exist in the age of when companies maintained its information primarily in paper format. The effect of this hidden liability is twofold. First, companies create more information then they know what to do with. Second, companies sometimes delete or destroy data and information that they actually do need.

For the unwary, these hidden liabilities may become exposed when your company is faced with a lawsuit. In today's litigation, the age of electronic data has generated a paradigm shift away from traditional paper documents to digital information. This shift has changed the discovery process in litigation by changing what attorneys are looking for; how they are looking; and where they are looking for relevant information. Companies can expect in today's litigation that the way it stores and preserves electronic information will be a central topic during the discovery process that will involve not only your record custodians, but also your information technology department. How well a company manages and preserves its electronic information may be an outcome determinative factor for it in litigation.

Today, companies that find themselves involved in a lawsuit oftentimes are faced with attacks through the discovery process as to how they typically store and delete electronic information. The purpose of this inquiry is to set the expectation as to what electronic information, such as e-mails, the company should or should not reasonably have at its disposal for discovery purposes. Companies that do not have a well-drafted record retention plan that addresses electronic information and which incorporates a comprehensive litigation hold policy may find themselves at a significant disadvantage in trying to defend what might otherwise be a winning case. That is why it is more important than ever for all companies, both large and small, to effectively manage their electronic information. This means that **companies must be litigation-ready** by taking affirmative actions that allow the company to effectively manage and retain electronic information. It is simply too late to start thinking about the manner and method of retention and destruction of electronic data after you have been served with a lawsuit.

The best tools to avoid these hidden liabilities is a **record retention policy** that addresses electronic information as well as a **litigation hold policy** that is designed to preserve

electronic data once litigation is reasonably anticipated. A record retention policy should be designed so that your company does not destroy information that it is obligated to maintain and at the same time the policy should be designed to destroy or delete information that the company no longer needs and/or is no longer mandated to maintain. Most companies have some sort of document retention policy. These retention policies were originally implemented to manage the volume and space occupied by paper documents. Companies have been less diligent, however, in applying their retention policies to the electronic information that they store on their servers and individual computer hard drives. This lack of diligence in managing electronic data has created a treasure trove for plaintiffs' lawyers looking for the proverbial "smoking gun," such as that e-mail that explains exactly what motivated the company's decision to terminate that troublesome employee.

A litigation hold policy has long been an important concept in litigation. In simple terms, it means that once you are sued, you have to stop destroying documents. It is an easy concept to understand when applied to paper documents, but it becomes a much more complicated task when dealing with electronic information. Electronic evidence can easily disappear, be altered or destroyed if not properly preserved. For example, some companies' computer systems provide for automatic deletion of e-mails and documents, so stopping that process takes an affirmative effort on behalf of management. When implementing a legal hold, a company needs to approach the hold requirement with a coordinated team effort. Business units, IT, records management and custodial personnel, and either in-house or outside counsel need to be involved and work together in the process of implementing the hold.

The failure to have a properly drafted record retention policy as well as a litigation hold policy may result in serious and adverse consequences for your company and may compromise your company's ability to defend itself in a lawsuit. For example, failure to have these policies in place can result in court-imposed sanctions, adverse jury instructions and significant monetary awards.

For example, a federal district court in Illinois recently agreed to permit the jury to be instructed that it can assume computer data destroyed by an employer would be unfavorable to its defense in an employee's lawsuit under the Americans with Disabilities Act when the employer permitted a software program to automatically overwrite computer data relevant to the claims in the case. It made no difference that the employer did not act intentionally in deleting the information, rather, the district court found that the employer's failure to prevent the automatic deletion made it "at fault" relative to its duty to preserve evidence that was discoverable pursuant to the Federal Rules of Civil Procedure. Consequently, thinking ahead and addressing the hidden liabilities created by your electronic information can save your company time and money, and, more importantly, potentially prevent your company from having to incur an unfavorable judgment as the result of electronic information being inadvertently deleted.