Knoxville Bar Association

THE CONSIGLIERE

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- **Submit an article for consideration.**
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From the Co-Chairs

FROM THE CO-CHAIRS

By: Marcia A. Kilby, Esquire
DeRoyal

There is an old holiday tune that proclaims this as "the most wonderful time of the year." I think that this is undoubtedly true. The time spent with family and friends (and let's not forget the good eats) are indeed wonderful! However, for corporate counsel, this time of year also means strategizing for 2018 and determining what new issues are waiting for us on the horizon. In my opinion, if there is one issue that will require attention from corporate counsel in the upcoming year it is this: Data privacy.

On May 25, 2018, a new landmark privacy law called the General Data Protection Regulation (GDPR) takes effect in the European Union (EU). The GDPR expands the privacy rights of EU individuals and places new obligations on all organizations that market, track, or handle EU personal data.

Specifically, the GDPR regulates the "processing," which includes the collection, storage, transfer or use, of personal data about EU individuals. Any organization that processes personal data of EU individuals, including tracking their online activities, is within the scope of the law, **regardless of whether the organization has a physical presence in the EU**. As such, if you process data about individuals in the context of selling goods or services to citizens in EU countries, then you will need to comply with the GDPR.

Some Key Facts to Know About GDPR

- It broadly expands rights for EU individuals such as deletion, restriction, and portability of personal data.

- It requires businesses to implement appropriate policies and security protocols, conduct privacy impact assessments, keep detailed records on data activities and enter into written agreements containing data privacy provisions with vendors.
- It mandates the appointment of a data protection officer (DPO) where an organization's core business involves processing personal data involving regular and systematic monitoring of data subjects or large amounts of sensitive personal data.
- It requires organizations relying on consent to process personal data will need to show that the consent is freely given, specific and informed and is an "unambiguous indication" of a data subject's wishes and expressed either by a statement or a clear affirmative action. Consent will be purpose limited i.e. related to explicitly specified purposes.
- It requires reporting of certain data breaches to data protection authorities, and under certain circumstances, to the affected individuals.
- It allows authorities to fine organizations up to the greater of €20 million or 4% of a company's annual global revenue, based on the seriousness of the breach and damages incurred.
- It provides a central point of enforcement for organizations with operations in multiple EU member states by requiring companies to work with a lead supervisory authority for cross-border data protection issues.

The EU has created a webpage that is intended to educate the public about the main elements of the GDPR. I encourage you to take a look at it as you consider whether this is an issue your company needs to tackle in 2018. If so, an extensive guide on how to prepare to comply with GDPR is available.

Wishing you a Happy New Year,

Marcia A. Kilby
Co-Chair

UPCOMING EVENTS

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The Knoxville Bar Association's Corporate Counsel and Employment Law sections are organizing a continuing legal education program focused on sexual harassment. The sections anticipate the program will be scheduled in the first quarter of 2018. Watch the Knoxville Bar Association's website for more details.

Health Care Reform

Health Care Reform Developments under the Trump Administration

By: Ashley N. Trotto, Esquire
Kennerly Montgomery & Finley, P.C.

Unless you've somehow managed to avoid the buzz, you probably know that the Affordable Care Act ("ACA") is still alive and well (for now). What you may not know is exactly what the Trump Administration has been able to accomplish with respect to its health care reform goals. This article intends to recap what has been done and clarify what hasn't been done since inauguration day.[1]

ACA Repeal

This fall, after several failed attempts, the Republicans tried one last time to repeal the ACA with the Graham-Cassidy bill. The bill would have eliminated the ACA's subsidized health insurance coverage and Medicaid expansion and provided block grants for state funding. However, too many Republican senators came out against the bill and the deadline to pass legislation with a simple majority came and went without a vote. As of today, the ACA continues to be the law of the land – with a few adjustments.

Contraceptive Mandate

The ACA mandates that health plans cover contraceptive care as a preventative service at no cost to covered individuals. However, religious employers, non-profit organizations with religious affiliations, and certain closely held corporations with sincerely held religious beliefs can opt-out of the mandate. Generally, for profit employers have been required to comply.

A shift occurred on October 6, 2017, when the Departments of Health and Human Services ("HHS"), Treasury, and Labor (the "Departments") issued interim final rules that broaden the scope of employers who can opt-out to include non-profit and for profit companies who have "sincerely-held moral convictions."[2]

The interim final rules do not define "moral convictions" (nor do they define "religious beliefs"), but the preamble states that the Departments seek to use the same background understanding of that phrase as reflected in the Congressional Record in 1973, which cites *Welsh v. United States* to support the addition of language protecting moral convictions. In protecting moral convictions parallel to religious beliefs, *Welsh* describes moral convictions

[1] WARNING – this article was written on December 13, 2017 and only takes into consideration action taken and official guidance issued as of that date.

[2] 82 FR 47862

warranting such protection as ones: (1) That the "individual deeply and sincerely holds"; (2) "that are purely ethical or moral in source and content; (3) "but that nevertheless impose upon him a duty"; (4) and that "certainly occupy in the life of that individual a place parallel to that filled by . . . God' in traditionally religious persons," such that one could say "his beliefs function as a religion in his life."[3]

As an interesting point, the Departments threw ordinary governmental procedure to the wind and issued these rules without first publishing proposed rules and requesting public comment. It is for this reason, in addition to claims of discrimination and violations of the First Amendment, that several lawsuits have been filed challenging the new rules.

The Executive Order

Six days after the interim final rules were published; President Trump signed an Executive Order ("Order") directing the Departments to consider proposing regulations or revising prior guidance on certain healthcare topics that have previously been regulated by the ACA.[4] Although the Order lacks specificity and the nature and scope of the intended changes will not be clear until guidance is issued by the Departments, the Order generally focuses on changes to three issues: association health plans, short-term limited duration health insurance, and health reimbursement accounts.

First, the Order directs the Departments to permit individuals and small employers (those with under 50 full-time employees) to join together to form Association Health Plans ("AHPs"). It appears that the Order would exempt AHPs from certain insurance mandates, like community rating and essential health benefit requirements. The Order also suggests that employers will be permitted to band together across state lines. However, for this directive to be successful the Departments will have to tackle the current federal regulations that impose burdensome restrictions and reporting obligations on Multiple Employer Welfare Arrangements ("MEWAs"), as those regulations would generally act as a barrier to unrelated employers and individuals participating in the same group health plan.

Next, the Order covers short-term limited duration health insurance. The ACA currently provides for an exemption from its mandates for short-term, limited duration health plans to bridge the gap between health insurance enrollments, like in the case of an employee transitioning from one job to another. However, the exemption is limited to policies covering an individual for less than three (3) months.[5] The Order directs the Departments to consider expanding the coverage offered by these short-term limited duration plans, but is not specific as to the extent of the expansion. The Order seems to infer that the Administration would be satisfied if the Departments reverted to pre-ACA guidelines which would permit coverage for up to 12-months with the option to renew in certain circumstances.

[3] *Welsh* v. *United States,* 398 U.S. 333 (1970).

[4] Executive Order, *Promoting Healthcare choice and Competition Across the United States*, available at https://www.whitehouse.gov/the-press-office/2017/10/12/presidential-executive-order-promoting-healthcare-choice-and-competition

[5] 26 CFR 54.9801-2.

Finally, the Order directs the Departments to consider changes to Health Reimbursement Account ("HRA") limitations to allow employees more flexibility and choices regarding their health care. In 2013, the Departments issued guidance prohibiting employers from reimbursing employees for individual insurance policies. The Departments characterized these arrangements as stand-alone HRAs and concluded that they were health plans that by their very nature would not be ACA compliant. Congress later created a limited exception to this rule for small employers that meet certain strict requirements. Although it isn't particularly clear, the Order seems to direct the Departments to broaden that exception to a wider range of employers and may intend for the Departments to ease the existing limits on reimbursable amounts (currently $4,950 for self-only coverage or $10,000 for family coverage) to provide additional employee flexibility and choice with respect to healthcare.

Cost-Sharing Subsidies

The ACA's cost-sharing subsidies, not to be confused with premium tax credits, reduce an eligible individual or family's out-of-pocket cost when they use health care services, such as deductibles, copayments, and coinsurance.

Taking further action to fulfill his promise to let the ACA fail, late on October 12, 2017, President Trump acted on his long-standing threat to cease funding these cost-sharing subsidies. Although the ACA directed these payments, it relied on Congress to appropriate the funds. When Democrats lost control of Congress, the Republican-led Congress declined to allocate the required funding, leaving the Obama Administration to do so through executive action. The Trump Administration ceased funding the subsidies based on the premise that Congress, not the President, has the responsibility and authority to appropriate the funds.

It is important to note that because insurers are required by law to provide them; cost-sharing subsidies are still available for eligible individuals. The problem is that the federal government will no longer be reimbursing insurers for these subsidies, leaving insurers to find other ways to maintain the status quo (e.g., premium increases).

Tax Reform

I would be remiss if I didn't at least mention the possibility that the Administration's current tax reform efforts may be broad enough to affect healthcare. For example, the Individual Mandate which requires most Americans to have and maintain health insurance coverage or pay a penalty may be on the chopping block.

This Administration has been and continues to be focused on healthcare and I don't expect a seismic shift in that focus anytime soon. Stay tuned, things are bound to change.

EMPLOYMENT LAW

Sexual Harassment Tips

By: Jesse Nelson, Esquire
Nelson Law Group

Men are nervous. Not all of them, but some. Women continue to come forward with allegations of sexual misconduct by their bosses and other powerful people. Some of the behavior is being resurrected from years ago. So what should employers do to ensure they're not the leading role in the next #MeToo saga?

Perhaps stating the obvious, the best way to prevent a problem from arising now is if the company handled everything correctly *then.* With few exceptions, the stories making headlines have a repetitive flair – the men directed their behavior to many women over many years – so we hope our business clients made the (not-so-) tough decisions years ago that will protect them now. Expounding on this, compare the current storm to household finances. If a person has worked hard to pay off debt, build savings, and invest wisely, he is prepared when the market takes an unexpected plunge. I dare say that most companies long-ago accepted the notion that prohibiting sexual harassment is a good idea, so hopefully the policies, procedures, and personnel are already in place to weather this current storm. But, if your client has lacked the necessary fervor for preventing these issues, here is what you must start doing right now:

First, the company must have clear, communicated policies preventing all forms of sexual harassment. The policy should actually define what behavior is prohibited, to include sexual jokes and innuendo.

Second, establish and communicate alternative paths for employees to report unwelcome behavior. If, for example, the policy requires employees to report sexual harassment to their immediate supervisor, what happens if the immediate supervisor is the harasser? Make sure there is more than one road to the same destination.

Third, the company must provide *relevant* training to supervisors. It's not enough to read the policy at a staff meeting. The client must equip managers to understand the nuances of how sexual harassment claims arise; for example, they often stem from once-consensual relationships or innocent banter. Ideally, your client will pay you or an employment law practitioner to provide the training.

When your client learns of sexually inappropriate behavior in the workplace, the company should assure the employee, in writing, that she is protected against all forms of retaliation. The writing should impose an affirmative obligation on the employee to notify a designated member of management if she believes she is being retaliated against. It should also instruct the employee not to discuss any aspect of the matter until the company completes its investigation. Again, ideally the company will hire you to draft this delicate language.

When it comes time to investigate, the company should perform an appropriate investigation, with an emphasis on the word "appropriate." There are two extremes employers should avoid. On the one hand, do not limit the investigation to asking the alleged harasser, "Did you do it?" But the other extreme is also dangerous. A scorched-earth inquiry resembling a murder investigation may tarnish innocent people's reputations, cause needless gossip and speculation, increase the risk of retaliation, and affect productivity. A good investigation is one where a neutral person – preferably two – gather the most relevant facts, speak discretely to the most relevant people, thoroughly document their findings, and present their findings to a third person – preferably someone higher up the food chain.

Lastly, take action. Or don't. In my opinion, a company should not resolve to fire every employee against whom a complaint is filed. The decision-maker(s) must weigh the investigative findings and thoughtfully consider how best to protect the company, the complainant, and even the alleged harasser. That being said, if the company chooses not to terminate the alleged harasser, it *must* implement procedures to protect the complainant and ensure ongoing compliance with company policy. The adage applies: "Fool me once, shame on you; fool me twice, shame on me."

So don't panic. Most of the employers making headlines were not blindsided by the allegations; they simply misjudged the risk of public exposure. The harassers were either too ingrained in the company's management and culture (think: Harvey Weinstein), or the dividends the harasser produced far outweighed the risks (think: Bill O'Reilly, Matt Lauer). Those men are unemployed because the public's scrutiny, or the very real risk of it, so drastically changed the risk/benefit analysis.

Let us encourage our clients – and all of us – to reflect on these lessons, to do what is right, and to learn from others' mistakes. Then, let's get used to the newest faces delivering our news on TV.

Intellectual Property

Trademark Pre-litigation Considerations

By: Matthew Googe, Esquire
Robinson Intellectual Property Law

The name of any business and its products is a valuable asset. But what happens if you discover that another business is using a similar name or if you are threatened by another business claiming to own the rights to a similar name? Many businesses discover a perceived threat and immediately send a cease and desist letter or cave in to demands to discontinue use of a particular mark. However, there are a number of factors to consider when evaluating whether a potential trademark dispute is credible.

Likelihood of Confusion

At the heart of any trademark dispute is whether any likelihood of confusion exists. Likelihood of confusion is evaluated by courts according to many factors, but the issue primarily comes down to similarities of the marks and similarities of the goods or services. If two parties use a similar mark but on entirely different goods, confusion is less likely. The more similar the goods or services, the less similarity required between the marks. The more similar the marks, the less similarity required between the goods or services. Therefore, the first consideration is almost always whether any consumer confusion is likely between the two marks used with their respective goods or services.

Strength of the Mark

Parties to a trademark dispute should also consider the strength of the mark being contested, and whether the word or phrase is even capable of functioning as a trademark. The strength of a trademark falls along a continuum ranging from fanciful to generic. A mark is typically stronger when it does not describe or characterize the goods or services used with the mark, and is therefore distinctive.

Occasionally a party will claim rights to a word or phrase that is either descriptive or commonly used in the industry. That party may even have been able to obtain a registration of the mark. However, if that mark is merely descriptive or generic for the goods or services offered by that party, it is unlikely that the party will own broad rights to the mark. Further, minor differences in the marks become significant when those marks are less distinctive.

Priority

An important consideration in deciding whether to pursue a trademark dispute is priority – that is, who used the mark first? Priority of use of a mark will typically insulate a potential infringer of another party's trademark.

For example, suppose a business owns a trademark registration and discovers another party using the same mark. Even though that business owns a federal trademark registration, if the other party made actual use of their mark first, that party may have its own rights to the mark that supersede the registration owner. If the registration owner's mark has been registered for less than five years, that registration could be exposed to potential cancellation by the other party based on that party's priority.

In some cases, if both parties used the mark without registration concurrently in different geographic locations, both parties could end up owning rights to the mark in their respective geographic areas.

If a business owns a registration or claims rights to a mark, that business should always conduct at least some initial due diligence to determine whether it has priority of use of the mark before demanding that another party discontinue its use of the mark.

When faced with a potential trademark dispute, a business should always consider at least whether a likelihood of confusion exists, and who has priority to the mark. Businesses should also consider retaining trademark counsel, who may be able to evaluate other issues prior to engaging another business in a trademark dispute.

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