



Recent Developments In Employment Law

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HIPAA PRIVACY RULE INAPPLICABLE TO EMPLOYMENT RECORDS

In a move that will be of relief to employers, the Department of Health and Human Services (“HHS”) modified its final rule regarding the Standards for Privacy of Individually Identifiable Health Information (“Privacy Rule”) to exclude employment records from regulation. But an employer may still be subject to the Privacy Rule if it acts in another capacity, such as plan administrator under an expense reimbursement plan.

In the Commentary to the amended Privacy Rule, HHS stated that it never intended the Privacy Rule to “apply to employers, nor does it apply to the employment function of covered entities, that is, when they are acting in their role as employers.” In fact, according to HHS, the statutory boundaries of HIPAA do not allow the Privacy Rule to apply to employers acting in that capacity.

Although HHS has not defined the term “employment records,” it provided the following examples of medical information which is excluded from regulation under the Privacy Rule:

“[M]edical information needed for an employer to carry out its obligations under FMLA, ADA and similar laws, as well as files or records related to occupational injury, disability insurance eligibility, sick leave requests and justifications, drug screening results, workplace medical surveillance, and fitness-for-duty tests of employees, may be part of the employment records maintained by a covered entity in its role as an employer.”

Under the amendments to the Privacy Rule, employers may continue to maintain these routine records without the restrictions of HIPAA.

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Employers, of course, still must comply with the ADA's confidentiality requirements.

HIPAA's Privacy Rule generally prohibits covered entities and their business associates from disclosing "protected health information" except as authorized by the individual or as required or permitted by the Final Privacy Rule. In general, protected health information is any information concerning an individual's health condition or treatment which identifies the individual.

Employers who self administer employee health care reimbursement accounts in which fifty or more employees participate must comply with the Privacy Rule in their role as plan administrator. They are required to create administrative firewalls to insure that protected health information learned in administering the reimbursement accounts is kept confidential and not used for any employment related decisions or in connection with any other benefit plans.

We recommend that employers who gather protected health information as plan administrators either contract that function to a professional third party administrator or prepare to comply with the Privacy Rule which takes effect on April 14, 2003.

PHOTOCOPYING A MICHIGAN DRIVER'S LICENSE BECOMES A CRIME

Many employers photocopy Michigan driver's licenses when completing I-9 forms or when verifying an employee's driving privileges for work assignments. These employers should know that a recent amendment to Michigan's Vehicle Code makes it a felony to possess two or more reproduced or duplicated Michigan driver's licenses. Possession of even one duplicated driver's license is a misdemeanor, punishable by up to one year in jail and/or a fine of up to \$2,000.

The amendment is clearly designed to prohibit forgeries and improper use of driver's licenses. Nevertheless, Secretary of State insiders say the office has taken the position that the law proscribes even employers' well-intentioned recordkeeping practices and that the language in the amendment

("reproduced" and "duplicated") applies to photocopies of licenses. Legislation to exempt legitimate business purposes from the amendment is purportedly being drafted.

Since employers are not required to photocopy the documents that they review in completing the I-9 form, this practice should be stopped. If you want to maintain proof that you have reviewed a driver's license, we recommend that you record the license number and expiration date.

SARBANES-OXLEY ACT HAS NEW PROVISIONS FOR EMPLOYERS

The Sarbanes-Oxley Act of 2002 was signed into law on July 30 in response to the financial reporting and stock manipulation scandals among some high profile public companies. Most of the Act concerns accounting oversight, disclosure requirements, and increased regulation of accounting auditing. Some of the provisions apply to all employers, while other provisions apply only to entities whose securities are registered under Section 12 or who are required to file reports under Section 15(d) of the Securities Exchange Act of 1934 ("public companies"). The Act also provides new protections for employees.

Whistleblower Protection – Public Companies. Employees of public companies are now protected against retaliation when they report fraud against shareholders. In order to have a Sarbanes-Oxley whistleblower claim, the employee must have a reasonable belief that a federal crime has been committed relating to fraud against shareholders, and the employee must report this to a federal regulatory or law enforcement agency, a member of Congress or committee of Congress, or to the employee's supervisor or to some other employee of the corporation who has authority to investigate, identify or respond to misconduct. There is also protection for employees who testify, participate in proceedings or file proceedings relating to such crimes. A whistleblower must file a claim under

the Act within 90 days of an alleged violation. Claims may be filed only with the U.S. Department of Labor, but if the Department of Labor has not resolved the claim within 180 days, the employee can sue in federal court. The civil penalties consist of reinstatement, back pay, compensatory damages and attorney fees.

Complaint Procedure – Public Companies.

The Act requires corporate audit committees to have procedures allowing employees to confidentially and anonymously submit concerns to the audit committee regarding “questionable accounting or auditing matters.” (Section 301).

Protection for Informants – All Employers.

The Act makes it a federal felony to retaliate against a person for providing truthful information to a law enforcement officer about the possible commission of a federal offense. Retaliation under the Act is a broad term and it includes interfering with a person’s employment or livelihood. Penalties are fines and/or imprisonment for not more than 10 years. (Section 1107).

Shredding or Altering Documents – All Employers. A person who knowingly alters, destroys or falsifies any record, document or tangible object in order to impede or influence any federal investigation can be both fined and imprisoned for up to 20 years. (Section 802). This obstruction of justice provision is not limited to accounting or auditing issues, but applies to any federal investigation, such as investigations concerning employment discrimination, wage and hour, OSHA, etc.

Increased ERISA Penalties – All Employers.

The penalties for criminal violations of ERISA have been increased from one to ten years and the monetary fines have also been substantially increased. (Section 904).

Summary. The criminalization of some types of retaliation, the expansion of criminal penalties for destruction or alteration of documents to impede a federal investigation and the increased ERISA penalties all emphasize the need for all

employers to protect the integrity of the organization’s records and to prevent retaliatory actions against employees who complain to law enforcement agencies or who make reports concerning shareholder fraud.

**SMALL EMPLOYER PENSION PLAN
DESIGN AFTER EGTRRA
“Piggy-back” Plans Are Obsolete**

The Economic Growth and Tax Relief Reconciliation Act of 2001 changed the optimal design of pension plans for small employers. Before EGTRRA small employers which desired the most flexibility while preserving the ability to make the maximum permissible contributions were best served by adopting two plans, a money purchase pension plan requiring a contribution of 10% of participants’ compensation and a profit sharing plan which by law permitted discretionary contributions up to 15% of participants’ compensation. The combination of plans permitted the maximum deductible total contribution of 25% of compensation while committing the employer to only a 10% contribution, leaving the 15% balance to the employer’s discretion.

EGTRRA made a major change to this landscape by increasing the permissible deductible contribution to profit sharing plans to 25% of compensation. Thus for 2001 and thereafter the money purchase pension plan has become superfluous. A profit sharing plan alone provides the greatest flexibility while permitting the maximum deductible contribution. As a result, many employers are eliminating their money purchase pension plans, usually by merging them with their existing profit sharing plans. A plan merger in which the pension plan accounts are merely moved intact to the profit sharing plan may be accomplished without IRS approval and is merely reported on the plans’ annual reports.

Care must be taken in communicating the elimination of a pension plan to employees. Tax law and ERISA require that the plan participants be prenotified of the elimination of future contributions to the pension plan, and employees

may negatively perceive the shift from mandatory pension contributions to discretionary pension contributions. Generally small employers have found ways to reassure their employees while eliminating the administrative costs of maintaining two plans.

401(k) Plans for Owners. Employers which employ only their owners had no reason to adopt 401(k) plans before EGTRRA because the owners controlled contributions to their plans anyway, and there was no advantage to permitting employee discretionary contributions. EGTRRA made an important change by disregarding employee 401(k) contributions when applying the employer deduction limit of 25% of compensation. Now an owner may make a deductible company contribution of up to 25% of compensation *plus* a 401(k) contribution of up to \$11,000 for 2002, subject only to the “§415” individual participant limit of the lesser of \$40,000 or 100% of compensation which governs total additions to a participant’s account. Generally, the new 401(k) advantage applies to owners whose compensation is less than \$160,000, at which level the maximum “§415” contribution of \$40,000 can be made within the 25% employer deduction limit. However, owners who are age 50 and over may want to adopt a 401(k) plan simply to make “catch-up” contributions of an additional \$1,000 in 2002 (increasing to \$5,000 by 2006) which count against neither the “§415” limit nor the 25% deduction limit.

THANKS FOR MAKING OUR SECOND EXECUTIVE BRIEFING A SUCCESS

We would like to extend our thanks to those who helped make part two of Bodman, Longley & Dahling LLP’s Executive Briefing Series a success. Nearly 75 Firm clients and friends attended our seminar, which was held on Tuesday, September 17, at the Troy Marriott. We appreciate those in attendance who took the time to provide us with detailed evaluations. We review each one and consider your comments carefully when planning future seminars.

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We are distributing this RECENT DEVELOPMENTS IN EMPLOYMENT LAW to our clients and friends. This newsletter is intended to provide a concise overview of some recent legal developments which may affect employment practices. The matters discussed are intended to provide general information only and are not intended to provide legal advice. Specific action should be taken only after obtaining competent legal advice.

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