



# THE CONSIGLIERE

WINTER 2017

Vol. 12, No. 1

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

- Call or email Paul E. Wehmeier at 546-7000 or Marsha Watson at 522-6522 or [mwatson@knoxbar.org](mailto: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

## FROM THE CO-CHAIRS

By: David Headrick, Esquire  
LandAir Surveying Company, Inc.

Politics has become so abrasive and divisive that it's become a topic best avoided in polite social circles. So, when the topic was suggested, we knew it had to be done. Please join us this Thursday (March 30) at the Alley for a one-hour CLE aptly named "Changes on the Horizon: Trump's First 100 Days." Having seen the slides, I'm convinced that this will be one of our best and most relevant CLEs to date. It will be a nuts-and-bolts look at how the current political climate could impact your clients and practice. Plus, The Alley is a solid venue that is centrally located and right off the Interstate.

I would also like to make a call for input for upcoming CLEs, particularly our annual late-summer CLE. We've got some ideas, but would like to hear your input. What would you like to see presented? Would you be interested in presenting? What's changing in your legal hemisphere that may be relevant to corporate and business interests? If you have answers to these questions, please email or call one of us to share.

Thanks for your participation in the Corporate Counsel Section. We are looking forward to hearing from you.

# UPCOMING EVENTS

## Changes on the Horizon: Trump's First 100 Days

**Thursday, March 30, 2017**

5:30 p.m. – 6:30 p.m.

The Alley, 7355 Kingston Pike

**Valeria Gomez**, Volunteer Immigrant Defense Advocates (VIDA)

**Marcia A. Kilby**, DeRoyal Industries

**O.E. "Sonny" Schow, IV**, Woolf, McClane, Bright, Allen & Carpenter

**Catherine E. Shuck**, East Tennessee Children's Hospital

Approved for 1 Hour of General CLE Credit

Cost: \$20 KBA Members; \$30 Non-KBA Members; No charge for KBA Members not seeking credit

Regardless of your political persuasion, all can agree that change is in the air with the newly inaugurated Trump Administration. The Corporate Counsel Section is offering a one-hour CLE that will explore some occurring or proposed changes in areas that impact businesses and in-house counsel. Topics will include international trade and taxation (Marcia Kilby and Sunny Schow), healthcare repeal (Cathy Shuck), and immigration and travel by employees and business partners (Valeria Gomez). This is intended to be a practical assessment of how changes could impact your clients and practice.



**Thursday, August 24, 2017**

Corporate Ethics & Updates: The 2017 KBA Corporate Counsel Section Annual CLE  
3 hours of CLE Credit

Section  
Events

# REGULATORY COMPLIANCE

By: Paul E. Wehmeier  
ARNETT, DRAPER & HAGOOD, LLP

## **Keeping Calm While Complying.**

On November 7, 2016, many who practice in the regulatory compliance area were generally confident that they knew the course most federal agencies were on. Because Secretary Clinton was the anticipated winner of the 2016 Presidential Election, many presumed that the trajectory of regulatory agencies would “generally” remain the same. Indeed, if prognosticators’ predictions held, Secretary Clinton might also have a friendly Senate to assist in advancing her agenda.

The November 8, 2016 election, however, proved to buck conventional wisdom. Not only did Republicans retain control of the Senate and House of Representatives, Donald J. Trump was elected the 45<sup>th</sup> President of the United States. Almost immediately inboxes began to swell with various predictions about how what practitioners had predicted for months was worthless and how regulatory compliance would require dramatic changes.

In the first two months of the Trump Administration, however, it appears dramatic changes may take more time than first anticipated. Although President Trump is on pace to use Executive Action (Executive Orders and Presidential Memorandums) more than his predecessor or any recent predecessor, his actions to date have been stymied by the judicial branch and, unexpectedly delayed, by the legislative branch. From healthcare to tax policy, immigration to labor policy, Mr. Trump is finding the ship difficult to turn.

To the extent Congress is helping Mr. Trump, it has mainly been through use of its regulatory review power set forth in the Congressional Review Act. Indeed, Congress has already used this power to overturn regulations through seven joint resolutions. Prior to the 115<sup>th</sup> Congress, this power only had been used to overturn ergonomics regulations at the beginning of the George W. Bush Administration. Nevertheless, the Affordable Care Act continues on despite Republican campaign promises to “repeal and replace.”

With that in mind, practitioners would be well served to guide clients to the potential issues all the while avoiding making major compliance related changes until clear changes in regulation are approved. In essence, stay calm and stay alert. While it is likely that significant changes loom ahead, businesses attempting to make permanent policy or compliance changes in light of the recent election may be doing so without adequate information or based on predictions that are erroneous. As in any transition in Washington, counselors must be cautious and take prudent steps to inform of potential

risks, without creating disruption or change that is otherwise unwarranted. As is the phrase these days, practitioners should “Keep calm and carry on.”

One place to gain the necessary information to advise you clients of potential risk and change is the upcoming CLE presented by the Corporate Counsel Section of the Knoxville Bar Association. It is scheduled for Thursday, March 30, 2017. We invite you to attend and look forward to seeing you there.

## HIPAA COMPLIANCE

By: Erin B. Williams  
London & Amburn, P.C.

### **Recent HIPAA Actions Underscore Importance of Timely Compliance**

Whether you represent a health care organization or a business that supports them, the compliance challenges within the health care sector are an everyday reality. The Office of Civil Rights (OCR), the federal agency responsible for the oversight and enforcement of HIPAA, recently released press bulletins highlighting OCR’s commitment to requiring timely compliance with HIPAA regulations. As the cases summarized below demonstrate, covered entities should act quickly and with strict adherence to the HIPAA regulations to avoid any penalties related to untimely compliance.

#### Presence Health

On January 9, 2017, OCR announced the first ever HIPAA settlement for untimely breach notification. Pursuant to 45 CFR § 164.404, covered entities experiencing a breach of protected health information (PHI) must notify the affected individual(s) “without unreasonable delay and in no case later than 60 calendar days after the discovery of the breach.” For breaches involving more than 500 individuals, the covered entity must also notify the media and OCR of the breach within the 60 day time period.<sup>1</sup>

On October 22, 2013, Presence Health discovered the paper operating room schedules of 836 surgical patients were missing. Presence Health did not notify OCR of the breach until January 31, 2014, more than a year after the discovery of the breach. Following an investigation, OCR concluded that Presence Health not only failed to timely notify OCR, but also failed to meet the 60 day notification requirement with respect to the affected individuals or the media. Presence Health agreed to pay \$475,000 in settlement.

<sup>1</sup> See 45 CFR §164.406; 45 CFR §164.408.

### MAPFRE Life Insurance Company of Puerto Rico

On January 18, 2017, OCR announced a settlement with MAPFRE Life Insurance Company of Puerto Rico. MAPFRE notified OCR on September 29, 2011, of a breach involving theft of an unencrypted USB data storage device containing the PHI of 2,209 individuals.

OCR's investigation revealed that MAPFRE did not utilize encryption or other comparable security measures for its laptops and removable storage devices until September 2014, nearly three years following the breach. OCR further found that "MAPFRE also failed to implement or delayed implementing other corrective measures it informed OCR it would undertake."<sup>2</sup> MAPFRE paid \$2.2 million in penalties to settle the alleged violations.

### Children's Medical Center of Dallas

On February 1, 2017, OCR announced that it assessed penalties against Children's Medical Center of Dallas in the amount of \$3.2 million for two separate breaches occurring in 2009 and 2013, both of which related to unencrypted electronic devices that were lost or stolen. Together the two breaches affected over 6,000 patients.

OCR's investigation found, among other things, that Children's Medical Center of Dallas failed to implement encryption or other comparable security measures for laptops or other removable devices until April 9, 2013. In connection with this finding, OCR issued a Notice of Proposed Determination that assessed \$3.2 million in penalties. Under 45 CFR §164.420, OCR must notify the covered entity that it has 90 days to respond to the Notice of Determination and request a hearing. Children's Medical Center of Dallas failed to respond or request a hearing within the 90 day time period; thus, OCR assessed the full amount of the proposed civil money penalty with no right to appeal.

\* \* \*

Based upon OCR's 2017 actions to date, it appears that OCR intends to strictly enforce the time requirements set forth in the HIPAA regulations. If a breach occurs, providers must take care to ensure timely compliance with all HIPAA requirements, including breach notification, implementation of corrective action, and responding to OCR. Failure to do so may result in costly penalties for your organization.

*Note: The contents of this article are for general informational purposes only and are not to be construed as legal advice. You should consult an attorney regarding any specific legal questions.*

---

<sup>2</sup> "HIPAA Settlement Demonstrates Importance of Implementing Safeguards for ePHI," January 18, 2017 (available at [www.hhs.gov/ocr/newsroom](http://www.hhs.gov/ocr/newsroom)).

# EMPLOYMENT LAW

By: J. Chadwick Hatmaker

Woolf, McClane, Bright, Allen & Carpenter, PLLC

## **EMPLOYER LESSONS FROM FEDEX'S DECISION TO STAND BY ITS MAN**

Recently a video of a Federal Express driver who stopped protesters in Iowa from burning an American flag went viral on social media. A group of protesters were setting fire to the American flag along the pedestrian mall in Iowa City. Federal Express driver Matt Uhrin intervened by taking one of the American flags from a protester's hands. Mr. Uhrin then went to his FedEx delivery truck to obtain a fire extinguisher, came back to the protesters and used the fire extinguisher to spray the protestors and another flag they were trying to burn. A local reporter videoed the incident and posted the video on his twitter account. Thereafter, the internet took over and the video went viral in a short time.

Mr. Uhrin became a topic of conversation on social media for people on both sides of the issue. Many praised him for his efforts in stopping the extremely unpopular and controversial act of flag burning. Some commented that Mr. Uhrin should be terminated and charged with assault. But those wanting Mr. Uhrin fired were the small minority. An on-line petition quickly circulated urging FedEx not to fire Mr. Uhrin. The petition garnered over 7,500 signatures in about a day.

The incident left FedEx at a cross-roads. By abandoning his vehicle and voluntarily interjecting himself in a protest and making physical contact with protesters who were not impeding his work Mr. Uhrin no doubt violated several FedEx rules and policies. But firing Mr. Uhrin, who was being hailed as a patriot on social media, would likely have resulted in a backlash against FedEx. Ultimately FedEx chose to take a page out of Tammy Wynette's *Stand By Your Man* playbook. The company announced on its corporate twitter account that Mr. Uhrin remained a FedEx employee and the company had no plans to change his status. FedEx did not disclose whether Mr. Uhrin was disciplined for the incident. I am confident that he was disciplined in some fashion.

So what can employers learn from this incident? First, although FedEx chose not to terminate Mr. Uhrin, the incident should serve as a reminder to employers that you can terminate employees for conduct that is not related to the job, even if the conduct occurs when the employee is off duty. Most employees are at-will. As a result, the employer does not have to have a reason to terminate the employee. Thus, terminating an employee for conduct unrelated to his job is acceptable so long as the conduct is not

protected activity which would make the termination discriminatory, retaliatory, or otherwise illegal.

Second, when deciding whether to terminate, employers should always consider the precedent they will be establishing with the decision. While I do not know, my belief is that Mr. Uhrin's job was saved because he has a strong performance record, he stopped the highly controversial act of flag burning, and FedEx knew it was going to face a backlash if it terminated him. But suppose a female FedEx driver leaves her vehicle to interfere with a group of protesters who are supporting a cause she believes is against women's rights. If her employment is terminated the company may face a sex discrimination lawsuit on the basis that it has already established a precedent that this type of conduct is not a terminable offense.

Another lesson for employers is to involve your public relations team, or an outside consultant, early in the process for matters that are a topic of public discussion or will likely become a topic of public discussion. FedEx announced its decision regarding Mr. Uhrin's employment on twitter. If FedEx had made the decision to terminate Mr. Uhrin's employment it no doubt would have released a statement on social media and other forums addressing its decision to do so. If the matter is controversial, or likely to become a topic of public discussion, be prepared to address it and "control the message".

Finally, employers must train their employees not to become involved in non-work matters during work hours if those events do not involve, interfere with, or impact their job duties. Mr. Uhrin's decision to leave his delivery truck and physically engage with the protesters could have resulted in a lawsuit against him and FedEx, and may still do so. Proper training can greatly reduce the likelihood of these situations occurring. Furthermore, if an employee is trained not to engage in this behavior and does so anyway, the case for termination is even stronger.

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

Phone:  
(865) 522-6522

Fax:  
(865) 523-5662

E-mail Addresses:  
dheadrick@lasurveying.com  
mkilby@deroyal.com  
pwehmeier@adhknox.com  
mwatson@knoxbar.org

<http://www.knoxbar.org>