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SO YOU WANT A DOCUMENT RETENTION PLAN?

PART III – PUTTING THE PLAN TOGETHER

This is another in a continuing series of client advisories that focus on various aspects of developing and implementing a document management program¹. In previous advisories we have discussed how to go about creating your company's document management program and some of the options you will want to consider. Now you are ready to put pen to paper (or more likely fingers to computers) and start drafting that written tome that will embody your actual company policy.

A WRITTEN PLAN FOR YOUR DOCUMENT MANAGEMENT POLICY

All document management programs should ultimately have a written plan or protocol that explains the company's document management policy. It is important to consider the goals of your company up front because the style and content of the policy can vary considerably depending on a variety of factors. The policy should be drafted with your organization's needs in mind. While there is no "one way" that you have to follow, there are two issues that you should keep in the forefront when contemplating the written policy: (1) the policy is likely to be requested in litigation and should be drafted to ensure compliance with applicable law, and (2) ease of implementation is the key to an effective document management program. In this advisory, we focus on the written plan and discuss the types of things you should consider including in your plan.

An overriding issue that will govern how you draft your policy is length. There are two competing schools of thought on this issue. Many people advise creating a policy that is as short as possible. They contend that in today's busy environment, it is very difficult for employees to take the time to read and understand a policy that is several pages long (or longer). They advocate that simpler is better and easier to roll out. A short policy, however, is often largely aspirational and provides

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¹ See: *So You Want a Document Retention Plan? Part I* (Nov. 2003), at <http://www.alston.com/articles/Document%20Retention%20Plan11103024638.pdf>; *Part II* (Nov. 2004), at <http://www.alston.com/articles/Document%20Retention%20Plan%20Part%20II.pdf>.

only a broad overview of the program. By necessity, the detail is left to the individuals charged with implementing and overseeing the policy. Conversely, others urge policies that provide more specifics and cover more areas. They advocate including more detail and guidance in the policy itself rather than depending on the implementers to provide the necessary structure. They believe this greater detail will increase the effectiveness of implementing and enforcing the policy. More detailed policies, however, often take longer to draft and are more complicated to explain and roll out. Both schools of thought have merit and you should balance those concerns as you draft the policy. There is no “best practice” on how much detail you have to put in your policy. Ultimately, the length of your policy will largely depend on the corporate culture of your company. Some companies are more comfortable with detailed policy and procedures manuals while others function better with broad aspirational statements to guide them.

ESSENTIAL ELEMENTS

Regardless of how long or short your policy is, there are certain essential elements that you will likely want to cover. First, you will want to explain what the policy is. Second, you will want to explain what the policy covers. Third, you will want to explain the retention periods and how they are to be implemented. Finally, you will want to identify who is in charge of this program and how it will work. We discuss each of these in turn.

Set Out the Company’s Policy on Document Management

A primary goal of drafting a policy is to communicate to your employees what your company’s policy is with respect to its documents. This should state not only why you think it is important to have a policy, but also what your goals are with respect to the policy and what is expected of employees.

When drafting the policy, keep in mind that it will likely become Exhibit A in any lawsuit initiated against the company. One of the first pieces of information that opposing counsel generally ask for is your company’s document retention policy. The purpose is twofold – to gather information about how your company manages its documents, and to look for ammunition to use against you in litigation. Spoliation charges (destruction of a document that should have been retained for some legal reason) are becoming more and more common, especially with respect to electronic records. Adversaries will analyze whether (1) your policies comply with applicable law and (2) whether you are wrongfully discarding and destroying documents or failing to properly abide by your policies. Therefore, you should draft your policy and procedures with the expectation that they will be reviewed and construed not only by people who are the intended recipients but also by adversaries.

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Many companies find that they want to establish special procedures for certain types of documents – such as electronic records. If there are certain protocols that you will enact, then you should consider discussing them in your policy. We will address various approaches to dealing with the complex issues inherent in electronic documents in a future advisory.

Explain How Broad the Policy Will Be

A second issue you need to address is what you intend to cover in the policy. While your policy may ultimately reach broadly, some businesses find that it is better to roll out their document management system in waves and not try to cover everything at once. You should assess whether any of the following questions are applicable to your situation. For example, is your policy going to try to cover both electronic and paper documents? Does the policy apply to creation of documents as well as document destruction? Will your email and internet policies be incorporated at this time? If your company has various divisions or branches, does this policy intend to reach all of them? What if you just merged, are you going to try to roll out the same policy to cover all entities? If you have international operations, is this policy going to apply outside of the United States? Does this policy apply to parents and subsidiary corporations? Does this policy apply to people that you do business with or independent contractors who may perform services for you? Once you determine how broadly the policy should apply, you need to communicate that in your document.

One aspect of this issue is the definition of what constitutes an official company record covered by the policy. You should emphasize that the materials covered by this policy belong to the company and not the individual employees. You want everyone to know that, regardless of where the company documents reside – in an individual's office, laptop, back-up tape, or elsewhere – the company, not the individual, has the duty and authority to do with those documents what the law and business needs of the company require.

Provide a Retention Schedule

A third integral component of almost every document management policy is the schedule providing retention periods for the categories of documents that the company intends to retain. Most companies include a retention schedule with the policy. If your program is highly centralized, i.e., you are relying only on a few individuals to be responsible for segregating pertinent documents and retaining them for the appropriate periods, then it is less important to circulate a retention schedule to all employees.

Another aspect of this issue is how much detail you want in your retention schedule. Retention schedules run the gamut - some only have a few broad categories of documents identified; others are extraordinarily detailed and are hundreds of pages long. If the retention schedule only has very broad

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descriptions like “accounting documents” or “HR materials,” then you are leaving a great deal of discretion to individuals to interpret what is or is not covered by those categories. Additionally, you will be keeping many records longer than necessary. On the other hand, a retention schedule that is hundreds of pages long is naturally more difficult to create and utilize. Furthermore, while such a schedule may provide clear guidance about what to do with each document, it can be cumbersome to implement and maintain. Most companies opt for a retention schedule somewhere in the middle categories specific enough to identify relevant records, but not identifying each and every document that the company creates. The most important thing is to create a schedule that is effective for your organization.

Set Out How the Policy Will Operate

Finally, your policy needs to tell the reader who is in charge and how the policy is going to be implemented. There are a variety of ways that companies can oversee a document management policy. Some companies have departments that are dedicated to overseeing this function (perhaps in conjunction with other tasks like internal audit, or your compliance program). Others rely on existing groups such as legal or HR to take ownership and responsibility for managing this task. Some companies designate individuals inside the various divisions of the company to act as a liaison and be responsible for the document management system. Others place the onus on each individual and have a very decentralized structure for compliance and preservation. As would be expected, each of these structures has strengths and weaknesses and the utility of each structure largely depends on the financial and personnel resources of the company. Whatever the structure, your policy should communicate clearly what that structure is and who ultimately will be responsible. This will ensure that board and senior management know who is responsible for making sure that the policy is being appropriately implemented and enforced.

While you are drafting your protocol, you will want to decide how your company is going to implement it because the method of implementation will impact what you want to include in your written policy. As alluded to above, there are also a number of ways to implement a document management program. We will discuss them in the next advisory: *Do's and Don'ts in Implementing Your Document Management Program*. In the interim, please contact your Alston & Bird attorney or anyone on the next page if you have questions or if we can be of any assistance.

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