Knoxville Bar Association

THE CONSIGLIERE

WINTER 2011 Vol. 6, No. 1

"Justice is the tolerable accommodation of the conflicting interests of society." -- Judge B. Learned Hand (1872-1961)

Let us know your ideas and suggestions for *THE CONSIGLIORE:*

- Call or e-mail Connie Ditto at 637-0203 or cditto@latlaw.com, Nick McCall at 632-4161 or jhmccall@tva.gov, or Marsha Wilson at 522-6522 or mwilson@knoxbar.org.
- Submit an article for consideration.
- Give us your feedback on this newsletter.
- Tell us about CLE topics or networking events you would like the Section to sponsor.

FROM THE CO-CHAIRS

Hello, Friends! I hope you all have had a good start to the New Year. For my Co-Chair, Marcia Kilby, and I, it is time to retool and plan for a new year for the Corporate Counsel Section.

This year, we will rely on some seasoned veterans as well as new blood for our meetings and programs. Our stalwart newsletter publisher, Nick McCall, is once again spearheading its publication and working with his co-editor, Connie Ditto. Fresh from his move to corporate counsel for B&W Y-12, Chuck Young has agreed to serve as the CLE committee chair. Also, Ned Morgan of Voices Heard Media has agreed to take on the social/membership position. We are all excited about what lies ahead.

I'd like to remind everyone about our Quarterly Meetings for 2011, particularly that they are not only fun, but rewarding. We are currently planning the dates and venues, which appear on the calendar section of this issue. Please go ahead and put these dates on the calendar. Each time the group meets, I am reminded why I remain faithful to the membership. The Section is comprised of individuals uniquely situated in prominent companies from Knoxville and the surrounding area. The stories are interesting and the energy is good. I look forward to four more this year, two of which we plan to have speakers of interest to our unique membership.

I also want to mention our annual CLE, which is our flagstone event. I'm pleased to say that it attracted more attendees in 2010 than ever before. The topics for 2011 are yet to be determined, but the volatile economic and political climate should provide ample areas of interest.

Let me close by saying this: WE WOULD LIKE TO HEAR FROM YOU! The Corporate Counsel Section Officers routinely scratch our heads trying to figure out what venues and speakers will attract the most members. If a particular topic, locale, or date/time would entice you to become involved with the group, please contact any of the board or core members.

Thank you and have a great quarter!--*David W. Headrick*

UPCOMING SECTION EVENTS

Your KBA Corporate Counsel Section has set its quarterly meeting dates for 2011. The quarterly meetings usually serve one of two purposes. Sometimes, our meetings are more formal, with a speaker(s) addressing topics relevant to most corporate counsel. But, because the offices of corporate counsel are spread throughout the greater Knoxville area and beyond, at other times the quarterly meetings are simply social gatherings which bring together members and guests in an informal setting.

Upcoming Section Meetings and Schedule for 2010

AND

The KBA's Law Practice Expo

Thursday, February 24, 2011, 5:30 to 7:00 at Dead End BBQ, 3621 Sutherland Avenue (across from UT Golf Range Apartments), phone: 212-5655, ***featuring in the In-House Counsel Toolbox Series:*** **What You Need to Know About Dealing with Intellectual Property Issues**

Speaker: Robert O. Fox, Luedeka, Neely & Graham, P.C.

Intellectual property topics of interest to corporate counsel and other practitioners will include:

- Importance of trademark registrations to protect your company;
- Difference between patent infringement and patentability;
- The importance of early registration of copyright;
- Avoiding copyright pitfalls by having up-front written agreements with non-employees hired to develop materials for the corporation.

The CLE program will be held from 6:00 – 7:00 p.m. and the program has been approved for 1 hour of General CLE credit.

Register now at:
https://www.knoxbar.org/index.php?option=com_content&view=article&id=8&Itemid=5&form=viewproduct&pID=200#lbCenter

Thursday, May 26, 2011: *Location to be determined*

Thursday, September 8, 2011: *Location to be determined*

Thursday, November 17, 2011: *Location to be determined*

If you have any specific questions about our Section's meetings, feel free to contact Membership/Social Committee Chair Ned Morgan at 403-7489 or at nmorgan@voicesheardmedia.com. For more information in general about the Section, please contact co-chairs Marcia Kilby at 362-1391 or David Headrick at 531-6440.

THE KBA'S LAW PRACTICE TODAY EXPO RETURNS ON APRIL 8

Members of the Corporate Counsel Section are encouraged to mark your calendar and plan to attend the Law Practice Today Expo on April 8, 2011. There will be a choice of thirteen CLE programs offered in three different tracks: Competition: Running Ahead of the Pack, Survival Guide for the Economy, and Technology Best Practices. The Expo features national speakers and CLE programming on the Future of the Legal Profession and a Corporate Counsel Roundtable. The Expo will provide members with an opportunity to get five (5) hours of CLE credit for the low price of $120.

The fee includes the judicial roundtable luncheon with featured speaker bestselling author Clay Travis (*On Rocky Top: A Front-Row Seat to the End of an Era*) and the opportunity to view products and services of interest to East Tennessee attorneys. Join us on April 8th.

TAX TIDBIT

An Overview of the Business Provisions in the 2010 Tax Relief Act

By Bradley C. Sagraves, Woolf, McClane, Bright, Allen & Carpenter, PLLC

The Tax Relief, Unemployment Insurance Reauthorization, and Job Creation Act of 2010 (the "Act"), commonly known as the 2010 Tax Relief Act, and less commonly known as "The Act That Saved the Economy from the Apocalypse of Expiring Tax Provisions," was passed on December 17, 2010, just in time to extend many expiring tax provisions. The Act affected everything from individual income tax rates and the estate and gift tax exemptions to environmental remediation costs and the Work Opportunity Tax Credit. This article will summarize some of the key provisions that apply to businesses this year.

One of the main provisions affecting businesses is the increased first-year bonus depreciation under Section 168(k) of the Internal Revenue Code ("Code"). Under the Act, the bonus first-year depreciation deduction is increased from 50% to 100% of the cost of the property placed in service after September 8, 2010 and before January 1, 2012. As a result, a business can immediately write-off the entire cost of eligible property that is placed in service and used completely for business purposes. The Act also increases the cap for the first-year depreciation deduction for passenger automobiles from $3,160 per vehicle to a maximum of $11,600 per vehicle for new vehicles placed in service before December 31, 2012. "Heavy SUVs" are not subject to $11,600 limit for the first-year bonus depreciation and are eligible for the entire 100% bonus depreciation if they are placed in service after September 8, 2010 and before January 1, 2012.

The Act extends the Work Opportunity Tax Credit (WOTC) through the remainder of 2011. The WOTC is a credit available to employers if they hire certain targeted individuals for employment. Some of the targeted individuals include veterans, ex-felons, a qualified SSI recipient, a long-term family assistance recipient or someone that is referred from a vocational rehabilitation program. If the new hire qualifies as a targeted individual under Code § 51(d), the employer is eligible for a credit against its income tax of up to $6,000 per employee. The credit increases up to $12,000 for a qualified veteran and is reduced to $3,000 for qualified summer youth employees. The WOTC generally only applies for the first year that the employee works for the company. If the employee is a long-term family assistance recipient, the WOTC applies to both first- and second-year wages and has a maximum credit of $10,000 per employee.

The Act also reinstates and extends the Differential Wage Payment Credit previously available to employers. This credit is available to employers that employ military personnel and pay differential wages while the employees are on active duty. The employer can claim a credit equal to 20% of up to $20,000 of differential pay made to an employee during the year. The employer must be a "small business employer," which is defined as (1) a company with less than 50 employees on average during the year (2) that has a written plan to provide eligible differential wage payments to each of its qualified employees. This credit is effective for 2010 and 2011.

TAX TIDBIT:

Overview Business Provisions in the 2010 Tax Relief Act

The Act provides enhanced charitable deductions for corporations that make specific gifts to charities. Section 741 of the Act provides an enhanced charitable deduction for book inventory contributed to public schools if certain donee certification requirements are met. Section 742 of the Act allows an enhanced charitable contribution deduction for certain computer technology or equipment (such as software, computer or peripheral equipment) donated to schools or libraries to be used for educational purposes. Section 745 provides an enhanced charitable deduction for food inventory donated to charities. The enhanced deduction for each deduction described above is equal to the lesser of (1) the basis of the property plus half of the property's appreciation, or (2) twice the corporation's basis in the property. Each of these enhanced charitable deductions expires on December 31, 2011.

Overall, the Act is a mix of provisions meant to continue expiring tax cuts and stimulate the economy through business-friendly tax provisions. Unless these provisions are extended again, the majority of these business provisions are slated to expire on December 31, 2011.

OUR FEATURE ARTICLES

CRIMINAL LAW: WHEN THE ALPHABET AGENCIES COME A KNOCKIN' – WEATHERING THE STORM OF A CRIMINAL INVESTIGATION

Tips for the Corporate Lawyer in the Initial Stages of a Criminal Investigation

By David M. Eldridge & Troy S. Weston, Eldridge & Blakney, P.C.

Chaos. In the most simplistic terms a criminal investigation into a corporation's activities creates chaos on all fronts. In-house counsel suddenly becomes inundated with questions – many of which do not have neat or immediate answers. Non-legal employees are suddenly subject to increased scrutiny, extreme internal stress, and anxiety. All the while, the everyday activities and demands on the corporate entity continue on, seemingly oblivious to the on-going investigation.

The lawyers are supposed to come armed with sage wisdom and a legal panacea. Though, it is at this very time that counsel is likely to feel like the beleaguered general ready to waive the white flag of surrender. Despite the chaos and confusion that follows the revelation of an on-going criminal investigation, it is precisely at that time that counsel – both in-house and outside counsel – need to be precisely focused on their responsibilities, ensuring quick compliance and preparation, anticipating what the next steps, both best and worst case, will be, and how to appropriately address future developments. This article will address the first and immediate steps that should be followed upon learning about an on-going criminal investigation.

FEATURE ARTICLES:

Weathering the Storm of an Agency's Criminal Investigation of a Business Entity

As an initial matter, corporate entities can be held criminally liable for the actions of individual agents and employees of the corporation. Generally, a corporation will be held liable for the criminal acts of an individual agent or employee when that agent's actions are within the course and scope of their employment, and when the allegedly criminal actions are for the benefit of the corporate entity.[1] Moreover, a corporation cannot escape liability by merely asserting that its agents and employees were only authorized to engage in lawful activities if the employee or agent possessed, at minimum, the apparent authority to act on behalf of the corporation.[2] Thus, upon learning of an on-going criminal investigation, it is of paramount importance that an "all-hands on deck" mentality develops between corporate management, in-house counsel, and outside counsel.

Investigations are often commenced without any notification to the entity under investigation. Often, the first time that the entity is aware of an on-going investigation is upon the issuance of a subpoena, information that employees are being interviewed by law enforcement outside the workplace, or the most invasive step – the execution of a search warrant. By the time that the entity learns of an investigation, it is often months or years after the investigation was initially begun. In order for the corporation to successfully get up to speed with the status of the investigation and determine what corrective measures may be necessary, the corporate entity must undertake a comprehensive internal investigation to determine potential liability and possible criminal exposure. The following checklist will outline the necessary immediate steps that the corporate entity should endeavor to take upon learning of an active criminal investigation:

- The corporation should put together a team to respond to the crisis. The team should consist of a response coordinator for each facility it operates, in-house counsel, and managers of all relevant work areas/departments.
- If a search warrant is executed, the response coordinator must know to monitor the search and to immediately notify the corporation's counsel (the response coordinator should be aware that law enforcement agents will secure the area to be searched and restrict employees access to their normal workplace, as well as interview as many of the employees as they can at that time). A copy of the search warrant should be obtained by the response coordinator, as well as the accompanying affidavit,[3] if available.
- The response coordinator should inform law enforcement and employees that any questions that arise during the search should be directed to the response coordinator.
- Law enforcement should be informed that privileged materials may be present during the search, and that the corporation does not, in any way, consent to the search of privileged materials.
- The response coordinator should accompany the agents at all times during their search, carefully recording, including possibly videotaping, the conduct, statements, and questions of law enforcement. **Access to areas not specifically detailed in the search warrant may be denied and it should be noted whether the agents confine their search to the areas described in the warrant.**
- Relevant and basic rights should be explained to corporate employees.
- Procedures should be established to protect privileged information from being disclosed. This may include the creation of a "privilege log"[4] by the corporation's counsel, or agents thereof, of all relevant documents and materials, including subject matter, date, author, and any other such information

that will allow members of the response team to identify and quarantine privileged materials.

- The response team should begin planning for media reaction following the revelation of a criminal investigation. The response team should immediately plan what, if any, response will be made in light of media inquiries.

If a search warrant is executed, the response coordinator and other agents of the corporation must remember that, while they cannot interfere with the execution of the search warrant, they are entitled to monitor the search in its totality. At the conclusion of the search, the response coordinator and counsel should request a debriefing from law enforcement.

While corporate officers and members of the response team must first understand the nature of the investigation and prepare an effective way to organize and respond to inquiries; simultaneously, it is critical that counsel function to disseminate information to the corporation employees. During the course of the investigation, it is the employees of the corporation that will be responsible for the maintenance of the day-to-day operations of the company. Counsel must provide sufficient information to the employees to ease their natural concerns, and to ensure appropriate conduct in light of the on-going investigation.

Employees need to know as immediately as practicable that an investigation in on-going and that the corporation is seeking to (1) conduct a thorough internal investigation, and (2) ensure compliance with all applicable state and federal laws. Additionally, employees should be made aware of the following rights:

- Law enforcement/investigators have the right to contact the employee to request an interview.
- Employees have the right to speak with law enforcement. The employee has the right to request a time and place for an interview that is convenient to the employee.
- The employee also has the right to decline to be interviewed.
- The employee has the right to consult with legal counsel prior to deciding whether to submit to an interview. (It is generally recommended that the corporation pay for the costs associated with such a consultation, and recommend an attorney for consultation, though the employee has the right to obtain their own private counsel.)
- If the employee consents to be interviewed, the employee has the right to have an attorney present, to consult with an attorney prior to the interview, and to terminate the interview at any time.
- Any statements made to law enforcement may constitute legal admissions which may later be used as evidence against the employee, the corporation, or both in subsequent legal proceedings.
- Employees should tell the truth, and should only state matters that they know to be a fact. It must be stressed that a false statement to law enforcement could very well constitute a federal or state criminal offense.[5]

In addition to apprising employees of their personal rights, counsel should also clarify necessary safeguards that should be implemented in the corporation's employees' daily responsibilities. This list will largely be dependent on the specific nature of the corporation's business and the subject matter of the investigation; however, one necessary instruction involves the retention of all relevant corporate documents. In the wake of Congress' passage of the Sarbanes-Oxley Act and subsequent amendments in the early part of the last

decade, document retention is of vital importance during the course of a criminal investigation, as a corporation's destruction of relevant documents may result in the corporation being charged with obstruction of justice.[6] Congress' codification of the offense of obstruction of justice is such that the penalties associated with a violation thereof may likely be more severe than penalties associated with the subject matter of the government's initial investigation.

The response team should immediately identify and retain an investigator to assist with the internal investigation. This investigator should be identified to corporate officers and employees, and must report directly to counsel for the corporation in order for the Attorney Work Product doctrine to apply and protect the fruits of the investigation from compelled disclosure.

With the investigator identified and retained, counsel for the corporation is ready to commence the fact-finding of the internal investigation. Communications between employees and counsel, or agents thereof (i.e., an investigator), are protected under the Attorney-Client Privilege.[7] With this protection in mind, corporate counsel and agents thereof should quickly endeavor to interview all employees with relevant knowledge and information.

At the outset of these interviews, employees need to be advised that their communications with counsel are protected the Attorney-Client Privilege and should be kept confidential, that the lawyer conducting the interview represents the company and not them individually, and that it is the company that controls that privilege and will decide whether and under what circumstances to disclose what the employee tells them. These admonitions are commonly known as the "Upjohn" warnings.

After obtaining relevant information from corporate employees, counsel will then be in a position to develop a strategy to respond to the on-going criminal investigation.

Investigations often present themselves to the corporate target with a rush of activity comparable to the flood gates of a dam being thrown open. Chaos ensues, and everyone looks to the attorneys to set the tone for the response and internal investigation. While it may seem overwhelming to helm a corporation's next steps following the revelation of a criminal investigation, as in-house or outside counsel, you are uniquely situated to provide the reassurance and guidance necessary to successfully weather the storm that is a criminal investigation.

[1] *U.S. v. Carter*, 311 F.2d 934 (6th Cir. 1963); *Continental Baking Co. v. U.S.*, 281 F.2d 137 (6th Cir. 1960).

[2] *See Continental Baking Co.* at 150-151.

[3] If a copy of the affidavit is available, counsel should immediately obtain copies of any referenced state of federal statutes therein.

[4] All materials prepared in response to a criminal investigation by members of the response team, including counsel and agents thereof, should be clearly marked on each page as "Attorney Work Product."

[5] *See, e.g.* 18 U.S.C. § 1001.

[6] 18 U.S.C. § 1519.

[7] *See Upjohn Company v. U.S.*, 449 U.S. 383 (1981)

Health Care Law: Stark Self-Disclosure Protocol

By Patti T. Cotten and Connie S. Ditto, London & Amburn, P.C.

On September 23, 2010, the Centers for Medicare and Medicaid (CMS) published its voluntary Self-Referral Disclosure Protocol (SRDP). The SRDP permits providers to self-disclose Stark-only violations, and participation in the SRDP may result in extension of the time periods required to report overpayments and/or reduction in the amounts owed. The Stark Law (Section 1877 of the Social Security Act) prohibits providers from referring a patient for designated health services (DHS) to an entity with which the provider (or an immediate family member of the provider) has a financial relationship, unless an exception applies. Stark violations can be simple "procedural" violations (such as failing to have a written contract signed by both parties) or more substantive violations (e.g. paying above fair market value for services of a referring physician). The penalty for Stark violations can be severe—all payments made by Medicare during the time the provider was in violation of the statute (not just those stemming from the prohibited relationship) may have to be repaid, and civil monetary penalties can be assessed.

Prior to March 24, 2009, providers were permitted to self-disclose actual or potential violations of the Stark Law or the Anti-Kickback Statute (AKS) to the Office of Inspector General (OIG). In an Open Letter to Health Care Providers on March 24, 2009, the OIG announced that it would no longer accept self-disclosure of Stark-only violations. This left providers with no recourse to report a violation of the strict liability Stark Law unless there was also a "colorable" violation of the AKS (which required intent to obtain prohibited remuneration).

Under Section 6402 of the Patient Protection and Affordable Care Act (while also known as ACA, hereinafter PPACA), any reimbursement the provider receives from Medicare while in violation of Stark may constitute an overpayment. Further, providers are required to return overpayments within (1) 60 days after the date the overpayment is "identified," or (2) the due of any corresponding cost report, if applicable. Unfortunately, neither PPACA nor the CMS protocol defined when the overpayment is "identified."

While utilizing the SRDP may not alleviate the provider's responsibility to return the overpayment (and in fact providers are encouraged to set aside appropriate amounts in an interest-bearing escrow account), participation in the SRDP suspends the 60-day time limit to repay Medicare. The time limit is tolled until: (1) a settlement agreement is entered, (2) the provider withdraws from the SRDP, or (3) CMS removes the provider from the SRDP.

More importantly, providers using the SRDP may obtain a settlement which compromises its overpayment refund obligation. Under the SRDP, CMS will make an "individual determination" of the facts and circumstances of each matter and may, in its discretion, reduce the amount owed to the government as a result of the disclosed Stark violation. Factors CMS will consider to reduce the amounts owed include:

- The nature and extent of the violation;

- The timeliness of the self-disclosure;
- The provider's cooperation in providing additional information;
- The litigation risk, and
- The financial position of the provider.

Corporate counsel need to be aware that while the SRDP provides a process for providers to report a Stark-only violation, the outcome of the self-disclosure is uncertain. Although CMS may reduce the amount owed, the Agency retains the right to refer the self-disclosed arrangement for further investigation by the OIG or other federal agencies for prosecution. Importantly, the SRDP is not a replacement for the advisory opinion process, and CMS has clearly stated that the SRDP "cannot be used to obtain a CMS determination as to whether an actual or potential violation of the physician self-referral law occurred." The Agency has also made clear that it is not bound by the provider's conclusions and "is not obligated to resolve self-disclosures in any particular manner." Further, there are no appeal rights if the matter is resolved with a settlement agreement. Thus, in addition to being timely, self-disclosure should be only be done after careful consideration of the surrounding circumstances and potential ramifications.

Once the decision to self-disclose has been made, the following information must be obtained and included in the self-disclosure:

- Name, address, NPI number, tax ID number, and other identifying information (including an organizational chart, if appropriate);
- Description of the arrangement, including the names of entities and/or individuals involved;
- A complete legal analysis of the Stark violation, including an analysis of any exception that may apply and the reason that the referral occurred;
- The circumstances that led to the discovery of the violation as well as measures taken to address the issue and prevent its re-occurrence;
- A description of the provider's previous violations of criminal or civil law, as well as any pending or former regulatory enforcement actions;
- An explanation of the provider's compliance plan at the time of the violation as well as subsequent measures taken to restructure the illegal arrangement;
- Whether the provider has provided notice of the situation to other Government agencies (such as the Securities and Exchange Commission or the Internal Revenue Service);
- Whether the provider is aware of any other investigations by government entities or contractors, and
- A financial analysis, including an itemized amount of the overpayment, the methodology used to determine that amount, and a summary of the audits completed and documents relied upon to complete the financial analysis.

The original and one copy of the self-disclosure must be submitted to CMS and another copy must be submitted electronically. Fax submissions will not be accepted. CMS will send a response email to verify that the electronic submission has been received. Once the Agency has reviewed the self-disclosure, it will send a letter to the disclosing party advising whether it will accept or reject the disclosure.

At this point in time, the overall impact of the SRDP on providers is uncertain. Prior to self-disclosure, it must be determined that a violation of Stark has occurred, as well as when the overpayment was "identified". Once those determinations have been made, the potential benefits of reducing the

amounts owed and suspending the deadline to return an overpayment must be weighed against the risks, including the potential of referral for prosecution. Section 6409 of PPACA requires the Secretary to submit a report to Congress by February 2012 detailing the number of self-disclosures; the amounts collected under the SRDP, the types of violations disclosed, and "such other information as may be necessary to evaluate the impact of this section." Hopefully, providers will not have to wait until then to find out the inclinations of CMS when reviewing self-disclosures.

RANDOM NOTES

Compiled and Collected from Various Sources and Reports

Privacy and E-Discovery, Meet Facebook and My Space

As anyone on Facebook, Twitter and My Space needs to know, although social networking sites can let their users restrict access to the information they post, those security settings can hardly be regarded as foolproof. Increasingly, many discovery battles are arising over postings found on social networking sites. In one New York case in 2010, a personal-injury plaintiff sought to keep her social networking information out of discovery on the grounds that any such disclosures would violate her Fourth Amendment right to privacy. Would she prevail?

Short answer: Not so fast there, plaintiff.... Stating that "privacy is no longer grounded in reasonable expectations, but rather in some theoretical protocol better known as wishful thinking" and that sharing personal information with others "is the very nature and purpose" of social networking sites, the court ordered the plaintiff to provide necessary authorization for access.

After holding that the information being sought was relevant, the Supreme Court, Suffolk County, New York, in *Romano v. Steelcase, Inc.*, 907 NY.S. 2d 650 (9/21/10) rejected her Fourth Amendment-based assertion of privacy. (Unlike some states, New York does not have a state common-law right to privacy.) To establish a right to privacy under the Fourth Amendment, the individual seeking the privacy protection must have exhibited an expectation of privacy and society must be prepared to accept that expectation as reasonable. The court rejected the plaintiff's expectation of privacy, reasoning essentially that she consented to loss of privacy the moment that she created her social networking accounts--the sharing of personal information being assessed by the court as being the very *raison d'etre* of MySpace and Facebook. And, the loss of the expectation of privacy was apparently not altered by the fact that the plaintiff used her accounts' enhanced privacy settings to restrict what her "non-Facebook friends" could see.

The court acknowledged--although not in any real detail--that it considered the Stored Communication Act ("SCA"), 18 U.S.C. §2701, and its limitations on disclosure of information from social network providers like Facebook and My Space. It should be duly noted, however, that several other courts have rejected efforts to subpoena information directly from social networking sites by holding that the SCA precludes such disclosure. One apparent distinction of the *Romano* case from the SCA-based cases is that the New York court

RANDOM NOTES FROM VARIOUS SOURCES

Privacy v. Discovery in the Age of Facebook: Who Wins?

ordered the plaintiff to provide consent and authorization for the release of such information to the defendant--which would allow the defendants to obtain access to all of the plaintiff's records, including any deleted or stored information--and did not directly order Facebook or My Space to provide that information.

Bottom line: All social networking users--including businesses--need to know that any and all information they post on Facebook, My Space and the like may be subject to disclosure in any litigation, and privacy concerns may or may not carry the day.

And, users must not expect that setting "high-level" security restrictions will carry the day on their discovery challenges against requested disclosures.

Labor and Employment Law: NLRB Issues Proposed Rulemaking to Require Employer Posting of NLRA Rights

Labor Law: NLRB Proposes Rule to Require Employer Posting of Employees' NLRA Rights

The National Labor Relations Board (the "NLRB") took a significant step in December 2010 by announcing a new proposed rule that would require employers to notify employees of their rights under the National Labor Relations Act (the "NLRA"). The NLRB has stated its concern that many employees are unaware of their rights under the NLRA. According to the NLRB, the notice is intended to increase employees' knowledge of the law and promote statutory compliance by employers and unions.

Among other matters covered in the proposed rule, employers would have to let employees know that they have the right to "take action with one or more co-employees to improve your working conditions by, among other means, raising work-related complaints directly with your employer or with a government agency, and seeking help from the union," as well as engaging in strikes and picketing. Covered businesses would be required to place a government-furnished poster -- "Employee Rights under the National Labor Relations Act" -- in prominent places in their work site and electronically, if that is the usual means of communicating with employees.

In essence, failure to post this new sign may be deemed to be a new unfair labor practice (a "ULP"). Under the proposed rule, which would apply to all employers governed by the NLRA, noncompliance with the posting requirements would be considered a ULP; could cause the statute of limitations for filing ULP charges against employers that fail to post the notice to be postponed; and could be considered "evidence of unlawful motive" in ULP cases.

The Notice of Proposed Rulemaking provides for a 60-day comment period, which began December 22, 2010.

Read more at:
http://www.nlrb.gov/About_Us/news_room/Notice_for_Rulemaking/rulefactsheet7.pdf

Benefit Plans and ERISA: Proposal to Expand ERISA Fiduciaries' Potential Exposure

On October 21, 2010, the Department of Labor ("DOL") proposed regulations that would, if adopted, significantly expand the circumstances in which a person will be treated as a fiduciary under the Employee Retirement Income

Employee Benefits and ERISA: Proposed Rule to Affect Fiduciaries Under ERISA

Security Act of 1974 ("ERISA") by reason of providing investment advice for a fee to an employee benefit plan. A fiduciary under ERISA is subject to strict prudential duties and conflict-of-interest standards; it is the DOL's intent to enhance its "ability to redress service provider abuses that currently exist in the market, such as undisclosed fees, misrepresentations of compensation arrangements, and biased appraisals of the value of employer securities and other plan investments."

Because many financial institutions have regular interactions with employee benefit plans and their fiduciaries, the proposed regulations are widely relevant for many in the financial services industry. Essentially, if promulgated "as-is" by DOL, these draft regulations would:

- Expand the definition of "investment advice" to include the rendering of appraisals and fair value opinions and making recommendations with respect to the "management" of securities or other property (in addition to the current advisory activities which include advice concerning the value of securities and recommendations regarding the advisability of buying, holding or selling securities and property, but currently exclude valuations of closely held stock);
- Impose ERISA fiduciary standards when investment advice is made, even on a one-time basis, pursuant to an agreement, arrangement or understanding that (1) the plan "may consider" the advice in making investments and (2) the advice will be individualized (thus eliminating the current law requirement that the investment advice be provided "regularly," pursuant to a mutual understanding that the advice will be a "primary basis" for making investment decisions); and
- Define "fees" to include fees received by affiliates and fees received in connection with transactions to which the advice relates, such as brokerage fees, commissions and so forth.

The proposed regulations contain exceptions for (1) persons acting as adverse counterparties (or agents thereto) in purchase and sale transactions, where the plan fiduciary knows or should know the counterparty is not undertaking to provide impartial advice (this exception does not apply to a person that represents or acknowledges it is acting as an ERISA fiduciary); (2) certain informational and other materials provided by 401(k) providers, without regard to the individual needs of the plan; and (3) valuation reports provided in compliance with applicable fee disclosure regulations (unless the report includes assets that are illiquid and the report will serve as the basis for plan distributions).

Because of the breadth of these proposals and the consequences of becoming an ERISA fiduciary, financial institutions should carefully review interactions with employee benefit plans and their fiduciaries (e.g., hedge funds and asset managers that are ERISA fiduciaries) to identify potential areas of compliance. The comment period ended on January 20, 2011. The final regulations would become effective 180 days after publication in final form in the Federal Register. The proposed regulations are broad and far-reaching in their current form. It is likely that there will be significant outcry from the plan service provider community (and potentially the plan sponsor community, if it thinks its vendor marketplace will shrink) in response to the proposed regulations.

Read the proposed rule at:
http://webapps.dol.gov/FederalRegister/HtmlDisplay.aspx?DocId=24328&AgencyId=8&DocumentType=1

Knoxville Bar Association
505 Main Street
Suite 50
Knoxville, TN 37902

Phone:
(865) 522-6522

Fax:
(865) 523-5662

E-mail Addresses:
dheadrick@terryadamslaw.com
mkilby@deroyal.com
cditto@latlaw.com
jhmccall@tva.gov
mwilson@knoxbar.org

We're on the Web!
http://www.knoxbar.org

NEWS AND NOTES

Thanks to Our Authors!

Thanks to all those who contributed to this issue of *THE CONSIGLIERE.* A very special note of appreciation is due to our authors Brad Sagraves of Woolf, McClane, Bright, Allen & Carpenter, PLLC for his latest "Tax Tidbits" contribution on the business-related provisions of the Tax Relief Act of 2010; David Eldridge and Troy Weston of Eldridge & Blakney, P.C., for their article on criminal investigations; Patti T. Cotton and Connie Ditto of London & Amburn, P.C., for their article on the Stark Law Self Disclosure Protocol; and Mark Graham of Luedeke, Neely & Graham, P.C., for his second article in a series on unlocking the mysteries of IP law.

CONTACT INFORMATION

See the contact information on the left-hand margin of this page. Use the hyperlinks to contact our Co-Chairs, David Headrick and Marcia Kilby; the Co-Editors, Connie Ditto and Nick McCall; or the KBA's Executive Director, Marsha Wilson.

See the web site address at the bottom of the left-hand margin on this page to access the official Knoxville Bar Association web site by the hyperlink.

Don't forget our first 2011 quarterly meeting at Dead End BBQ on Thursday, February 24, 2011 at 5:30 to 7:00 p.m.--and, now with one hour of CLE credit. See you there!