

Advisory | eDiscovery & eRetention

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Document Retention for U.S. Litigation Beyond Borders: Considerations for Foreign Companies

Discovery in the United States is uniquely broad, and under the Federal Rules of Evidence and various state laws, parties have a legal obligation to preserve documents and data if they know or should have known that they represent relevant evidence in pending or reasonably anticipated litigation.¹ Companies headquartered outside of the United States also have obligations under these rules.² As a result, companies should be aware of their obligations and consider taking precautionary steps to reduce the risk of sanctions that can be imposed for rule violations.³

Document Retention Policies and Practices

The building block of complying with the broad umbrella of U.S. discovery is having an internal document retention policy that is implemented consistently. Having an appropriate retention policy in place as a routine business matter carries significant importance, given the potential consequences of destroying evidence relevant to a litigation. For example, one consequence can be court sanctions, including monetary penalties and an instruction to the jury that it may infer the destroyed evidence contained information harmful to the case. In a recent case,⁴ inconsistent testimonies and conflicting information

¹ *Gerlich v. U.S. Dep't of Justice*, 711 F.3d 161, 170–71 (D.C. Cir. 2013).

² But courts may determine when the duty to preserve evidence begins as it relates specifically to anticipated litigation in the United States. *Lunkenheimer Co. v. Tyco Flow Control Pac. Party Ltd.*, No. 1:11-CV-824, 2015 WL 631045, at *6 (S.D. Ohio Feb. 12, 2015).

³ “Blood Pressure Drug Manufacturer Faces Sanctions Over Discovery,” Bloomberg Law, May 13, 2024.

⁴ *MedImpact Healthcare Sys., Inc. v. IQVIA Inc.*, No. 19-CV-1865-GPC-DEB, 2022 WL 1694428 (S.D. Cal. May 26, 2022).

about the company's electronically stored information (ESI) retention policies raised concerns about the reliability of its document retention efforts, underscoring the importance of consistent and well-documented policies, as well as the need for timely and accurate litigation holds.⁵

A robust document retention policy helps streamline procedures and reduce litigation costs. Foreign companies, however, may not fully grasp the broad and burdensome nature of the U.S. discovery process. This gap in understanding highlights the need for a robust document retention policy that aligns with U.S. legal requirements.

International companies, including those from civil law countries, often adhere to their home country's document retention standards, which may not meet U.S. legal expectations.

Decentralized information systems in business departments can impede the adoption of a comprehensive, U.S.-compliant document retention policy. Furthermore, establishing a document retention policy only at U.S. subsidiaries is not sufficient. Headquarters should implement consistent rules across all group companies globally, to the extent possible. This uniformity enables foreign companies to address potential U.S. litigation and governmental inquiries.

Responding to a Legal Notice

In addition to implementing routine document retention practices, companies should also consider formalizing an internal process for responding to legal notices.⁶ There are several immediate steps the company's legal division can consider upon receiving an official Legal Notice, including consulting with outside counsel.

- **Litigation Hold:** A litigation hold is an internal written directive sent from counsel to select company employees notifying them that they must preserve specific categories of documents and ESI. The notice details the nature of the documents and ESI that must be retained. It is standard (and expected) practice for a company to promptly issue litigation holds as part of a defensible process to preserve documents and information relevant to a pending or reasonably anticipated legal proceedings or requests. The legal team must identify and notify all pertinent employees and departments, keeping records of these communications. Companies should involve their IT departments to suspend any data retention policies that might delete or recycle relevant ESI.
- **Legal Requirements and Obligations of the Legal Notice:** The company's legal team should assess whether a legal proceeding's request or notice is compulsory or voluntary. This involves verifying the authority of the issuing entity and ensuring the request meets all statutory and regulatory requirements, such as proper signatures, dates, and translations. It is also important to determine whether the company falls under the jurisdiction of the requesting authority and whether the requested documents or information falls within the request's applicable statutory authority. The company should also consider if complying with the request would be unduly burdensome and if grounds exist to object to complying with the request based on burden and proportionality grounds.

⁵ See, e.g., *ELG Utica Alloys, Inc. v. Niagara Mohawk Power Corp.*, No. 616CV1523BKSATB, 2023 WL 2655111, at *14 (N.D.N.Y. Mar. 27, 2023) (finding that sanctions were warranted because plaintiff's destruction of documents constitutes gross negligence and the destroyed evidence was relevant to the defendants' defenses).

⁶ For purposes of this article, a "Legal Notice" refers generally to official legal correspondence such as:

- 1) notices related to legal proceedings or threatened legal proceedings;
- 2) requests for documents, testimony, or information, such as via subpoena; and
- 3) official requests related to public authority investigations or regulatory procedures.

- **Confidentiality Obligations of the Legal Notice:** The company should review the Legal Notice and assess whether compliance would conflict with other obligations imposed on the company, such as contractual mandates or obligations from government agencies. Should a secrecy requirement conflict with disclosure obligations, the company should consider explaining its confidentiality requirements to the issuing entity, seeking a written waiver or acknowledgment to permit compliance, and analyzing the potential liabilities associated with either disclosing or objecting to complying with the request. Based on this analysis, the company should then determine the appropriate strategy regarding disclosure to interested stakeholders.
- **Maintain Privileges:** Maintaining legal privilege is paramount, particularly in U.S. matters, where the privileges safeguard the confidentiality of legal advice and work product protections for company decisions made during investigations and litigation. Among other things, the attorney-client privilege protects client communications intended to facilitate the rendition of legal advice and to protect counsel's advice rendered to a client. To protect these confidences, the company should ensure that counsel oversees investigations, is included in relevant decision-making, and provides timely legal analysis addressing privilege and confidentiality protocols. While U.S. privilege laws generally apply abroad during U.S. government investigations (provided counsel carries out and monitors the inquiries), involving U.S. counsel and legal teams in all stages of the assessment can further secure these protections. Companies will want to avoid internal inquiries that compile and assess company documents and witness statements without the instruction and guidance of counsel.
- **Other Considerations:** If the Legal Notice requests personal information about an individual, companies should ascertain whether compliance with such a request would infringe the privacy rights of any individuals under applicable data privacy laws. Furthermore, if the Legal Notice contains any elements found unreasonable, unlawful, inconsistent with domestic or foreign laws, or violative of the privacy rights of third parties, it is prudent to consider appealing, narrowing, quashing, or otherwise challenging the Legal Notice as permitted by law.

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