

for managing the hiring process throughout an organization to avoid breaking the law. If a company does not have such a policy, it should develop and implement one immediately. Where the possibility of potential mistakes exist, company executives should call for prompt and thorough investigations.

Courts frequently consider an employer's response once they are put on notice of potential employment of unauthorized employees. In addition to consulting a qualified immigration attorney to assist with all phases of this process, executives should consider retaining a federal criminal law attorney to give advice regarding criminal charges, if they find themselves in a tight spot.

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## Preserve or Pay

### NEW FEDERAL RULES MANDATE RETENTION OF ELECTRONIC DATA

**BY REBECCA BRUCH  
AND BRENT RYMAN**

If it plugs in, used to plug in, plugs into something else that plugs in, or uses batteries, your company must have a plan to preserve it. As of Dec. 1, 2006, new federal rules mandate retention of electronic data for purposes of litigation. These new rules affect new cases filed as well as all pending cases. They govern retention of all electronic information, including e-mail, voicemail, faxes, instant messages, spreadsheets, charts, graphs, scanned images, videos, PowerPoint presentations, external and internal hard drives, deleted items, archived data, including e-mail, and tape back-ups. This also includes removable storage such as disks, thumb drives, stick drives, laptops, servers, networks, CDs and retired hardware. Basically, if it plugs in, used to plug in or uses a battery, you should assume it is governed by the new rules.

- Your company must assume and anticipate litigation.

In regard to electronic information, companies must now reasonably anticipate federal court litigation in light of complaints, issues or investigations. The majority of the burden for instituting retention and retrieval practices will very likely fall on the HR department, specifically its director. And certainly, HR departments are expected to comply with the new rules. HR departments must work with the IT department and the company attorney to determine the best methods for instituting the new rules. HR departments must also take the lead in educating employees about the critical nature of rule

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compliance, stressing the perils of failure. The company's policy should be discussed at all training, and is easily included in harassment training, discouraging e-mail, jokes and unauthorized websites.

• **A lawsuit is not the time to formulate company policy.**

Companies should avoid learning about the new rules from your attorney after a lawsuit is filed. Failure to comply based on ignorance of the rules can translate into disaster when the plaintiff's attorney requests any or all of the above information. The consequences of failure to retain relevant electronic information could be fatal to the defense of a lawsuit. Penalties may include the following:

- Monetary fines.
- Instructions to the jury to presume the information was intentionally destroyed by the company to hide evidence.
- Exclusion of evidence, including witness testimony on critical issues. In extreme cases, automatic judgment against a company for ignoring the obligation to preserve evidence.

One company was recently sanctioned to the tune of \$2.75 million when key employees deleted e-mails in contravention of a court order. In another case, a bank received a \$15 million penalty for withholding thousands of relevant e-mails. Finally, a software company was fined \$25 million – in addition to a jury award – based on a court finding of e-mail-related misconduct.

• **Anticipated litigation commands even higher precautions from your company.**

Remember that every time you turn on your computer or print a file, the properties of the information are modified or transformed. Therefore, once a lawsuit is filed (or when a company anticipates such an action), routine document retention and destruction policies must be suspended immediately. The rules also suggest that a "litigation hold" be placed on all sources of electronic information even remotely relevant to the pending or anticipated litigation. Litigation may even require shelving entire computers to assure data remains untouched.

Your company needs attorney assistance in policy formulation and litigation hold oversight.

Attorneys in all federal lawsuits must now meet and confer early in the case on issues related to preservation and production of electronic information. As such, companies must work with their attorneys to develop plans

for electronic discovery. Attorneys must be prepared to discuss issues such as server location, routine overwriting of information, mechanics of data preservation and server indexing, i.e. organization of file allocation tables.

Because of the broad burdens on both companies and their attorneys, it is imperative they work together long before litigation to formulate the least oppressive and most inexpensive plan for mandatory production of electronic information. A good understanding of the strengths and weaknesses of the company's electronic systems is critical to presenting the best defense in every case.

• **It's better to have it and not need it than for your company to explain why it's been deleted.**

A sound plan may avoid overproduction of information and overly burdensome searches. With no plan in place your data may not be organized to allow for easy access, which could force retention of expensive IT experts to satisfy your legal obligations. Worse yet, absence of a plan could result in inadvertent production of far more information than necessary or requested. This allows opposing counsel to rummage through your data, harvesting any desired information. And keep in mind, just because information is retained does not mean it's admissible. In fact, it may not even be discoverable. But it must be retained and accessible in the early stages for companies to avoid potentially fatal consequences from the most innocent of errors or omissions.

Companies and their HR departments want to avoid becoming an example of what not to do. You must, with attorney assistance, institute methods for preservation and retrieval of specific data long before a lawsuit is filed. Failure to do so can create insurmountable hurdles to defending a lawsuit, even in a case with otherwise limited or nonexistent liability. It is crucial to be proactive.

Contact your employment-law attorney for more information about preservation and retrieval plans, and to discuss what you can do to prevent your company from facing the consequences of failure to preserve electronic data.

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