

FOCUSING ON THE BIG PICTURE:

The voice on the phone is direct. A confidential report is due in two weeks. The current downturn in the economy is landing squarely on the records and information management (RIM) professional's desk. The organization is downsizing and a plan must be prepared to:

- Recommend significant cost savings
- Protect the organization's legal recordkeeping obligations
- Redistribute records from departing custodians, including records from office, department, or facility closings

RIM professionals must be prepared to provide practical solutions for an orderly redistribution of records within a shrinking organization and take action to protect against legal pitfalls during downsizing.

RIM's Role in Minimizing Risks

It is extremely important for RIM professionals to take proactive measures, whether or not downsizing looms on the horizon. The mis-management of records is a significant legal risk during good times and bad. However, downsizing magnifies the risk with its potential for records to be abandoned, lost, prematurely destroyed, or mis-managed as employees depart, departments consolidate, and offices close.

RIM professionals help minimize this risk by:

- Ensuring compliance with retention schedules
- Mirroring appropriate retention periods with business operations
- Developing and refining policies that ensure records are retained for appropriate (and not overly long) retention periods



RIM'S LEADING ROLE IN PROTECTING ORGANIZATIONS DURING DOWNSIZING

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CHECKLIST FOR PROTECTING LEGAL HOLDS

- When faced with widespread layoffs, send a general notice about compliance to all employees. Reminding the organization that legal holds need to be protected during downsizing will help prevent the inadvertent destruction of records and ESI subject to an existing legal hold.
- Coordinate with IT and legal to make sure all parts of the legal hold business process of the organization remain intact. Update contact lists for the members of the organization's legal hold business process. Anyone new to the legal hold business process should be quickly brought up to speed about the procedures in place and the legal obligations of the organization.
- Coordinate with IT and legal to ensure the ESI of departing employees is not inadvertently deleted without collecting ESI subject to legal holds.
- Consider imaging (the IT term for creating an exact electronic copy) the hard drives of desktops and/or laptops of departing key custodians.
- Compare a list of departing employees against custodian lists for existing legal holds.
- Identify employees subject to existing legal holds for special handling of records and ESI subject to existing legal holds.
- Have HR audit departing employees for compliance with legal holds.
- Modify existing legal holds to reflect that an employee has left the organization. It is unlikely that a former employee will remain a custodian.
- Issue partial legal hold releases to reflect that departing employees are no longer custodians of preserved documents and ESI.
- Record new contact information for departing employees in the event the organization needs to confirm prior compliance with legal hold notices.
- Modify legal holds and issue amended notices to new custodians of inherited files. There is a risk of destruction if an employee inherits documents and ESI subject to a legal hold, but is not aware of the organization's duty to preserve.
- Complete the release of any legal hold prior to implementing a downsizing plan. Legal hold releases frequently lag behind the date of resolution of the underlying trigger event. Attending to backlogged releases can help reduce the number of departing custodians that are subject to existing legal holds.
- Examine legal hold procedures to ensure they conform to the needs of the downsized organization.

- Helping identify specific records in support of appropriate (and not overly broad) scope of legal holds
- Adhering to disposition schedules
- Archiving non-active files
- Ensuring documented destruction of expired records and non-records

During downsizing, RIM professionals can play a leading role in ensuring an organization's risks don't increase by refining the RIM program and protecting legal recordkeeping obligations.

Refining the RIM Program

By working to squeeze more efficiency out of the RIM program, the organization will be better prepared to respond to economic hardship or downsizing. Proactively working to reduce the volume of information stored at an organization can reap obvious cost savings, such as by reducing fees for offsite paper storage, archiving, and server space.

Refining the policy and procedures used to manage records can also help prepare for the orderly transition of records should downsizing be required. Developing innovative ways to increase compliance with existing retention policy and procedures will help shape an organization's culture, predisposing it to maintain optimal record efficiencies through tough times.

There are a number of simple initiatives that will reduce the volume of stored information and their associated costs and risks. For example:

- Ensure non-records are removed from active storage as expeditiously as possible (e.g., drafts, notes, scraps of paper, and other non-business related documents and communications).
- Work to reduce unnecessary duplication of records. To illustrate, sending an e-mail with a 1 MB attachment to 100 people adds 100 MB of electronically stored information (ESI) to the organization. Storing that same 1MB record in a central server or document management program and sharing a link to access it would eliminate the need for extra storage space.
- Utilize document management or enterprise content management systems to implement or expand automated disposition of expired electronic records to help streamline disposition.
- Analyze and update current policies and procedures. Periodically reviewing retention schedules is essential to effective records management, but conduct an analysis now to determine whether the retention schedule can be refined further by weeding out obsolete classifications or reducing the number of classifications by combining record series. This will make the retention schedule easier to follow and can help increase compliance.
- Develop user-friendly RIM guides (think whitepaper

for RIM policy and procedures) to enhance adherence to retention requirements. Classification and disposition checklists, flow charts, intranet links, and other user-friendly compliance tools are all inexpensive ways to help organizations reduce the volume of stored records. Judicial opinions are rampant with criticism of party witnesses who lack basic knowledge of retention schedules and legal hold policies and procedures. Easy-to-create training can increase knowledge. For example, an inexpensive, recorded presentation can be posted on an intranet or e-mailed to members of the organization. A lunch time webinar or conference call can quickly reinforce RIM practices organization-wide.

- While it will not reduce the overall volume of an organization's records, developing legal hold policies that preserve a defensible, yet more targeted, scope of relevant documents and ESI can reduce the volume of records subject to the legal hold and result in significant cost savings. The largest cost in litigation right now is the preservation and production of ESI. More data means higher transactional costs for preservation, collection, review, and production during litigation.

Protecting Legal Recordkeeping Obligations

Extraordinary steps are required during downsizing. There are three key areas that require special attention: 1) implementing legal holds; 2) integrating records from outgoing employees; and 3) maintaining records related to downsizing.

1. Implementing Legal Holds

For a myriad of reasons, some beyond the scope of this article, courts are examining the implementation and effectiveness of legal holds more than ever. A legal hold is an affirmative act by an organization to prevent the destruction of documents, including physical documents, such as paper, as well as ESI relevant to a lawsuit or government investigation. Practitioners and courts may also refer to this concept as a record hold, document hold, data hold, disposition hold, litigation hold, regulatory hold, hold order, audit hold, or preservation order.

A legal hold is necessary whenever an organization has a legal duty to preserve evidence in response to litigation or whenever litigation is reasonably anticipated. While an organization is free to preserve documents in any manner it sees fit whenever a duty to preserve evidence exists, some cases have held that organizations are required to implement a legal hold, including giving written notice to custodians subject to the legal hold.

In *Acorn v. Co. of Nassau* (2009 WL 605859, EDNY March 9, 2009), the court held that "the failure to implement a litigation hold at the outset of litigation amounts to gross

negligence." The court was not persuaded by the defendant's claim that a verbal litigation hold was issued by the organization, citing lack of evidence (like an affidavit or testimony) from anyone that allegedly received the verbal litigation hold. The court held that the failure to implement a litigation hold required a monetary sanction to punish the defendant's conduct and awarded the costs of the motion and attorneys fees.

Downsizing presents the risk that legal hold procedures will be violated and data will be lost or destroyed. As the organization is in flux, it is imperative that organizations focus

SAMPLE DEPARTING EMPLOYEE INSTRUCTIONS

Your cooperation is required. Please follow these instructions to help facilitate the orderly removal of personal records from the organization, reduce the volume of duplicate and non-records from your work area, and maintain accurate recordkeeping in compliance with our established records management policy.

- Remove or destroy personal, non-business documents from your work area.
- Remove or destroy personal electronic files from your computer system. Please be reminded that removal of electronic files used to perform your work is prohibited. Seek permission from your immediate supervisor if you wish to obtain copies of any of the organization's files for your personal use, such as examples of your work.
- If you have received a legal hold notice, be sure any documents or electronic files subject to it are not destroyed. If you are unsure which documents and electronic files are subject to a legal hold, be sure to seek guidance from your immediate supervisor.
- Segregate and preserve documents and electronic files subject to a legal hold.
- Be sure paper and electronic files in your work area or on your computer system are properly labeled.
- Dispose of any non-records not subject to a legal hold, such as drafts, work notes, working copies of other files, reference materials, and articles.
- Dispose of any expired records not subject to a legal hold.
- Dispose of any copies of paper and electronic files.
- Organize and box active paper files and attach an outline of the contents of each box.
- Organize and box inactive paper files that can be archived, and attach an outline of the contents of each box.
- Organize electronic files on your computer system using accepted protocol.

special effort on protecting existing legal holds. The sidebar “Checklist for Protecting Legal Holds” on page 24 provides practical advice in this area.

CHECKLIST FOR HANDLING DEPARTING EMPLOYEES’ RECORDS

- Analyze the documents and data of departing employees.
- Properly classify and retain official records.
- Identify whether the custodian is subject to a legal hold and take care to preserve all documents and data subject to the scope of legal holds, including drafts, notes, etc.
- Dispose of copies and non-records, personal files left behind, drafts, notes, and other documents and data that do not meet the criteria for official records of the organization.
- Dispose of expired records.
- Archive inactive records.
- Forward active records to the business unit manager or directly to the custodian inheriting the business functions of the downsized employee.
- If offices are being closed, the same principles apply, but they may require a wider application depending on where the official records of the office are stored. Is the office or department part of the records management system of the organization, or is it separate requiring additional integration steps?
- If possible, consolidate records from multiple locations into a centralized paper or electronic filing system.
- Create an audit trail of activity according to the business needs of the organization. Does the organization need to identify new custodians of official records? For example, does the organization maintain record metadata that includes custodians? Are records located by a custodian, requiring the organization to keep track of who received the downsized employees’ records?
- When possible, track the reduction in volume. Real reductions in storage can be demonstrated by comparing the volume of documents and data processed from outgoing employees to the volume of official records redistributed within the organization or assimilated back into the RIM program. Report results using easily understood metrics. For example, describe the number of boxes of documents purged or the gigabytes of data removed from the computer storage system.

A common mistake is the failure to advise the IT department about departing employees subject to existing legal holds, which may lead to IT deleting the contents of that employee’s hard drive and reformatting it for use by another employee.

As an example, in *Cache La Poudre Feeds v. Land O’Lakes* (224 FRD 614, D.Co. 2007), a defendant conceded it continued its practice of expunging hard drives of former employees even after the commencing of litigation. The court held this practice was a violation of the duty to preserve evidence and granted monetary sanctions.

In most organizations, legal has the overall responsibility for implementing legal holds. As demonstrated by *Cache La Poudre Feeds*, RIM, IT, and legal must cooperate to ensure existing legal holds are protected. Extra attention is required to guarantee all parts of the organization’s legal hold procedures are intact and followed during downsizing.

2. Integrating Records From Outgoing Employees

RIM plays an important role in the orderly and efficient integration of the downsized records into the remaining organization. In many instances, processing and redistributing individual employee records will be the main job of RIM. In other instances, RIM will be required to integrate larger record sets and electronic storage media from closed offices, discontinued offsite storage facilities, and discontinued data storage relationships. Efficient processing, consolidating when possible, and redistributing the organization’s official records are critical to its business needs.

Official and unofficial records of departing employees should be processed using a systematic approach. Whenever possible, specific procedures should be developed to provide guidance to departing employees and their managers. The sidebars “Sample Departing Employee Instructions” on page 25 and “Checklist for Handling Departing Employees’ Records” on this page are good examples.

Using organization-specific checklists is strongly advised. Items to include in a checklist are:

- Specific instructions for cleaning up existing records and ESI, such as proper labeling, removal of unnecessary duplicates, and deletion of duplicate ESI
- Disposal of non-records
- Removal of personal records and ESI often accumulated by employees
- Preparing non-active records for archiving
- Disposing of expired records and preventing the unlawful removal by departing employees of proprietary, confidential, and other sensitive records and ESI

It is advisable to create written guidance documents to help direct RIM requirements during downsizing. The breadth of written guidance will vary depending on the size and culture of the organization. Simple, straightforward planning documents, as well as easy-to-follow instructions

for all areas of the organization, are the best way to ensure an orderly transition of records, including ESI, during downsizing.

Written guidance will help the organization understand RIM requirements, serve as a plan for handling records, and give specific instructions to departing employees. In addition, supervisors and managers will benefit from specific instructions so they can ensure the records of departing employees in their departments are integrated into the organization pursuant to a standard protocol. Existing RIM guidance documents can be modified to include the specific circumstances presented by organizational downsizing. See the sidebar “Sample Departing Employee Instructions” on page 25 for an example.

The purpose of the RIM program remains unchanged during downsizing. Compliance with policy and procedures, however, is made extremely difficult due to the compressed time, the extraordinary volume of records affected at once, and the lack of resources when RIM needs as much help as possible. Adding uncooperative employees into the mix may make compliance even more difficult. If an organization has the resources, a complete inventory of all departing employees’ records will serve to:

- Correct non-compliant documents and data by classifying and assimilating them into the RIM process
- Discard unofficial documents and data (with the exception of those subject to legal holds)

- Reassign official records of the organization in an orderly manner, allowing new custodians of the records to attend to the business of the organization rather than sorting through piles of inherited records

While a complete records inventory is optimal, it may be difficult for most organizations due to time and budget constraints. It may be necessary to use alternative, creative strategies to achieve the recordkeeping goals of the organization under less than optimal circumstances. Consider the following ideas.

Send a notice to departing employees to ask them to bring their files into records management compliance, and have immediate supervisors audit them. Departing employees may cooperate because of their sense of personal responsibility or desire to be rehired when the economy improves.

Have IT perform remote audits of downsized employees for compliance with electronic recordkeeping protocols. It may be useful for IT to create temporary, transitional file locations, where departing employees or their immediate supervisors can save files until surviving employees can retrieve and integrate them into the organization.

Designate records liaisons to assist with integration at various levels across the organization. Giving them more detailed guidance will allow them to assist employees and supervisors in preparing and integrating the records of departing employees. With training and support from records management, these individuals can each take on a

portion of the project to ensure compliance and integration.

Establish integration teams as a short-term increase of RIM professionals. Team members can be departing employees willing to stay with the organization through the completion of integration. Current employees not subject to downsizing can also be temporarily assigned to the team. In addition, RIM professionals may be hired on a temporary basis. Depending on the scope of the downsizing and the tasks needed for compliance and integration, temporary non-RIM professionals may also be hired to help.

Use records management vendors and consultants to supplement records management during downsizing. It may be advisable to consult a RIM professional from outside the organization to help develop a plan and guidance documents to support records integration during downsizing. Similarly, an outside professional may be used to manage implementation of the downsizing RIM project. The use of outside professionals may be a cost-effective alternative for the organization depending on the budget created, the volume of layoffs and records affected, and the size of the records management department.

3. Maintaining Records Related to Downsizing

In the United States, most employers are governed by federal and state laws that prohibit discrimination based on age, race, or disability during downsizing. The Age Discrimination in Employment Act of 1967 and the Older Workers Benefit Protection Act are two examples.

Other laws – such as The Worker Adjustment and Retraining Notification Act of 1988 – may require special notification to employees who are being downsized.

Any organization considering downsizing must consult with a lawyer to identify applicable employment statutes and specific legal requirements.

However, common to all laws affecting a downsizing is the need to keep accurate records of the organization's deci-

sion-making process. There is a strong likelihood that a downsizing initiative will result in litigation. For this reason, it is important to keep complete records related to the reasons for the downsizing, such as financial records, and the method of selecting employees for downsizing, such as employee evaluations, performance records, workforce analysis, memorandum regarding the future structure of the organization, and the objective application of the selection criteria.

Although an organization is objectively fair in its selection process, the facts and assumptions used by the organization will likely be tested in litigation. Maintaining complete records is the best way for an organization to defend itself on the merits of the claim and avoid accusations of foul play.

For many organizations, current retention schedules should be sufficient to cover downsizing specific records. For records that do not fit neatly into existing classifications, it may be necessary to create downsizing-specific classifications – even if such classifications are temporary.

Depending on the circumstances of the downsizing, an organization may need to implement a legal hold in conjunction with the downsizing. The duty to preserve evidence is triggered whenever an organization reasonably anticipates litigation. If the downsizing is significant, a court may deem litigation was reasonably anticipated. If, for example, e-mail exists among senior management demonstrating the organization's belief that litigation is likely, a legal hold may be necessary. If, on the other hand, only a few employees were released, and they did not make specific threats of litigation, a legal hold may not be necessary.

When to issue a legal hold is still an evolving area of law in the United States. Courts consider whether a legal hold should have been issued on a case-by-case basis, and it is very fact-specific. As a result, a lawyer should be consulted to help the organization determine if the downsizing itself triggers the need to preserve records and if the organization needs to issue a legal hold.

Focusing on the big picture during downsizing will increase the profile of the RIM program as a problem solver and produce quantifiable savings for any organization. Taking proactive measures now to increase records management compliance will benefit the organization whether or not downsizing takes place. In the event downsizing is required, thoughtful preparation will go a long way toward ensuring the orderly and efficient integration of records received from departing employees and help prevent the destruction of records the organization has a duty to preserve. **ENR**

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