

**BLBA BULLETIN NO. 15-03**Issue Date: **JAN 27 2015**

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Subject: DOL Litigation Document Retention Policy

Background: This bulletin addresses DCMWC's duty to preserve evidence when trial litigation in district court (or, more rarely, state courts) is reasonably anticipated. For DCMWC, the duty to preserve evidence occurs primarily, but not exclusively, in the enforcement context. (One might argue that administrative litigation is "reasonably anticipated" when a benefits claim is filed, and a near-certainty when it is referred to OALJ. But the Office of Administrative Law Judges has not imposed such requirements on DOL in the past. The following evidence-preservation practices do not apply to routine OALJ hearing referrals.)

Applicability: Appropriate DCMWC Personnel.

Purpose: The purposes of this bulletin are to (1) establish a policy to preserve evidence, even without a formal litigation hold, when certain enforcement-related triggering events occur; (2) describe the role of formal litigation holds in the evidence-preservation process; and (3) outline the scope of DCMWC's duty to preserve evidence when a triggering event occurs or a formal litigation hold is received.

Once DOL reasonably anticipates litigation, it has a legal duty to preserve all evidence potentially relevant to that litigation. Failure to do so can lead to a variety of penalties ranging from reprimands and adverse inferences to default judgments and sanctions against the individuals responsible for the loss of evidence and their attorneys. Litigation holds are one way to ensure that evidence is preserved whenever litigation is reasonably anticipated. Almost as important, litigation holds allow DOL to document its preservation efforts to opposing parties and the courts.

After a specific matter is formally referred to SOL (or DOJ), counsel will be primarily responsible for deciding whether and when a litigation hold should be issued. But there are many circumstances where DCMWC may have cause to "reasonably anticipate" litigation before a case is referred to counsel. Consequently, it is important to develop appropriate procedures to ensure that DCMWC is prepared not only to respond to formal litigation holds from SOL or DOJ, but also to identify triggering events that should lead it to preserve evidence on its own.

The following procedures will ensure that when DCMWC personnel are asked to produce materials related to a document retention case, individuals will be able readily to locate all pertinent documents from personal email archives and the agency will have a readily accessible, secure, comprehensive and redundant repository that contains all relevant materials.

Action:

1. Enforcement-related events triggering DCMWC's duty to preserve evidence even without a formal litigation hold.

The most common situations where DCMWC would have reason to anticipate trial litigation arise in the enforcement context. Because enforcement activities are a routine part of DCMWC's operations, and because potentially relevant materials are often generated before an enforcement matter is referred to SOL, DCMWC establishes the following trigger points to initiate document retention procedures:

- a. When DCMWC learns that a coal mine operator, an insurance company that issues BLBA policies, or an entity that provides self-insurance guarantees (such as surety bonds or letters of credit) to coal mine operators has or is about to become insolvent, bankrupt, or otherwise unable to pay benefits.
- b. When a final award has been issued and the liable party has not reimbursed the BLDTF for interim benefit payments (including medical benefits) within 90 days. Unless it is clear that the liable party is refusing to pay for a reason specific to that claim, all information relevant to that party (including other claims against it) should be preserved.
- c. When DCMWC or OWCP refers a matter to SOL for enforcement.
- d. When DCMWC commences an investigation to determine whether:
 - 1) to apply a civil monetary penalty for failing to file required reports (20 C.F.R. § 725.621(d)); operating a mine without insurance or self-insurance authorization (20 C.F.R. §§ 726.300-320); or
 - 2) the employer concealed or destroyed property to avoid paying benefits (30 U.S.C. § 933(d)(2)); or
 - 3) the employer discriminated against a miner who has pneumoconiosis and is not totally disabled (30 U.S.C. § 938).

In an enforcement case, the hold should extend to all materials relevant to the underlying claims adjudication(s) as well as those related to DCMWC's collection efforts and the liable operator's insurance or self-insurance.

2. Formal litigation holds issued by SOL or DOJ.

In certain cases SOL or DOJ may impose formal, written litigation holds. In appropriate circumstances, holds may be issued outside the enforcement context. For example, at some point SOL might reasonably anticipate litigation challenging a new regulation, which would trigger the obligation to preserve related materials.

Litigation holds issued by counsel will clearly state the reason for the hold, the scope of the hold, and DCMWC's obligations under the hold. They will also include a receipt for DCMWC to sign and return. A formal litigation hold remains in effect until it is formally released.

3. The scope of DCMWC's duty to preserve evidence once that duty has been triggered by DCMWC policy or a formal litigation hold.

The scope of discovery in civil litigation is extremely broad. Consequently, once DCMWC's obligation to preserve evidence is triggered (whether by a triggering event described above or a formal litigation hold), it must retain a broad range of materials. These include materials that cannot be kept (or may not be routinely kept) in physical files. For example, notes, records of telephone conversations, drafts of documents, and all other potentially relevant evidence must be preserved. Perhaps most importantly, all electronically stored information (ESI) – including e-mails, databases, spreadsheets, Word documents, etc. – must be retained *in its original format* including its metadata.

4. Procedures for maintaining electronic evidence on DCMWC share drive

- a. A "LITIGATION HOLD" folder with additional sub-folders has been established on the DCMWC share M:\ drive. Folders and sub-folders are (will be) set up and organized to allow for storage and retrieval based on logical naming characteristics identified by the trigger event or formal litigation hold.
- b. "Write" access to this folder and sub-folders will be restricted to DCMWC District Office Directors and National Office Managers. (All share drive folders are secured by nightly back-ups.)
- c. District and National Office Managers are responsible for identifying trigger events that occur on claims within their jurisdiction. When a trigger event occurs, the manager contacts the BSRP Branch Chief by email to describe the trigger event and confirm the need for document retention as outlined herein.
- d. The BSRP Branch Chief creates an appropriately-named sub-folder and sends notification to all DCMWC managers, advising them of the new trigger event or formal litigation hold and directing them to follow required steps to retain relevant documents.

- e. Managers are responsible for ensuring that they and employees within their jurisdiction copy all pertinent existing electronic documents (see Action Item 3, above) contained in personal or other shared folders into the appropriate newly-created sub-folder(s).
- f. In the event an alternate secure and comprehensive folder or other system of records previously had been established and maintained on another accessible share drive, it is not necessary to copy/replicate all electronic documents so maintained. But an email that fully describes such alternate shared folder/system of records must be issued to relevant staff (including, at a minimum, the BSRP Branch Chief). The email must then be saved as a PDF file and stored in the newly created Litigation Hold sub-folder; it will serve as an important road map to facilitate future access for anyone searching for relevant documents.

If the location of the alternate comprehensive folder or other system of records is an employee's personal folder, then copying/replicating is required to ensure ongoing security & accessibility in the event the employee leaves DCMWC.

- g. Each person in a DCMWC office that is involved with a particular document retention action must set up his/her own personal Outlook folder system that mimics the Litigation Hold system set up on the M:\ drive. As future pertinent emails are sent and received they must be moved for permanent storage into the appropriate personal Litigation Hold Outlook folder/sub-folder.

In addition, the recipient or the sender [not the person(s) on the "cc" line] of any pertinent email must also save a PDF copy of the incoming/outgoing email, and any attachments, to the appropriate centralized ("Master") M:\ drive LITIGATION HOLD sub-folder. (Do not convert attachments to PDF.)

5. Procedures for maintaining hardcopy evidence

Non-electronic original (paper) files must be maintained securely in each office location. Generally, the official BLBA claims folder will be the official repository for containing all pertinent documents related to a specific black lung claim. No separate paper/manual document retention system to replicate a claim folder is anticipated.

In some cases, claim folders and/or other original records not maintained electronically may be transferred to a single DCMWC office for convenience or safe-keeping or preparation for litigation activity.

Disposition: Retain this Bulletin until further notice, or until its incorporation into the Black Lung Procedure Manual and Library.



Michael A. Chance
Director, Division of Coal Mine Workers' Compensation

Distribution: All DCMWC staff