

# VSSSP

## Employment Law Bulletin

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### Avoiding the Electronic Trap in the Information Age – Tips for CEOs and General Counsel

Big name companies were hit with multi-million dollar verdicts in the past two years because they destroyed electronically stored information or "ESI."

- UBS Warburg was assessed \$20 million in punitive damages in a single plaintiff discrimination lawsuit, because key e-mail was deleted and back-up tapes were recycled. A "litigation hold" to retain documents had been issued, but the lawyers failed to effectively communicate with IT, and relevant data was lost.
- Morgan Stanley was hit with a \$1.4 billion default judgment in a securities fraud case because it failed to produce relevant e-mail and made erroneous statements to the court about its ability to recover old e-mail.

New federal discovery rules that went into effect on December 1 make it more important than ever that companies understand their IT systems, know where their relevant ESI is stored, and how to preserve ESI. A conference of state Chief Justices has also issued similar guidelines on ESI discovery disputes.

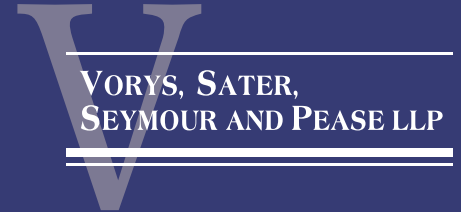
Companies can start to take action now to be ready to comply with these new discovery rules and greatly reduce the likelihood of these type of sanctions.

### What To Do?

1. Take stock of IT. Understand your IT systems, your data collections, data storage media, record retention policies, and archive and recycling policies. Know what logs and back-ups are generated by your relevant systems, even when the user thinks the data is deleted.
2. Analyze your retention policies. Determine whether there is a business need or legal need to keep the data you create and revise your policies accordingly. If you don't need to keep e-mail for five years, then don't. Educate your employees about the policies and periodically monitor compliance.
3. Make sure you have an effective protocol for implementing a litigation hold that includes ESI. Know how to obtain a snapshot of relevant data so ESI can be obtained without undue burden on normal business operations.
4. Communicate early and often. Lack of communication between decision makers, IT and counsel is the most common element among businesses hit with large sanction awards.

Identifying, collecting and producing electronic documents can be expensive, and the sanctions for destroying e-data may be severe. Preparation is your best preventative measure. If you wish to discuss these issues further, please contact your Vorys attorney.

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## Employers Watch Closely as Web Site Accessibility Issue Grows

On September 6, 2006, a federal judge in California ruled that websites may be covered under the access provisions of the Americans With Disabilities Act (ADA), and may therefore be required to be accessible to the visually impaired. This decision could have significant implications for both commercial websites selling goods and services and websites used for employment applications and other business functions.

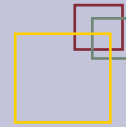
Title III of the ADA prevents discrimination against the disabled in places of public accommodation. In order to ensure that the disabled have access to goods and services in places of public accommodation, the statute requires "reasonable modification" of "policies, practices, and procedures," the provision of auxiliary aids to ensure effective communication with the disabled, and the removal of architectural and communications barriers.

In the California case, the National Federation of the Blind ("NFB") sued Target Corporation in a class action arguing that the Target website is, like the company's brick-and-mortar stores, subject to the accessibility provisions of the ADA and must therefore be accessible to the visually impaired. The Court agreed with the NFB that the ADA "applies to the services of a place of public accommodation, not services in a place of public accommodation." Because Target operates physical stores (which are places of public accommodation), the Court reasoned, it must either make its on-line "store" physically accessible or offer other equally effective alternatives. The court has not yet addressed the merits of the NFB's argument that "reasonable accommodation" requires that the website be compatible with screen-reading software for blind users that vocalizes information on the site, and requires that the website be accessible without a mouse.

The overall state of the law on this issue, however, is still developing. In 2002, a federal court in Florida ruled that Southwest Airlines did not have to make its website accessible, finding that the ADA's public accommodation provision applies only to physical space, not "virtual spaces." Other retailers (including Priceline.com and Ramada.com) have chosen to settle claims filed in New York by making their web pages easier for the visually impaired to use. Even under the Target court's reasoning, it is unclear whether a web-only store (such as Amazon.com or Travelocity.com) would be a "place of public accommodation" subject to the ADA access provisions.

Please contact your Vorys attorney if you wish to discuss these issues further.

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### Accessibility of Employment Related WEBSITES

ADA web-accessibility issues may also affect an employer's obligation to make its internal company website, or kiosks or other web-based employment application systems, fully accessible.

The EEOC has no provided clear guidance on this issue. In a 2005 staff advisory letter, the Commission noted that "an issue arises as to the extent to which an employer must ensure that its on-line recruiting and application process is compatible with assistive technology used by some people with disabilities, such as screen-reading software used by people who are blind or visually impaired." Rather than answer the question, the letter stated, "The Commission has not taken a legal position on this issue."

Employers may want to examine their websites to determine if the sites present any danger of "screening out" disabled applicants and/or customers.

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