Knoxville Bar Association

THE CONSIGLIERE

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Let us know your ideas and suggestions for

THE CONSIGLIERE:

- **Call or email Brittany Brent Smith at Brittany.smith@siemens-healthineers.com; Paul E. Wehmeier at 546-7000; or Marsha Watson at 522-6522 or mwatson@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

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By: Marcia Kilby, DeRoyal

On June 28, 2018, the California Legislature passed the California Consumer Privacy Act (the "Act"). The Act goes into effect on January 1, 2020, but will not be enforced until the California Attorney General officially publishes the implementing regulation. The publication deadline is July 1, 2020. Nevertheless, those of us that fall within the scope of the Act now have a matter of months to develop a compliance program.

What the Act does. The Act provides California consumers with five new privacy rights:

- to know what personal information is collected about them;
- to know if and to whom their personal information is sold/disclosed and to opt-out of its sale;
- to access their collected personal information;
- to demand that a business delete their personal information; and
- to exercise their rights under the Act free from discrimination.

The definition of personal information. The Act defines personal information as information that "identifies, relates to, describes, is capable of being associated with, or could reasonably be linked, directly or indirectly, with a particular consumer or household."

Affected companies. The Act applies to for-profit businesses that:

- collect and control the personal information of California residents;
- do business in California;
- and meet one of the following:
  - have annual gross revenues in excess of $25 million;
  - receive or disclose the personal information of 50,000 or more California residents, households or devices on an annual basis; or
  - earn 50 percent or more of its annual revenue from selling the personal information of California residents.

Comparison with GDPR. Due to similarities with Europe's General Data Protection Regulation (GDPR), the Act has been referred to as the California GDPR. While it is true that there are a number of similarities between the two regulations, there are also a number of differences. For example, the GDPR has a broader scope, requires breach notifications, and imposes restrictions on data transfers outside of specific countries. Despite the differences, if your company has already implemented a GDPR compliance program, then the company can likely use parts of that program to satisfy some of the Act's compliance requirements.

Impact of the Act. The Act does impose fines of $2,500 for unintentional violations and $7,500 for intentional violations. There are also fines ranging from $100 to $750 per incident, per consumer for data breaches. The Act also allows actions for actual damages for data breach. I see class actions as a result. In addition, it is anticipated that the Act could serve as a model for other states that are working on their own privacy regulations. Stay tuned!

In closing, the above is a small summary of the Act. There are many more requirements as well as a number of exemptions. If you think your company may be subject to the Act, please review its text here:

https://leginfo.legislature.ca.gov/faces/billTextClient.xhtml?bill_id=201720180AB375&search_keywords=Consumer+Privacy+Act+of+2018.

Marcia Kilby
Co-Chair of the KBA Corporate Counsel Section

**** See CLE Note on page 3 about a Session on the GDPR during the KBA's Law Practice Today Expo on April 12.**

UPCOMING EVENTS

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Bridging the Gap from Corporate Counsel to the Court Room

Corporate Counsel Section Spring CLE
Thursday, March 14, 2019, 5:30 p.m. to 6:30 p.m.
Featuring: **Terry Adams**, The Adams Law Firm
Location: The Adams Law Firm, 8517 Kingston Pike

Approved for 1 Hour of Dual CLE Credit

When In-House Counsel sees the need to pass the baton to outside counsel for litigation, there are a plethora of issues facing corporate counsel and litigation counsel. Perhaps there is no situation that is so fraught with ethical and pragmatic issues than this hand off. In this CLE, we will discuss issues concerning identification of the client, conflicts of interest, the independence of corporate counsel, and the dual role of corporate counsel as both the employee of, and the lawyer for, the organization in the context of litigation. We will dig deep into the Model Rules of Professional Conduct to establish how best to handle this situation.

Data Privacy – Why do you need to know about GDPR?

Law Practice Today Expo – Learn more at www.knoxbar.org/expo
Friday, April 12, 2019, 3:30 p.m. – 4:30 p.m.
Featuring: **Eliza Scott**, Woolf, McClane, Bright, Allen & Carpenter, PLLC
Location: UT Conference Center, 600 Henley Street

Approved for 1 Hour of General CLE Credit

As marketplaces become more global and our clients do business outside the U.S., they need to understand how to comply with regulations related to the storage, use, and sharing personal information. The General Data Protection Regulation (GDPR) from Europe became effective in 2018 and impacts every company doing business with persons located in the European Union. Understand the theory and basic provisions of the regulation, including key terms and effects. There will also be a review of some GDPR cases.

HEALTHCARE COMPLIANCE

HIPAA REMINDER: KEEP AN EYE ON YOUR AGREEMENTS

By: Ian Hennessey, London Amburn

I strongly suspect that, to many lawyers, HIPAA compliance provisions and business associate agreements ("BAAs") are unlikely to register much in the way of excitement. In fact, in many ways, BAAs have become more or less mundane boilerplate. It's time to think again.

In today's healthcare sector, a multitude of companies offer any number of business solutions to a medical practice or facility: billing software, marketing, electronic communication, etc. When a vendor performs certain functions or activities that involve the use or disclosure of protected health information ("PHI") for a covered entity (e.g., a medical practice or hospital), then that vendor is considered a "business associate" under HIPAA. Business associates are subject to HIPAA, and covered entities must have a written BAA with each of its business associates.[1] In addition, each BAA must include certain provisions in order to be HIPAA-compliant.[2]

While much attention is devoted to HIPAA compliance within a facility or medical practice, agreements between covered entities and business associates are very much a target for government enforcement. According to HHS Office of Civil Rights ("OCR"), in 2018 the mean financial penalty for HIPAA violations was $2,607,582.[3] Business associates, however, are just as susceptible to committing HIPAA violations as any medical practice.[4] In 2016, a business associate that provided management and IT services to nursing homes paid OCR $650,000 to settle alleged HIPAA violations.[5] Last year, another business associate paid OCR $100,000 for failure to properly store and dispose of medical records. The message from OCR is clear: failure to comply with HIPAA can cost your organization dearly.

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[1] In 2017, the Center for Children's Digestive Health paid HHS $31,000 to settle potential HIPAA violations for failing to have a written business associate agreement in place with one of its vendors: **https://www.hhs.gov/hipaa/for-professionals/compliance-enforcement/agreements/ccdh/index.html** (last visited March 5, 2019).

[2] See, e.g., 45 C.F.R. 164.504(e).

[3] Summary of 2018 HIPAA Fines and Settlements, HIPAAJournal.com (**https://www.hipaajournal.com/summary-2018-hipaa-fines-and-settlements**) (last visited March 5, 2019).

[4] See HHS Office of Civil Rights' "Wall of Shame" detailing HIPAA breaches affecting 500 individuals or more during the past 24 months: **https://ocrportal.hhs.gov/ocr/breach/breach_report.jsf** (last visited March 5, 2019).

[5] Business Associate's Failure to Safeguard Nursing Home Residents' PHI Leads to $650,000 HIPAA Settlement: **https://www.hhs.gov/hipaa/for-professionals/compliance-enforcement/agreements/catholic-health-care-services/index.html**) (last visited March 5, 2019).

HEALTHCARE COMPLIANCE CONTIUNED

Unfortunately, terms and conditions found in vendor agreements are sometimes expressly contrary to HIPAA or otherwise put one or both parties in a disadvantageous position with respect to maintaining compliance. Here are some common scenarios:

- Defined terms like "confidential information" do not properly account for HIPAA.
- The terms of the BAA contradict the terms of the underlying agreement, with no clarification that the terms of the BAA control.
- The agreement does not properly account for what happens to PHI when the agreement is terminated or a party is in breach.
- Excessive time periods for reporting a breach to a covered entity.
- Limitations of liability and/or indemnification provisions that fail to account for exposure due to non-compliance with HIPAA, including both expenses related to breach as well as potential fines.

It's boring, it's mundane, and it's boilerplate, but it's necessary to address HIPAA compliance in your organization's contracts. Failure to do so could be disastrous to your organization in terms of its patient relationships, its reputation in the community, and its bottom line.

EMPLOYMENT LAW

7TH CIRCUIT HOLDS APPLICANTS CAN'T CLAIM DISPARATE IMPACT UNDER THE ADEA.

By: J. Chadwick Hatmaker, Woolf, McClane, Bright, Aller Carpenter, PLLC

On January 23rd the US Court of Appeals for the Seventh Circuit held that applicants cannot make a claim for disparate impact age discrimination under the ADEA. Disparate impact discrimination occurs when a facially neutral policy has a disparate or disproportionate impact on a protected class of persons.

In March 2014 Dale Kleber, an attorney, applied for an in-house counsel position with CareFusion Corporation. The job description required applicants to have "3 to 7 years (no more than 7 years) of relevant legal experience". Kleber, who was age 58 when he applied, had more than seven years experience and was thus not selected for the position. CareFusion hired a 29 year old applicant who met but did not exceed the experience requirement. Kleber then sued claiming that the experience requirement created a disparate impact in violation of section 4(a)(2) of the ADEA.

In affirming the dismissal of Kleber's case the Seventh Circuit focused on the plain language of section 4(a)(2) of the ADEA. Section 4(a)(2) makes it unlawful for an employer:

> "to limit, segregate or classify his employees in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's age."

Since the relevant statutory language only protects employees the Court held that Kleber could not state a disparate impact claim. In doing so, the Seventh Circuit joined the Eleventh Circuit in holding that a disparate impact claim is not available to applicants under the ADEA. Other Courts of Appeals have held to the contrary.

While this decision is a win for employers it does not change the fact that:

1. All employment policies, selection tests, and other selection procedures and criteria must be neutral on their face;
2. These policies and selection procedures and criteria must not have a disparate or disproportionate impact on a protected class; and
3. A disparate impact theory is still available to employees under the ADEA.

Remember, an ounce of prevention is worth a pound of cure!

GOVERNMENT CONTRACTS

BASIC PRACTICE TIPS -- GOVERNMENT CONTRACT PROPOSAL DEVELOPMENT AND SOURCE SELECTION.

By: N. Harry Herrick, Harry Herrick & Associates, LLC

Introduction. There are many reasons an Agency does not select a proposal for award of a Federal government contract. The factors discussed below do not involve Agency discretion and are therefore within the control of the company submitting a proposal.

1. Solicitation Ambiguities. Most solicitations provide instructions for submitting questions regarding the solicitation, including its specifications and drawings. However, instead of submitting a timely question, many companies pad their proposed price to account for risk or contingencies associated with ambiguous specifications. Asking a timely question may potentially reduce the proposed price.

From a competition perspective, there is little strategic advantage to not clarifying a solicitation ambiguity. The GAO will not consider a protest based on alleged improprieties or errors in a solicitation that are apparent on the face of the solicitation after the closing date for receipt of initial proposals. 4 C.F.R. § 21.2(a)(1). Therefore, the offeror will likely be precluded from protesting an apparent or patent ambiguity in the solicitation after it has submitted its initial proposal. While the Agency will disclose the clarification question and answer to the other potential offerors; it will not disclose the source of the question or any other information that could potentially compromise competition.

From a contract administration perspective, there is good reason to clarify ambiguities in the solicitation prior to award of the contract. In the context of a claim involving; i.e., ambiguous specifications, the board and court will examine extrinsic evidence, including pre-award communications, if the intent of the parties cannot be ascertained from the contract's terms. See; i.e. Cessna Aircraft Co., ASBCA No. 48118, 95-2 BCA ¶ 27,560, reversed, in part, by Dalton v. Cessna Aircraft Co., 98 F.3d 1298 (Fed. Cir. 1996). Therefore, even if the Agency fails to amend the solicitation or modify the contract to address the ambiguity, your pre-award communications may provide crucial evidence in winning a future claim during contract performance.

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2. Solicitation Submittal Requirements. Solicitations provide instructions to the offerors for submitting their proposal, and the evaluation factors the Agency will use to select a proposal for award. For each evaluation factor the solicitation usually prescribes submittal requirements. During proposal evaluation, the Agency carefully checks each proposal to ensure all submittal requirements have been met. Regularly, proposals are not selected because they are missing a submittal requirement in the initial proposal; and the GAO routinely upholds the Agency's decision, regardless of significance of the missing information. Matter of: Bethel-Webcor JV, B- 410772 (2015). Therefore, careful attention should be placed on the solicitation submittal requirements. The company may not have another chance after its initial proposal to submit missing information, as most solicitations include FAR Clause 52-215(f)(4), which permits the Government to award the contract without discussions.

3. The Definition of "Relevant Project". Similarly, the Agency will not consider a project in its evaluation of past performance and experience if it does not meet the explicit definition of a "relevant project." Therefore, pay close attention to every element of the definition of relevant project in the solicitation, and clearly demonstrate to the Agency how/why each project meets this definition; or else a crucial project may not be considered in the Agency's evaluation.

4. Attribution of Affiliate Past Performance and Experience. Offerors often need to rely on the past performance and experience of affiliate companies. An agency properly may consider affiliate experience/past performance if the offeror's proposal clearly demonstrates that the affiliate will be meaningfully involved in the performance of the contract and therefore, its record bears on the offeror's ability and likelihood to successfully perform the contract. To determine whether to attribute affiliate past performance/experience, agency evaluators carefully examine the role(s) to be performed by the affiliate under the contract. Therefore, the proposal should clearly identify the specific resources of the affiliated company that will affect the performance of the offeror. Matter of: Bethel-Webcor JV, B- 410772 (2015). To help ensure consideration of affiliate experience/past performance it is important to provide concrete information in the appropriate location of the proposal.