



Evidence Preservation: A Primer for Investigations

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1. WHEN DOES A COMPANY HAVE A DUTY TO PRESERVE EVIDENCE?

- Typically, when the company has notice that information in its possession may be relevant to an investigation or judicial process. Formal processes are the clearest triggers of a duty to preserve, e.g., a subpoena, a civil investigative demand, a Wells notice, a search warrant, or a civil or criminal complaint.
- Communications or publicly available information indicating that the company should anticipate an investigation or judicial process may constitute notice, e.g., news reports that an enforcement agency is investigating a transaction involving the company.
- An internal complaint may constitute notice. The more plausible the allegation raised in an internal complaint, and the more serious the allegation, the more likely it is that the internal complaint triggers a duty to preserve.

Tip

- Use the test for gauging the applicability of the attorney work product doctrine (e.g., the foreseeability of litigation) as a proxy for the duty to preserve.
- If you would invoke the work product privilege over contemporaneous documents about the matter, then you have a duty to preserve information related to that matter.

2. WHAT EVIDENCE SHOULD A COMPANY PRESERVE?

- A company should preserve all evidence within its “control” that is potentially relevant to the matter, broadly construed.
- Companies typically “control” evidence that they have the legal right to obtain, including those held by their affiliates, agents, and partners abroad.
- Data privacy laws in most jurisdictions may constrain document collection and production from outside the U.S. Consult with a lawyer familiar with the applicable foreign data privacy regulations before proceeding.
- U.S. enforcement agencies consider production of information held abroad, where applicable, to be necessary for cooperation credit.

3. HOW SHOULD A COMPANY PRESERVE EVIDENCE?

- Once a duty to preserve evidence attaches, the legal department should issue a legal hold notice as soon as possible.
- A legal hold should address: (1) custodians included, (2) substantive areas covered, (3) applicable dates, (4) what systems, files, or geographies are included, and, if appropriate, (5) why the hold is necessary.
- IT personnel should always be aware of the legal hold because they often can suspend deletion practices, preserve electronically stored information remotely, and retain old electronic hardware.

Common Preservation Steps

- Draft the legal hold notice, communicate the hold to necessary employees, and update the hold as necessary.
- Suspend normal document deletion procedures.
- Retain old hardware (PCs, laptops, phones) for covered custodians.
- Image key custodians’ devices.
- Investigate and document any loss of covered data or evidence, whenever it occurred.
- Do not rely on pre-existing company policies—even if employees are instructed not to use certain devices or store data in a certain way, not all employees may follow it.
- Work with outside counsel and trusted third-party vendors as needed.

- The hold notice should apply to all types of evidence, including emails, documents, texts, voicemails, and physical evidence.

4. POTENTIAL SOURCES OF EVIDENCE TO PRESERVE AND COLLECT:

- For the company:
 - Email servers, including active email and backups.
 - Network drives, including shared or central drives, and any section specific drives (e.g., human resources, legal, etc.).
 - Cloud-based storage, or other central repositories of information or data (e.g., extranet sites).
 - Paper files, including those centrally stored and those in off-site storage or archives.
- For individual custodians:
 - Company-issued laptops or PCs, and home computers used for business.
 - Company-issued phones or tablets, and personal phones or tablets used for business.
 - Flash or thumb drives, CDs, DVDs, or other portable storage.
 - Internet-based storage, including collaborative sites or cloud-based systems.
 - Paper files, including those maintained at desks, at assistants' desks, in central files, or at home.
 - Calendars and contact information, whether kept electronically or in hard copy.
 - Instant messaging or text services, including any saved conversations.
- Corporate and individual social media accounts, including Twitter, Facebook, and LinkedIn.
- Do individual custodians save emails in locations other than the company's active email, for example, through the use of .pst files or personal folders on their computers?
- Do individual custodians use personal or non-company email accounts for business?
- Are documents encrypted or password protected?
- Do assistants have access to or maintain a custodian's devices, emails, electronic documents, or paper files?

5. ADDITIONAL CONSIDERATIONS.

- Assume that the Government will eventually uncover the allegations raised in an internal complaint in light of the financial and legal incentives (e.g., whistleblower awards and SOX reporting) to report wrongdoing outside internal channels and plan your preservation strategy accordingly.
- U.S. enforcement agencies can often obtain information held abroad through cooperation agreements with foreign enforcement agencies regardless of the Company's cooperation. Cooperation, where possible, is often the best response to a request for information held abroad from the U.S. government.
- Good preservation practices are evidence of robust compliance programs. Accordingly, document any decision to issue, or not issue, a legal hold.
 - Similarly, record and document each step of the preservation process, including any issues that arise with loss or destruction of evidence, and any key decision points on what and how to preserve the evidence.
- Aside from the Company's legal obligations, under ABA model Rule 3.4(a), attorneys have a professional and ethical obligation to preserve data that could reasonably become relevant in a judicial proceeding.

Consult outside counsel as soon as possible when:

- The government is involved or may become involved
- In-house resources are insufficient
- The problem in question is already public
- The problem has known serious implications
- The matter has other sensitivities
- You need a "gut check"
- You don't know what to do

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