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The HIPAA hurdle trips up attorneys

By Elliott C. Bankendorf[1] and Melaina D. Jobs[2]

Introduction

On February 17, 2009, President Obama signed The American Recovery and Reinvestment Act of 2009, better known as the "Stimulus Bill."[3] The Stimulus Bill amended the Health Insurance Portability and Accountability Act ("HIPAA") mandating that Business Associates of covered entities now comply with the several provisions of HIPAA, including those relating to security and privacy. The Stimulus Bill further provides a stricter enforcement provision for compliance failures. This means that more entities than ever before now have to deal with HIPAA issues during litigation. Proper preparation will provide the tools necessary to overcome the potential obstacles.

Changes to HIPAA that Affect Business Associates

A "business associate," as defined under HIPAA, includes a person who provides legal, actuarial, accounting, consulting, data aggregation, management, administrative, accreditation or financial services to a covered entity (e.g., a health plan, a health care clearinghouse, or a health care provider), where the terms of service involve the disclosure of individually identifiable health information.[4] Therefore, under this definition, attorneys, accountants, actuaries and others representing a health insurer, health care provider, or other covered entity qualify as Business

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The Impact of Health Care Reform in 2010-2011

By Bernard G. Peter

The new healthcare legislation ("Health Care Reform") is a combination of two bills, H.R. 3590 (the "Affordable Care Act") and H.R. 4872 ("Health Care Act"), the last of which was signed by President Barack Obama on March 30, 2010. Many of the provisions of the Affordable Care Act and the Health Care Act do not become effective until 2013 or later. This article focuses on key changes that will affect employers and employer-sponsored group health plans beginning this year and next.

General Description of Health Care Reform

In general, Health Care Reform establishes a clearinghouse exchange for the purchase of health insurance by individuals and small businesses. Under Health Care Reform, eligibility for Medicaid will extend beyond the federal poverty level, and benefits will become available to "adult" children up to age 26. Almost everyone will be required to have health insurance or pay a penalty, and graduated subsidies will help individuals with incomes as high as four times the federal poverty level if they cannot afford health insurance.

Starting in 2010, businesses with fewer than 25 employees that pay at least 50 percent of health care premiums for employees will qualify for a tax credit to cover up to 35 percent of those premiums, depending on number of employees and their average wage. However, sole proprietors will not qualify for this tax credit. As set forth below, Health Care Reform also imposes

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Associates. Before the Stimulus Bill, Business Associates were not subject to most HIPAA provisions such as those relating to security, privacy, and notification. However, the Stimulus Bill significantly changed the responsibilities of Business Associates by making several key HIPAA provisions applicable to them.

Formerly under HIPAA, provisions relating to security and privacy of protected health information (PHI) only applied to covered entities. Business Associates merely had to comply with the written business agreements with the covered entity, which may or may not have contained privacy and security measures that met HIPAA standards. However, under the Stimulus Bill effective on February 17, 2010, the HIPAA security and privacy provisions were extended to Business Associates.[5] Therefore, for the first time, Business Associates must take measures to protect PHI and failure to comply with either the security or privacy provisions will subject the Business Associate to civil and criminal penalties.[6]

The Stimulus Bill extended several security provisions to Business Associates. The specific security provisions that now apply to Business Associates include: (1) administrative safeguards contained in 45 C.F.R. § 164.308; (2) physical safeguards contained in 45 C.F.R. § 164.310; (3) technical safeguards contained in 45 C.F.R. § 164.312; and, (4) policies, procedures, and documentation requirements contained in 45 C.F.R. § 164.316.[7] These new requirements place a substantial burden on Business Associates. For example, Business Associates, among other things, now have to:

- Conduct an accurate and thorough risk analysis to identify the potential risks and vulnerability to the confidentiality, integrity, and availability of electronic PHI;[8]
- Implement procedures to systematically review records of information system activity, such as access reports and security incident tracking reports;[9]
- Implement physical safeguards for all workstations that access PHI and restrict such access to authorized users;[10]
- Assign a unique number or name for identifying and tracking user identity;[11]
- Implement hardware, software, and/or procedural devices that record and examine activity in information systems that contain or use electronic PHI.[12]

Currently, a considerable amount of confusion exists regarding what technologies and methodologies should be used to protect PHI (i.e., is e-mail required to be encrypted? if so, what software programs are adequate?). Fortunately, under the Stimulus Bill, the Secretary of the Health and Human Services (HHS) is required to issue annual guidance on the specific technical safeguards that a covered entity or Business Associate should employ to secure PHI.[13]

The Stimulus Bill also extended HIPAA privacy provisions to Business Associates. Under the Stimulus Bill, Business Associates that obtain or create PHI pursuant to a written agreement now have a legal duty to ensure that their use and disclosure of PHI is in compliance with 45 C.F.R. 164.504(e).[14] Section 164.504(e) provides the terms that must be in a contract between a covered entity and a Business Associate.[15] For example, the provision requires that contracts between Business Associates and covered entities establish the permitted and required uses and disclosures of PHI.[16] In addition, Business Associates for the first time have a duty to monitor the cover entity's compliance with the contact between it and the covered entity. Under the Stimulus Bill, Business Associates are not in compliance with HIPAA standards if they are aware of a pattern of activity or practice of the covered entity that constitutes a material breach or violation of the covered entity's obligation under the agreement, unless the Business Associate has taken reasonable steps to cure the breach or stop the violation.[17] If the reasonable steps taken by the Business Associate are unsuccessful, then the Business Associate must either terminate the contract with the covered entity (if feasible) or report the problem to the Secretary of HHS.[18]

Before terminating the contract with the covered entity or reporting the problem to HHS, an attorney who qualifies as a Business Associate should review the Illinois Rules of Professional Conduct to ensure that such actions do not violate his or her professional responsibilities. In particular, Rules 1.6, 1.13 and 1.16 should be reviewed. Under Rule 1.6, a lawyer is generally prohibited from revealing information relating to the representation of a client.[19] However, a lawyer is permitted to reveal confidential information that the lawyer reasonably believes is necessary to comply with "other law."[20] Rule 1.13 relates to the representation of an organization as a client. If a lawyer for an organization is aware of a matter "that is a violation of a legal obligation to the organization and that is likely to result in substantial injury to the organization," then the lawyer must take actions that he or she believes to be in the best interest of the organization, which may include referring the matter to the highest authority that can act on behalf of the organization.[21] Finally, under Rule 1.16, a lawyer must withdraw from the representation of a client if the representation will result in the violation of "other law."[22] However, court approval or notice to the court may be required before a lawyer withdraws from pending litigation.[23]

The privacy and security rules newly applicable to Business Associates must be incorporated into the business associate agreement.[24] Covered entities and Business Associates will need to identify all existing business associate agreements and incorporate these privacy and security rule obligations if they are not already included in the agreement. If a business association agreement is not already in place, then the Business Associate and covered entity will need to carefully draft such an agreement to ensure that the necessary privacy and security requirements are included. Moreover, any additional requirements of the Stimulus Bill that relate to security and privacy that are applicable to covered entities are also applicable to Business Associates, and must be incorporated into the business associate agreement between the Business Associate and the covered entity.[25]

The Stimulus Bill also expanded the notification requirements for a security or privacy breach and has extended them to Business Associates. Previously, a covered entity was not required to notify individuals of such breaches unless it determined that notification was necessary to mitigate damage to the individual. Under the Stimulus Bill, both covered entities and Business Associates that access, maintain, retain, modify, record, store, destroy, or otherwise hold, use, or disclose

"unsecured" PHI must now provide notice to certain parties in the event of a breach.[26] Additionally, if the breach involves 500 or more individuals, notice of the breach must be immediately given to the Secretary of HHS, which will post information relating to the breach on its Web site.[27] Media outlets must also be contacted if the breach affects more than 500 residents of a particular state or jurisdiction.[28]

Another change that affects Business Associates is a new obligation of certain organizations that provide data transmission services for protected PHI to a covered entity or a Business Associate to enter into a written agreement with the covered entity or Business Associate.[29] The agreement between the organization and covered entity or Business Associate must meet all of the applicable HIPAA requirements.[30]

The Stimulus Bill also contains several enhanced enforcement provisions, which are applicable to Business Associates. For example, the Secretary of HHS must formally investigate any complaint of a privacy or security violation if the preliminary investigation indicates that the alleged violation is due to willful neglect, and if such violation is found, civil penalties will be imposed.[31] Furthermore, an individual who is harmed by a security or privacy violation may be entitled to receive a percentage of any civil monetary penalty or settlement collected, giving individuals more reason to claim harm.[32] Another enforcement change is a tiered increase in the amount of the civil monetary penalties based on whether the violation was (1) triggered by a person who did not know (and by exercising reasonable diligence would not have known) that he caused a violation, (2) due to reasonable cause and not to willful neglect, or (3) due to willful neglect,[33] with the civil penalties per violation ranging from $100 to $50,000, respectively.[34] Further, state Attorneys General now have the authority to bring a civil action in U.S. District Court on behalf of a resident who has been threatened or adversely affected by a person who caused a violation.[35] Moreover, the Secretary of HHS is required to conduct periodic audits to ensure that covered entities and Business Associates are in compliance with HIPAA.[36]

Another change mandated by the Stimulus Bill is that the Secretary of HHS must issue a new "minimum necessary" standard.[37] The general rule under HIPAA is that if a covered entity is using PHI for any purpose other than for treatment purposes, e.g., litigation, then it must provide only the "minimum necessary" information to accomplish the purpose of the use or disclosure.[38] Until a new "minimum necessary" standard is issued, standard practice for covered entities or Business Associates should be to limit PHI, to the extent possible, to a "limited data set." A "limited data set" is PHI that excludes indentifying information such as name, telephone number and street address (including town/city, state and zip code is allowed).[39] If it is not possible to limit the use or disclosure to the limited data set, then the covered entity or Business Associate must apply the minimum necessary standard. The new "minimum necessary" standard is required to be issued within eighteen months of enactment.[40] Moreover, the Stimulus Bill does not affect the use, disclosure or request of de-identified health information.[41]

The Effect on Litigation

During litigation, a litigant may be required to use such things as marketing materials, health care records or health care forms to support its case.[42] All these forms of evidence, however, may contain PHI, which must be protected under HIPAA.[43]

Under the Stimulus Bill, attorneys representing health insurers, health care providers, or other entities covered under HIPAA now share in the responsibility of keeping PHI secure and private. These new responsibilities add greater obstacles for attorneys to overcome during trademark litigation.

Methods for Overcoming HIPAA's New Obstacles

Although much more is now expected from attorneys who fall under the definition of Business Associate, it is still possible to comply with the new changes to HIPAA while engaging in effective representation.

First, attorneys representing health insurers, health care providers, or other covered entities must ensure that new and existing business associate agreements are HIPAA compliant. In addition, business associate agreements are now required for clients that are third party vendors that provide data transmission of PHI. For example, an attorney must enter into business associate agreements with a third party vendor that is hired to assist with the collection and transmission of electronically stored data in response to an e-discovery request.

Perhaps the biggest burden now on Busi-

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ness Associates is the new security and privacy requirements. Attorneys will need to carefully review the internal practices and policies of not only their clients but also their own law firms to make sure they meet the applicable HIPAA standards or face potential penalties.

When disclosing documents during discovery, Business Associates have a duty to ensure that only the "minimum necessary" is disclosed. If paper document discovery is requested then the attorney should ensure that the documents provided to opposing counsel contain only a limited data set. Alternatively, the attorney could provide summary health information or documents containing de-identified health information to opposing counsel. Summary health information is information that provides a summary of claims or treatment but does not contain any identifying information.[44] Similarly, de-identified health information does not identify or provide a reasonable basis to identify an individual.[45] The greatest advantage to using de-identified health information is that there are no restrictions on its use or disclosure.[46]

It is increasingly likely, however, that e-discovery is requested by opposing counsel. The most straightforward way to comply with HIPAA and still provide access to electronically stored information during discovery is for the attorneys to meet during a Rule 26 conference and narrow the scope of "relevant information."[47] This way the electronically discoverable information would exclude information that is subject to security and privacy provisions of HIPAA.[48] As noted above, however, this may be difficult to do as in many cases, the pertinent evidence may well contain PHI.[49]

Because it may not be possible to completely exclude information subject to the security and privacy provisions of HIPAA from e-discovery, other approaches may be needed. Another possible method is to agree not to produce materials in their electronic form but rather produce redacted hard copies of the documents or in a form that eliminates identifying data yet preserves the remainder of the electronically stored documents.[50] A further option would be for the parties agree that the metadata of the electronically stored documents is not important and allow the documents to be produced in paper format with the appropriate redactions.[51] These approaches would also reduce the need for assistance from a third-party vendor.[52]

Finally, because implementation of HIPAA compliant security and privacy measures will be costly and time consuming, methods that avoid HIPAA should be utilized. Attorneys representing covered entities only fall under the definition of Business Associates when the terms of service involve the disclosure of individually identifiable health information. Thus, unless clearly necessary for a matter, a covered entity should not disclose PHI to its attorney so the attorney does not qualify as a Business Associate under HIPAA.

Conclusion

The Stimulus Bill has placed a greater burden on attorneys that serve as Business Associates for covered entities by extending several HIPAA provisions to them. Because many of the changes require considerable action on the part of the Business Associate, Business Associates should identify and address potential HIPAA issues sooner rather than later. Finally, attorneys and others who deal with personal injury and malpractice issues should become familiar with the new responsibilities placed on Business Associates as such provisions are also applicable to them. ■

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3. American Recovery and Reinvestment Act of 2009 "Stimulus Bill," Pub L No 111-5, 123 Stat 115 (2009).

4. 45 CFR § 160.103. See Stimulus Bill § 13400(2), 123 Stat at 258.

5. Stimulus Bill §§ 13401, 1304, 13423, 123 Stat at 260, 264, 276.

6. Id at §§ 13401(b), 13404(c), 123 Stat at 260, 264.

7. Id at § 13401(a), 123 Stat at 260.

8. 45 CFR § 164.308(a)(1)(ii)(A).

9. Id at § 164.308(a)(1)(ii)(D).

10. Id at § 164.310(c).

11. Id at § 164.312(a)(2)(i).

12. 45 CFR § 164.312(b).

13. Stimulus Bill § 13401(c), 123 Stat at 260.

14. Id at § 13404(a), 123 Stat at 260.

15. 45 CFR § 164.504(e).

16. Id at § 164.504(e)(2)(i).

17. Stimulus Bill § 13404(b), 123 Stat at 264; 45 CFR § 164.504(e)(1)(ii).

18. Stimulus Bill § 13404(b), 123 Stat at 264; 45 CFR § 164.504(e)(1)(ii).

19. Ill R Prof'l Conduct R 1.6(a) (Sept 2009).

20. Id at R 1.6(b)(6).

21. Id at R 1.13(b).

22. Id at R 1.16(a)(1).

23. Ill R Prof'l Conduct R 1.16 cmt (Sept 2009).

24. Stimulus Bill §§ 13401(a), 13404(a), 123 Stat at 260, 264.

25. Id at § 13404(a), 123 Stat at 264.

26. Id at §§ 13402(a), (b), 123 Stat at 260. A breach is defined as "the unauthorized acquisition, access, use, or disclosure of protected health information which compromises the security, privacy, or integrity of protected health information maintained by or on behalf of a person." Id at § 13400(1), 123 Stat at 258. However, a breach "does not include any unintentional acquisition, access, use, or disclosure of such information by an employee or agent of the covered entity or business associate involved if such acquisition, access, use, or disclosure, respectively, was made in good faith and within the course and scope of the employment or other contractual relationship of such employee or agent, respectively, with the covered entity or business associate and if such information is not further acquired, accessed, used, or disclosed by such employee or agent." Id.

27. Stimulus Bill §§ 13402 (e)(3), (4), 123 Stat at 262.

28. Id at § 13402 (e)(2), 123 Stat at 261.

29. Id at § 13408, 123 Stat at 271.

30. Id.

31. Stimulus Bill § 13410(a)(2), 123 Stat at 271–72. This change will apply to penalties imposed on or after the date that is 24 months from the date of the enactment of the Stimulus Bill. Id at § 13410(b), 123 Stat 272.

32. Id at § 13410(c)(2).

33. Id at § 13410(d)(1)), 123 Stat 272–73.

34. Id at § 13410(d)(2), 123 Stat at 273.

35. Stimulus Bill § 13410(e), 123 Stat 274.

36. Id at § 13411, 123 Stat at 276.

37. See id at § 13405(b), 123 Stat at 264–65.

38. US Dept of Health & Human Services, OCR Privacy Brief: Summary of the HIPAA Privacy Rule 10, online at <http://www.hhs.gov/ocr/privacy/hipaa/understanding/summary/privacysummary.pdf> (visited Apr 29, 2010).

39. Id at 9.

40. Stimulus Bill § 13405(b)(1), 123 Stat at 264–65.

41. Id at § 13405(b)(4), 123 Stat at 265.

42. Elliott Bankendorf and Sherry Rollo, *The Higher HIPAA Hurdle*, 46 Ill Bar J 10, 10 (Mar 2007).

43. Id.

44. Elliott C. Bankendorf and Sherry L. Rollo, *Hopping the HIPAA Hurdle: Proving Trademark Use in the Healthcare Industry*, 16 Intell Prop & Tech L J 1, 1–2 (Oct 2004).

45. US Dept of Health & Human Services, OCR Privacy Brief: Summary of the HIPAA Privacy Rule 4 (cited in note 38).

46. Id.

47. Bankendorf and Rollo, 46 Ill Bar J 10 (cited in note 42).

48. Id at 10.

49. Id.

50. Id at 10-11.

51. Bankendorf and Rollo, 46 Ill Bar J 11 (cited in note 42).

52. Id at 11.

The Impact of Health Care Reform in 2010-2011

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significant requirements on employers and their group health plans.

Changes Effective in 2010

The following changes affect all group plans:

1. Summary and Explanation of Benefits (Plan years beginning on/after 3/23/10)

A group health plan must provide participants with a uniform summary and explanation of benefits, using standardized definitions.

2. Coverage for "Adult" Children Up to Age 26 (Plan years beginning on/after 9/23/10)

A group health plan that offers family coverage (coverage of children) must also offer coverage for "adult" children (regardless of marriage status), until age 26. However, an adult child under age 26 need not be offered coverage if s/he is eligible to enroll in another group health plan. (Dollars spent on healthcare for adult children are not taxable income for the parents or the adult child, even if the child does not qualify as a tax dependent.)

3. Limits on Coverage and Rescission of Coverage (Plan years beginning on/after 9/23/10)

A group health plan may not place a lifetime limit or an "unreasonable" annual limit on aggregate benefits for participants or beneficiaries (no aggregate annual limits after 2013). A plan may place annual and lifetime limits per participant and per beneficiary on specific covered benefits. A plan may not generally rescind coverage for a participant once covered under the plan, unless the covered individual engages in fraud or intentional misrepresentation of material fact.

The following changes apply only to group health plans that are not "grandfathered." Although this term is not clearly defined, a plan that is not grandfathered has been interpreted to mean one that was not in existence on the date Health Care Reform was enacted (March 23, 2010):

4. Preexisting Conditions (Plan years beginning on/after 9/23/10)

A group health plan may not exclude coverage for pre-existing conditions with respect to children otherwise eligible for coverage under age 19 (no preexisting condition exclusion of any kind after 2013).

5. Discrimination Based on Salary (Plan years beginning on/after 9/23/10)

Self-insured group health plans are already subject to scrutiny so as not to discriminate in favor of highly compensated individuals. Under Health Care Reform, a group plan other than a self-insured plan would similarly be prohibited from discriminating on the basis of salary with respect to health coverage.

6. Appeals and Review Process (Plan years beginning on/after 9/23/10)

A group health plan must provide a process for appealing claims and coverage that includes binding external review. Coverage must continue pending the outcome of any appeal.

7. Preventative Care (Plan years that beginning on/after 9/23/10)

A group health plan must provide certain preventative care services without imposing any cost-sharing, including, for example, certain immunizations and child and adolescent health and breast cancer screenings.

8. Retiree Reinsurance (Effective 6/21/10)

Until 2014 or when $5 billion in funding is exhausted, the federal government will reimburse employer group health plans for 80 percent of the cost of benefits provided on claims between $15,000 and $90,000 made by retirees age 55 to 64 who are not eligible for Medicare.

9. Phase out of "Donut Hole" (Effective 1/1/10)

Beginning with a $250 rebate to Medicare Part D beneficiaries affected by the "donut hole" gap in coverage, the law gradually reduces the donut hole year-to-year by phasing down the coinsurance in the coverage gap to reach the standard 25 percent beneficiary cost sharing by 2020.

Changes Effective in 2011

1. W-2 Reporting (2011 Tax Year)

For the 2011 tax year, employers will be required to report the value of health coverage received by the employee on the employee's IRS Form W-2. The Forms W-2 must be issued to employees in January 2012.

2. Account-based Reimbursement (2011 Plan Year)

In 2011, the costs of over-the-counter medicines will not be reimbursable from a flexible spending account (FSA), health savings account (HSA), or health reimbursement arrangement (HRA), unless the medicines were obtained through a prescription, or the drug is insulin. In addition, the tax penalty of withdrawals from HSAs for non-medical reasons will double to 20 percent.

3. Long-Term Care Insurance (Program Begins 1/1/11)

Beginning in 2011, the federal government will create a new voluntary program for the provision of long-term care insurance that will be self-funded. Workers will be able to make payroll deductions to pay for coverage only if employers have payroll deduction systems. ■

Employers that offer group health care plans should immediately assess the impact of Healthcare Reform in 2010 and 2011 on their particular situation. Provisions of Health Care Reform that will become effective in the next few years, as well as any modifications to Health Care Reform and new regulations, will be addressed in subsequent newsletters.

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Employee Benefits update

By Bernard G. Peter

Health and Welfare Plans

1. President Obama Signs New Health Care Legislation.

On March 23, 2010, President Barack Obama signed into law the Patient Protection and Affordable Care Act ("Affordable Care Act") and on March 30, 2010, President Obama signed the Health Care and Education Reconciliation Act of 2010 ("Health Care Act"). Together the Affordable Care Act and the Health Care Act will make very significant changes in the availability of health care to individuals and how employers offer health care programs to their employees. Many of the provisions of the Affordable Care Act and the Health Care Act do not become effective until 2013 or later. In a subsequent article in this newsletter the highlights of this new health care legislation are set forth.

2. The COBRA Subsidy is Extended.

The provisions of the American Recovery and Reinvestment Act of 2009 ("ARRA"), under which employers are required to subsidize 65 percent of the cost of COBRA coverage for employees who were involuntarily terminated from September 1, 2008 to December 31, 2009, were extended by the Department of Defense Appropriations Act of 2010. Under the extension, the 65 percent subsidy covers employees who were involuntarily terminated through February 28, 2010. Also, the maximum coverage period of the subsidy was extended from nine months to fifteen months. The Temporary Extension Act of 2010 (the "Act") has further extended the 65 percent subsidy to employees who are involuntarily terminated through March 31, 2010. In addition, the Act extends the COBRA coverage subsidy to individuals who lost health coverage as a result of a reduction of their hours of employment and are later involuntarily terminated on or after March 2, 2010. Furthermore, the Act clarifies that the subsidy period begins on the first day to which the subsidy is applied. On April 15, 2010, President Obama signed into the law the Continuing Extension Act of 2010. This law extends the premium subsidy to eligible employees who are involuntarily terminated during the April 1, 2010 through May 31, 2010 period. Employers must notify affected individuals of this new extension of the COBRA subsidy. Legislation has been introduced in Congress which would further extend the 65 percent subsidy through December 31, 2010.

Qualified Retirement Plans

1. The Department of Labor Has Finalized the Deferral Deposit Safe Harbor For Small Plans.

On January 14, 2010, the Department of Labor ("DOL") finalized the small plan safe harbor for the deposit of elective deferrals and loan repayments to a pension or welfare plan with fewer than 100 participants at the beginning of the plan year. This regulation reconfirms the long standing position of the DOL that elective deferrals and loan repayments taken from the compensation of a plan participant must be deposited in the plan within a reasonable time after the employer reduces the compensation of the employee by the amount of the elective deferral or loan repayment. Under the safe harbor, amounts withheld by an employer from the wages of a plan participant must be deposited with the plan no later than the 7th business day following the day on which the amount would have been payable to the participant in cash, except for the deferral election. For loan repayments and any other amounts which a participant or beneficiary pays to an employer, the payments are to be deposited with the plan no later than the 7th business day after the day on which the amount is received by the employer. The safe harbor rule became effective January 14, 2010. The DOL considered extending the safe harbor to large plans with over 100 participants, but decided not to do so at this time.

2. The Restrictions of Internal Revenue Code 436 Could Prohibit the Implementation of a Collectively Bargained Benefit Increase in an Employer Sponsored Defined Benefit Pension Plan.

On October 15, 2009, the Internal Revenue Service issued final regulations under Code Section 436 on the benefit restrictions applicable to single employer defined benefit pension plans for plan years beginning after December 31, 2009. Code Section 436 was added by the Pension Protection Act of 2006 and amended by the Worker Retiree and Employer Recovery Act of 2008. Under Code Section 436 and the final regulations, an amendment to increase benefits cannot take effect if the Adjusted Funding Target Attainment Percentage (AFTAP) of a plan is less than 80 percent, or would be less than 80 percent taking into account the amendment. This can cause a potential grievance issue for employers who maintain collectively bargained defined benefit pension plans. Employers who maintain these plans generally enter into a collective bargaining agreement with the union for a three- or four-year period. Under the agreement, the pension plan benefit factor for the defined benefit pension plan normally increases each year for the life of the contract. If, for example a contract was entered into in 2010 providing for yearly increases in the benefit factor and in 2012 the plan fell below the 80 percent threshold, the plan would be unable to implement the benefit increase.

There are a number of steps employers can take to avoid the implementation of the restriction; such as making an additional contribution to reach the 80 percent threshold and providing security. Regardless, in any future negotiations employers have with union organizations regarding defined benefit pension plan increases in the pension factor, employers should consider including language in the contract that it is the intent of the employer to maintain the funding status of the plan at or above 80 percent but that the employer cannot absolutely guarantee that the employer will always be able to do this.

3. The EGTRRA Deadline was April 30, 2010.

All defined contribution prototype and volume submitter retirement plans had to be amended and restated for the provisions of the Economic Growth and Tax Relief Reconciliation Act of 2001 ("EGTRRA") and subsequent legislation by April 30, 2010. If an employer that has adopted a prototype or volume submitter defined contribution plan failed to amend and restate its retirement plan by the April 30, 2010 deadline, then the employer will be required to file under the Voluntary Correction Program of the IRS and pay a non-amender penalty. The penalty is reduced by 50 percent if the employer files under the VCP within one year of April 30, 2010.

For employers who maintain single employer defined benefit and defined contribution plans and have an employer identification number ("EIN") ending in a 5 or a 0, the remedial amendment period for restating

these plans for EGTRRA and subsequent legislation and for filing a request for a determination letter from the IRS, if so desired, began February 1, 2010 and ends February 31, 2011. Thus, the single employer defined benefit and defined contribution plans of employers with an EIN ending in a 5 or 0 must be restated by January 31, 2011.

Deferred Compensation Plans

1. The IRS Grants an Opportunity To Correct Deferred Compensation Documents Which do Not Comply With Internal Revenue Code Section 409A.

On January 6, 2010 the Internal Revenue Service issued Notice 2010-6 which offers companies the opportunity to correct deferred compensation documents which do not comply with Internal Revenue Code (hereinafter sometimes referred to as "Code") Section 409A and avoid penalties which might otherwise apply under Section 409A. Employers should review their deferred compensation documents to make sure they comply with Section 409A because Notice 2010-6 states that any documentary failures can be corrected by December 31, 2010, and if they are corrected by December 31, 2010, the corrections will be treated as having been made on January 1, 2009.

There is one very significant item discussed in Notice 2010-6 which could affect employers who entered into employment or separation agreements with some of its employees. Paragraph VI B of Notice 2010-6 applies to a plan provision which provides for payment upon a permissible event under Section 409A; *i.e.*, separation from service, but conditions the payment on an employment-related action of the employee such as the execution and submission of a non-competition agreement, a non-solicitation agreement or a release of claims. Basically, under this scenario, any employment agreement must provide that a payment under the agreement, which is conditioned upon the employee signing a release, cannot be made later than 90 days after the separation of service of the employee and the date when the payment is made must be at the discretion of the employer and not the employee. All employment agreements should be reviewed to determine if they comply with this rule.

Individual Retirement Accounts

1. In 2010, Anyone Can Convert from a Traditional Individual Retirement Account to a Roth IRA.

Effective January 1, 2010 taxpayers with a traditional Individual Retirement Account ("IRA") can convert their traditional IRS to a Roth IRA regardless of their modified adjusted gross income or income filing status. There are advantages and disadvantages to converting from a traditional IRA to a Roth IRA. Anyone who is thinking about making this change should investigate the positives and negatives before making the change, as well as seek financial and legal advice.

2. There are No Spousal Rights in an Individual Retirement Account.

On January 22, 2010, the United States Court of Appeals for the Ninth Circuit found that there were no automatic surviving spouse rights under the Employee Retirement Income Security Act of 1994, as amended ("ERISA"), or the Code in the Individual Retirement Account ("IRA") that the husband of Katherine Chandler, Wayne Wilson, had established prior to his death. Mr. Wilson had been employed by Siemens/GTE and after terminating his employment with Siemens/GTE, took a lump sum distribution of his 401(k) account from Siemens/GTE Plan and transferred the funds into a Smith Barney IRA. Later, Mr. Wilson transferred about half the funds from the Smith Barney IRA to an IRA with Charles Schwab. Although Mr. Wilson was married, he advised Charles Schwab that he was divorced and named his four adult children from his prior marriage as his primary beneficiaries. The Court found that an IRA, established in the manner that the Schwab IRA was set up, was not a qualified plan under Code Section 401(a) and therefore the surviving spouse provisions of the Code and ERISA did not apply to the Schwab IRA.

Compliance Matters

1. New Form 5500 (Annual Report) Rules for the 2009 Plan Year.

Under rules and revisions to Form 5500 (Annual Report form), which were issued in 2007 by the DOL but became effective for the 2009 plan year, the preparation by employers of Form 5500 likely will be much more difficult. The Form 5500 for the 2009 plan year, with a calendar year as the plan year, is due by the end of the seventh month after the end of the plan year (July 31) unless the plan requests an extension. Employers now will be required to list on the Schedule C to the Form 5500 service providers who received $5,000 or more of direct or indirect compensation from the plan. Since it will take considerable effort to determine exactly what constitutes indirect compensation, we recommend that employers start the process of preparing 5500 forms much earlier than they have in the past.

2. IRS Audit Initiative

The IRS is about to commence employment tax audits. The audits will be concentrated in the following four areas:

- The classification of workers as employees or independent contractors;
- The reasonableness of executive compensation;
- The tax treatment and reporting of fringe benefits as tax-free or as taxable compensation; and
- The tax treatment and reporting of employee reimbursements.

In view of this initiative, employers should consider undertaking themselves or with the assistance of an outside vendor, a self-audit of their human resources and employee benefits departments so as to spot any problems and correct them before the IRS arrives on their door step.

3. Summary Plan Description Language Must Be Clear.

The United States Supreme Court has let stand a decision by the U.S. District Court for the Eastern District of Pennsylvania which was affirmed by the 3rd Circuit of Appeals that Unisys Corp. was barred from increasing the cost retirees must pay for health care coverage and eventually shifting the entire cost to the retirees because the language giving Unisys the right to terminate or modify benefits was not clear in the retiree health plan summary plan description ("SPD"). This decision points out that it is critical that SPDs be written carefully and be reviewed by legal counsel before being distributed to participants. Even though there might be language in the SPD stating that the plan document governs, many courts have held that the SPD language will govern. ■

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Upcoming CLE programs

To register, go to www.isba.org/cle or call the ISBA registrar at 800-252-8908 or 217-525-1760.

June

Friday, 6/18/10– Quincy, Stoney Creek Inn—Legal Writing: Improving What You Do Every Day. Presented by the Illinois State Bar Association. 8:30-12:45.

Monday, 6/21/10- Webinar—Advanced Legal Research on Fastcase. Presented by the Illinois State Bar Association. *An exclusive member benefit provided by ISBA and ISBA Mutual. Register at <https://www1.gotomeeting.com/register/863461769>. 12-1.

Tuesday, 6/22/10- Teleseminar—Buying and Selling Distressed Real Estate, Part 1

Tuesday, 6/22/10- Webcast—Women in the Criminal Justice System. Presented by the ISBA Women in the Law Committee. 12-1.

Wednesday, 6/23/10- Teleseminar—Buying and Selling Distressed Real Estate, Part 2.

Wednesday, 6/23/10- Teleseminar—Health Care Reform 2010- How it Will Impact Employers, Part 2.

Thursday, 6/24/10- Friday 6/25/10- St. Louis, Hyatt Regency St. Louis at the Arch—CLE Fest Classic St. Louis- 2010. Presented by the Illinois State Bar Association. 11:00-4:40; 8:30-4:10.

Thursday, 6/24/10- Teleseminar—Business Exit and Succession Planning for closely Held Businesses. 12-1.

Tuesday, 6/29/10– Springfield, INB Conference Center, 431 S. 4th St—Legal Writing: Improving What You Do Every Day. Presented by the Illinois State Bar Association. 8:30-12:45.

Tuesday, 6/29/10- Teleseminar—Negligent Hiring. 12-1. ■

You are invited to join a new e-mail discussion group just for our section!

We're excited to offer this great new benefit that empowers you to pose questions to, and share information with, fellow Corporate Law Departments Section members from around the state.

This is a pilot program for a handful of sections only. (That also means we're fine-tuning our section discussion group system, so thanks in advance for your patience if we experience a few glitches).

To join the list go to <http://www.isba.org/sections/corplaw/discussionlist>.

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