

Hearsay

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If you have any questions about the publication or would like to submit an article for a future issue, please contact Janie Catherine Paulson or Andrew Loose.

MSBA



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Greetings from the Chair

Christina Weber

I hope that by the time you are reading this, the weather is a warm and balmy fifty degrees. It goes without saying that this winter has proven to be challenging for many of us. Although I wanted nothing more than to stay indoors during the several massive snow storms we have endured this year, the New Lawyers Section has kept me on my toes and out amongst the living.

We are holding an event called “Fashionably Social: Lawyers Representing the Latest Trends” on March 31st. The event will feature several of the latest trends for young attorneys both inside the courtroom and for those rare moments when we find ourselves with free time. A big thank you to our sponsors, Minnesota Lawyers Mutual Insurance Company, Rubicon Mortgage, David Abele, Realtor, ExamWorks, and Dan Stoudt State Farm Insurance Agency. Also, many thanks to the models, all of whom are attorneys, and the New Lawyers Social Chair, Anne Stoudt, who are making this event possible.

The next event we have planned is the annual spring Tri-Bar Social, which will occur on May 5, 2011 from 5:00 – 8:00 p.m. at Brit’s Pub in Minneapolis. The event is jointly sponsored by the New Lawyers Sections of the MSBA, RCBA, and HCBA. Admission is \$10, all of which will be donated to Teens Alone, a local organization assisting teenagers who find themselves in many difficult situations. Please come join us for what will prove to be a fantastic event held on the roof top of a fine local establishment!

The year has continued with many great and free CLE opportunities for our members. Since the last publication of the Hearsay, we have sponsored CLEs in the areas of estate planning, family law, effective witness preparation, how to prepare a DWI case, and an ethics presentation. We have several additional CLE opportunities to round out the bar year in the areas of bankruptcy and considerations in starting your own practice. We will also be hosting a program with the Civil Litigation Section on effective deposition techniques. The CLE will be held at the St. Thomas School of Law on May 5, 2011, immediately preceding the spring social.

More information can be found about any of these upcoming events by going to the New Lawyers’ page on the MSBA website. If you have any questions about the Section, its activities, or how you can become involved, please contact me at cweber@wilfordgekse.com or 651-209-3300. Our next meeting will be held on April 14, 2011 at 5:30 p.m.



Christina Weber, is the chair of the New Lawyers Section and an attorney with Wilford & Geske in Woodbury. You can reach Christina at cweber@wilfordgekse.com or 651-209-3300.

So You Want To Start A Blog?

Tips and Techniques to Starting a Blog

Jennifer Santini, Jamie Held, Maggie Green, Jayne Sykora

In the past decade, blogs have become increasingly more prominent as a medium from where we seek news and information. Blog topics range from sports and celebrity gossip to politics and breaking news to self-help guidance and personal diatribes.

With the struggling economy, people and businesses have been furiously trying to find ways to gain exposure to potential customers, clients and/or referral sources. Blogs have gained recognition as a great way to market yourself or your business, in order to gain this exposure. With this in mind, the four writers of this article decided to start a blog.

We are all solo or small-firm practitioners who hung our shingles within the last year. We quickly understood the importance of networking and marketing to ensure the success of our firms. We knew that having a blog was one way to market our practices but we also knew that maintaining a blog would be a large undertaking for each of us individually. The four of us often talked about issues related to blogging. Ultimately, Maggie Green had the brilliant idea to join forces and create a collaborative blog.

With the four of us contributing content, the daunting upkeep of a blog is much more manageable, since we are all building our practices and have to keep up on current clients. Yet, we knew we still had to devote extensive time at the onset to ensure its success.

Our choices were right for the four of us, but you may decide to go a different route.

Nonetheless, for those of you considering a blog of your own, we have identified the following questions and points of advice, as we know firsthand the amount of work it takes to get one off the ground.

1. What is your focus, who is your target audience and how do you intend to distinguish your blog?

Technorati, a blog search engine, claims to track approximately 1.25 million blogs (<http://technorati.com/blogs/directory/>). With a number like that – how are you going to distinguish your blog from other blogs? Ask yourself: What will be the focus of your blog? Will it focus on a specific area of law? Will it focus on business management practices? Will it become more of a personal diary to capture your life as a lawyer or will it be more of a legal resource website? Are you targeting potential clients, peers or referral sources?

Understandably your blog topics will likely overlap with other blogs, since there are only so many topics and issues on which to write. However, if there is a different angle from which you can write or a niche on which to focus – be sure to highlight the differences or uniqueness in some way. People will want to know how the information you offer is different from what they can get from some other site.

Additionally, you will want to find ways to market your blog to attract readers. Traditional ways are of course utilizing social media networks such as Twitter and Facebook. We utilize both methods and have made great

connections with them. Not only do we actively promote our blog but we also continually express interest in other blogs through these outlets. Doing so has provided us with opportunities to guest contribute to these other blogs and attract guest authors to our blog.

2. What is the name of your blog and how do you want it to look?

It could be that all four of us are extremely particular or it could be that because all four of us had to reach a final agreement, but these two items – name and aesthetics – took a great amount of time to decide when we began creating our blog. We all felt strongly about choosing a name that captured the essence of our blog and even when we finally agreed upon our first choice, it turned out that particular domain name would cost us roughly \$20,000. Alas, we returned to the drawing board. When choosing a name ask: can people spell the name, pronounce the name correctly and does it relate to the nature of the blog? Even then, you may not be able to secure your preferred domain name, so it is advisable to think of several back-up choices.

As for the appearance of the blog – the ultimate goal should be to create an enjoyable reading experience for your audience. Hard to read font, distracting graphics and drab color tones will be one of the fastest ways to lose readers. We have all been told not to judge a book by its cover, but we all know people do. Design your blog to attract readers aesthetically and then retain them with its content.

The name and look of the blog are an essential part of marketing and branding, which is an extension of marketing and branding yourself. Just as you wear a suit to a court and blue jeans to a ball game, the appearance of the blog must coordinate with how your readers relate to you.

3. How much time do you have to devote to your blog and how often will you be able to post to your blog?

If you are unable to continually update your blog, then you need to determine if it is worth the effort of launching one. If you know from the beginning that you cannot devote the optimum amount of time to the blog, do not be discouraged because truthfully, blogging is not for everyone because it can be time consuming. Blogging daily may be too time consuming, but one post per month is often not enough to attract an audience. Readers want a consistent stream of information. Be realistic about how often you can contribute to the blog and be sure to commit to that schedule.

Even with four us, we each spend a considerable amount of time on our blog. The amount of time we each spend per week on the blog can vary from week to week. However, between writing and reviewing posts, reviewing and updating the design and layout of the blog, soliciting guest authors, and marketing and promoting the blog, it is fair to say that at least one of us is doing something related to the blog each and everyday.

4. Will you be the sole contributor to your blog or will you welcome guest contributors?

If you discover that you cannot maintain a consistent stream of posts, consider inviting others to contribute to your blog. Guest contributors can alleviate the workload of keeping the blog current, enable networking, and is a way to return favors to referral sources by giving them a forum to market their services.

If you are unable to launch a blog personally, consider being a guest contributor to other blogs. For example, Minnesota Lawyer's JDs

Rising blog welcomes and encourages guest contributors. We, of course, welcome contributors to [Epilawg](#) and are always looking to grow our list of guest authors. If interested in guest contributing, contact someone at a particular blog to determine if there are restrictions and/or guidelines for guest posts. Guest posting on a practice specific blog can be a great way to get your name out to other practitioners in your practice area.

5. Be appropriate

When blogging, remember the golden rule for attorneys – adhere to the Rules of Professional Conduct. Do not blog about clients, opposing counsel, colleagues or judges. Do not disclose confidential information. Do not reveal facts or particulars of clients or cases that can lead to their identity. A blog is an extension of you and your personal and professional reputation. Do not behave in any manner through your blog that could jeopardize your career. Accordingly, protect yourself from potential disciplinary actions or malpractice claims for issues such as lack of competency, improper advertising, or misleading communications. Writing blog posts is a great way to continue your legal education by researching subjects on which you wish to learn more. However, be sure the information you disseminate is accurate. Ensure the proper disclosures and disclaimers are conspicuous on your website alerting readers that the content is purely for informational purposes and for personal legal assistance they need to contact an attorney.

Go For It!

Whether you have either hung your own shingle, are thinking of going solo, are an associate at a firm, or are working in some other capacity, blogging can expand your legal knowledge and skills, and help you gain the visibility to grow your career. Research

other blogs to become familiar with various approaches and techniques to blogging, and determine if it has a place in your practice, and if it does, then go for it. We have found the benefits of blogging outweigh the time & ethical burdens present in legal blogging.

The authors are the creators and contributors to [www.epilawg.com](#). Epilawg is a collaborative blog by these four lawyers providing all the pieces to complete your estate plan.



Jennifer Santini – co-founder of the law firm Sykora & Santini, which focuses on business law and estate planning. Before becoming an attorney, Jen worked in the legal departments of two investment management companies in Boston, MA.

Jamie Held – the principal attorney at Held Law Office. Jamie's practice focuses on estate planning and probate. Jamie is also a CPA with nearly five years of tax experience in Big Four public accounting.

Maggie Green – the principal attorney at Donohue Green Law Office, PLLC. Maggie Green's legal practice focuses on estate planning and probate services for individuals and families in Minnesota.

Jayne Sykora – co-founder of the law firm Sykora & Santini. Prior to law school, Jayne began her professional career as a marketing professional for American Republic Insurance Company in Des Moines, Iowa.

Could Your Client's Identity be Stolen From a Court Record?

The Importance of Following Minn. R. Gen. Prac. 11

Janie Paulson

As Americans, one aspect of our legal system we pride ourselves on, is allowing the public to be a part of the judicial system. The right of the public to take part in the judicial process includes allowing the public access to court records. But with unencumbered public access comes unencumbered access to personal information that may be contained in those public records.

In Minnesota, [Minn. R. Gen. Prac. 11](#) aims at protecting this personal information from possible misuse. The rule forbids attorneys from disclosing sensitive information in any pleading or court document unless it is on a separate [Confidential Information Form or Sealed Financial Source Document](#). The rule identifies several types of sensitive information attorneys should not disclose, including “restricted identifiers” and “Financial source documents.” Examples of “restricted identifiers” are social security numbers, employer identification numbers, and financial account numbers of a party or party’s child.¹ “Financial source documents” means income tax returns, W-2 forms and schedules, wage stubs, credit card statements, financial institution statements, check registers, and other financial information deemed financial source documents by court order.² These examples are not exhaustive, however, as medical records and other personal information may also require that an attorney take particular care to ensure that private documents and private information remain private. As the comments note for all

court proceedings: “**parties are now responsible for protecting the privacy** of restricted identifiers...and financial source documents by submitting them with the proper forms...unless the party files a motion to seal them or the court acts on its own initiative under Rule 11.03.”³

You may remember to seal bank records or credit card records, but a social security number or a bank account can appear on many other types of documents. A lease, a car loan, a medical record, or even a letter may contain a social security number. If you deal in contracts, personal injury, employment or debtor-creditor, pay particular attention to this rule because these types of cases often include restricted identifiers on the evidence submitted. 24 MNPRAC § 4:2 on inventory recognizes the possibility of restricted identifiers and financial source documents when filing an estate’s inventory and reminds attorneys to follow rule 11. Likewise, 24 MNPRAC § 4:3 points out, a witness or non-party may have a restricted identifier contained in a document you submit for filing, such an identifier is also required to be protected even though you do not represent that person.

The burden of policing documents is on the attorney. Rule 11.02 states: “The parties are solely responsible for ensuring that restricted identifiers do not otherwise appear on the pleading or other document filed with the court. The court administrator will not review

each pleading or document filed by a party for compliance with this rule.” Court administrators are required to seal documents only when restricted identifiers or financial source documents are contained in records generated by the court.

Court employees, including filing staff and judges, have no requirement to make you aware of your mistake and have no independent duty to seal a record that contains a restricted identifier. The burden is on the party, which means in most cases, **the burden is actually on the attorney** to ensure restricted identifiers are not contained in publicly accessible documents.

Recognizing that in some instances a file that contains a Sealed Financial Source Document, the rules also create procedures for requesting access to sealed financial source documents in Rule 11.05. Most notably the rule contains a balancing test that gives the court discretion to allow, and impose conditions on disclosure “if the court finds that the public interest in granting access or the personal interest of the person seeking access outweighs the privacy interests of the parties or dependent children.”

Seems simple enough right? But many restricted identifiers and financial source documents are filed without being blacked out, sealed or filed pursuant to Rule 11. Affidavits, criminal and civil complaints, memoranda of law and answers are all possible places to find restricted identifiers and financial source documents. If you order a transcript and ask for fees, often a court reporter’s bill is included in your affidavit, and what might be on that bill – a social security number or tax ID number – along with an address for all to see. The public access to court documents and records includes exhibits, which are accessible to

anyone until returned to the parties or destroyed.

What does this mean? It means your client’s social security number or bank account is in a publicly accessible file for anyone to review. And, court administration has no duty to inform you of your mistake.

What happens if you do not follow Rule 11?

- 11.04 states: “If a party fails to comply with the requirements of this rule in regard to another individual’s restricted identifiers or financial source documents, the court may upon motion or its own initiative impose appropriate sanctions, including costs necessary to prepare an appropriate document for filing.”
- Additionally, Minnesota Rule of Professional Conduct 1.6 requires that a lawyer not knowingly reveal information relating to the representation of a client. Certainly a social security number may relate to the representation of a client, but seldom is that number an essential material fact that requires disclosure to the general public in perpetuity. Disclosing such information may also mean a violation of the professional responsibility rules.
- The failure to protect the information may constitute professional negligence as well because there is a clear rule that prohibits such conduct because of the risk of misuse of such private information.
- If the restricted identifier was on a medical record, [HIPPA](#) violations may have also occurred depending on which party disclosed the medical record to the public.

With all the technological advances of the past few decades, gaining access to data,

including court records, is quicker and easier than ever before. This advancement has created the potential problem that identity thieves may attempt to take court records to steal identities. The stories of identity theft through public records become more and more common every day. Recently [Colorado](#) thieves used public records to steal thousands of dollars from businesses. In [Ohio](#), public access to records has been blamed for a person stealing the identity of a child who disappeared. In Wisconsin, [a medical company filed patient medical records when it filed for bankruptcy](#). In [Ohio](#), a woman's identity was stolen from a speeding ticket she received because it contained her driver's license number, date of birth, social security number and address.

Whenever you file anything with a court, take a few extra seconds to double check that you are not violating Rule 11. Your clients will appreciate your attention to detail in preventing their personal information from being misused.

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Mary's University of Minnesota. Since the fall of 2007, Janie has been the law clerk to Judge J. Thomas Mott of the Second Judicial District. Janie is a board member of Tickets for Troops, www.tix4troops.org, a Minnesota non-profit that donates event tickets to members of the military and their families. Janie is also a member of the Junior League of St. Paul www.jlsp.org and active in the MSBA New Lawyers Section.

Notes

¹ Minn. R. Gen. Prac. 11.01(a).

² Id.

³ Minn. R. Gen. Prac. 11.05 (emphasis added).

Because We Live Where Water Reflects the Sky¹

Part II: Sovereignty “Lite”

Jamie Ford

In the last issue of [Hearsay](#), I wrote about what you should do if you run into a potential estate planning client with ownership interests in reservation property. I alerted you to the federal laws and regulations unique to Indian Country that impact estate planning for Indian landowners. In what I perceive as a victory for increased public awareness, a handful of attorneys contacted me after my last article wanting to know more about the issues. However, most of the questions I received were not about specific practice areas or legal scenarios; the questions I received were about the origins of tribal sovereignty and the basic governing structure of tribes in our state. In response, this article is devoted solely to explaining the basics of sovereign tribal governments. If the extensive coverage this topic has received in Supreme Court decisions, law review articles and Indian law textbooks is any indication, this is not an easy task. I’ll try to keep it short and simple - while recognizing the risks of being overly simplistic in realms of complex legal and governing systems. In recognition of this simplistic explanation of a complex issue, I title this installment “Sovereignty ‘Lite’.”

Minnesota has eleven Indian reservations - each a distinct tribal community and governed as a sovereign tribal nation. “Sovereign tribal nation” can be a confusing concept for many. “Sovereign” has several meanings according to Webster’s Dictionary, including some that obviously don’t apply, like “a British gold coin worth 1 pound.”² But

some definitions are very useful; for example, “supreme in power or rank,” or “self-governing, independent.”³ Black’s Law Dictionary defines sovereign as, “[t]he supreme, absolute, and uncontrollable power by which any independent state is governed,” or, “the self-sufficient source of political power, from which all specific political powers are derived.”⁴

As lawyers, we know that dictionary definitions are not nearly enough to make a case, but court cases, legal opinions, and federal laws on the topic can further confuse the concept of tribal sovereignty. Federal policies and laws such as the Indian Reorganization Act of 1934⁵ and the Indian Self-Determination and Educational Assistance Act of 1975⁶ reaffirm tribal sovereignty. But even those in the highest positions of government do not always understand the concept of tribal sovereignty. Take, for example, former President George W. Bush’s statements during office on tribal sovereignty. When asked his thoughts on the meaning of tribal sovereignty in the 21st century, he offered this insight, “Tribal sovereignty means that; it’s sovereign. I mean, you’re a - you’ve been given sovereignty, and you’re viewed as a sovereign entity. And therefore the relationship between the federal government and tribes is one between sovereign entities.”⁷ Clear as a bell now, right?

Don’t worry, that didn’t make sense to anyone else either, and President Bush got a

lot of flak for that statement.⁸ The statement that, “[Tribal nations have] been given sovereignty...” is a big part of the problem. One of the most important concepts of tribal sovereignty is that sovereignty is not something that is given. Sovereignty is inherently present in an autonomous political entity.⁹ The aspects of sovereignty that tribal nations have *retained* in the time since non-Indian settlement are what characterize tribal sovereignty today.¹⁰ The Supreme Court held in one of its earliest Indian law cases, *Worcester v. Georgia*, that tribes had not lost their sovereign powers by way of their becoming subject to federal power, that only Congress [not the states] had overriding power over Indian affairs and that, in general, state laws do not apply within reservation boundaries.¹¹ That last one can come as a surprise to many Americans, even lawyers, who grew up learning in school about our federal system of government.

Since tribes do not line up within the traditional hierarchy of federal-state-county governance, they do not “fit” neatly within the federal system. This is an important distinction to make, because it is the characteristics of sovereignty, as expressed by the Supreme Court and exercised by tribal nations, which distinguish tribes from local governments. To complicate matters, reservation lands are situated within and across county, state and national (and international, in the case of the Mohawk Nation lands, which lie both in New York and Canada¹²) territories. Several significant exceptions have developed over the years¹³, but the basic principle that tribes are self-governing and outside the regular jurisdiction of the state(s) in which they reside still holds true.

A recent Supreme Court case affirms this special sovereign status for tribal nations. Chief Justice Roberts summarized the Court’s

current view on tribal governmental authority in the 2008 *Commerce Bank* decision, stating that the Court continues to recognize the self-governing powers of tribal nations, particularly around tribal self-determination in relation to tribal members and tribal territory.¹⁴ Tribal sovereignty continues to be a relevant topic in both the local and national political arenas.

All of this background information supports one simple statement: tribal governments, by nature of their retained sovereign status, are handled in a distinct and unique way within our federal system. Federal laws and Supreme Court cases (as well as treaties, not discussed here) make that clear.¹⁵ Probably some of the hotly contested community debates that center on the non-Indian community’s outrage at the “special status” that tribes enjoy by nature of tribal sovereignty, could be more easily resolved if there was more widespread understanding of tribal sovereignty among the general public today. We, as young lawyers, have an opportunity to explain the sovereign status of tribes to our clients when the situation arises and to foster community understanding through knowledge of the present-day laws around tribal self-governance.

I hope this installment of my overview series on Indian law and topics of relevance to new attorneys in Minnesota has answered some of the questions I received from readers last time and given the rest of you something to think about. There is certainly more to say to about the extent and practical implications of tribal sovereignty today, but a broad overview of tribal governance within the broader context of federal and state governance is a good start. We can serve our clients in Minnesota communities better if we understand the purview of all of our communities in Minnesota, including the 11 sovereign Indian nations within state lines.

One last word of advice, always seek the assistance of a more experienced attorney when you are dealing with areas of the law with which you are unfamiliar.

Notes

¹ Minnesota gets its name from the Dakota word “minisota”, which means, “water that reflects the sky.” Minnesota State Government Website, <http://www.state.mn.us/portal/mn/jsp/home.do?agency=NorthStar>, 9/17/2010.

² Webster’s II New Riverside Dictionary: Houghton Mifflin Company, (rev. ed. 1996).

³ *Id.*

⁴ Black’s Law Dictionary, West Group Publishing, (6th ed. 1990).

⁵ Indian Reorganization Act, (Wheeler-Howard Act), 25 U.S.C. § 461 et seq.

⁶ Indian Self-Determination and Educational Assistance Act, 25 U.S.C. § 450 et seq.

⁷ “Bush’s comment on tribal sovereignty creates a buzz,” Seattle PI, August 13, 2004, http://www.seattlepi.com/national/186171_bushtribes13.html (1/25/2011), quoting President George W. Bush, Washington, D.C., Aug. 6, 2004.

⁸ “Bush’s comment on tribal sovereignty creates a buzz,” Seattle PI, August 13, 2004, http://www.seattlepi.com/national/186171_bushtribes13.html (1/25/2011).

⁹ United States v. Wheeler, 45 U.S. 313, 323-324 (1978).

¹⁰ David H. Getches et al., Federal Indian Law, Thomson West, p. 3 (5th ed. 2005).

¹¹ Worcester v. Georgia, 30 U.S. 1 (1831).

¹² “St. Regis Mohawk Indian Nation: Land Base,” Environmental Protection Agency Website, <http://www.epa.gov/region2/nations/srm.htm> (1/25/2011).

¹³ Exceptions include, perhaps most notably, Public Law 280, which extended limited state jurisdiction over reservation communities in several states, including Minnesota; see Act of Aug. 15, 1953, 67 Stat. 588 (codified as amended at 18 U.S.C. § 1162, 25 U.S.C. §§ 1321-26, 28 U.S.C. § 1360).

¹⁴ Commerce Bank v. Long Family Land & Cattle

Company, Inc., 128 S. Ct. 2709 (2008).

¹⁵ Worcester v. Georgia, 31 U.S. 515, 559 (1832). See also United States v. Lara, 541 U.S. 193, 204-205 (2004) (affirming the Supreme Court’s traditional understanding of each tribe as ‘a distinct political society...capable of managing its own affairs and governing itself,’) (quoting Cherokee Nation v. Georgia, 30 U.S. 1 (1831)).

Jamie Ford is a 2008 graduate of William Mitchell College of Law and works for the Indian Land Tenure Foundation. Indian Land Tenure Foundation is headquartered in Little Canada and is the only national organization dedicated to the return of reservation land to Indian ownership. Jamie can be reached at jford@iltf.org or 651-789-1752.



Healthcare Reform

What Every Employer Needs to Know

Emily L. Ruhsam

Nearly one year after President Obama signed the Patient Protection and Affordable Care Act (PPACA) into law, many unanswered questions remain. When representing employers, it is important to be aware of the known (and potentially unknown) impact PPACA has on your client. Although many details of PPACA need clarification, this article provides an overview and summary of changes important to be aware of when advising employers.

Recent Changes for Health Plans

PPACA requires health plans with calendar year reporting periods (Jan 1 – Dec 31) to comply with the following changes effective January 1, 2011. For health plans on any other reporting period, the effective date for these changes is the first day of the plan year beginning in 2011. For example, if the health plan begins on April 1 of every year, these changes go into effect on April 1, 2011.

Non-grandfathered plans must provide for certain internal appeals procedures (including an external review process).¹

- Non-grandfathered plans are required to cover certain preventative services (i.e., immunization and infant screenings) without cost sharing.²
- Non-grandfathered, fully insured plans must undergo non-discrimination testing (currently a requirement for self-insured plans only). This is similar to the top-heavy discrimination testing for 401(k) plans.³

- If a plan offers dependent coverage, it must offer coverage until age 26 (grandfathered plans must cover such dependents only if the dependent is not eligible for other employer sponsored coverage).⁴
- No pre-existing condition limitations allowed for children under 19.⁵
- No lifetime limits on minimum essential benefits (i.e. maternity and newborn care, prescription drugs, and emergency services).⁶
- No “unreasonable” annual limits on minimum essential benefits.⁷
- No recession (cancellation) of participants.⁸

Additionally, regardless of when the plan year begins, effective January 1, 2011, over-the-counter medications cannot be reimbursed through a health Flexible Spending Account, Health Reimbursement Account, Health Savings Account or Archer Medical Savings Account without a physician prescription.⁹

Grandfathered Health Plans

A grandfathered health plan is a plan that was in place and had at least one participant enrolled on March 23, 2010.¹¹ Although re-enrollment and new employee enrollment does not affect a plan’s grandfathered status, regulations issued in June 2010 require that the following changes cause a plan to lose its grandfathered status:

- Significantly reducing or cutting benefits (i.e. a plan cannot decide to no longer cover diabetes treatments).¹¹
- Raising co-insurance charges (i.e. if a patient is required to pay a fixed percentage of a charge, i.e., 20% of a hospital bill, the plan cannot increase this percentage).¹²
- Significantly raising co-payment charges.¹³
- Raising co-payment charges more than the greater of:¹⁴
 - \$5 (adjusted annually for inflation); or
 - 19-20% per year (15% plus the cost of medical inflation 4-5% per year).

Employer “Pay or Play” Mandates

There has been a significant amount of discussion regarding the employer “pay or play” mandates, which essentially requires some employers to offer insurance to their employees or pay a penalty. On January 1, 2014, only “large employers” will be required to offer “affordable” health insurance to full-time employees or pay a \$2,000 per year, per full-time employee penalty in any month in which a full-time employee receives a federal individual insurance subsidy.¹⁵ Employer coverage is considered unaffordable if: (1) the employee’s share of the premium for self-coverage is more than 9.5% of the employee’s modified adjusted gross household income or if the employer’s share of the cost of benefits is less than 60%; and, (2) an employee obtains a tax credit for coverage through a state exchange.¹⁶ (Effective January 1, 2014, states must establish health insurance exchanges through which individuals and employers with less than 101 employees may purchase health insurance.)

The PPACA defines “large employer” as one which employs at least 50 full-time

equivalent employees during the preceding calendar year.¹⁷ A full-time employee is an individual averaging at least 30 hours of service per week, calculated on a monthly basis (excluding full-time seasonal employees working less than 120 days during the calendar year).¹⁸ Although an employer is not required to offer coverage to part-time employees (or pay penalties for not offering coverage to part-time employees), hours worked by part-time employees are included in the calculation of a “large employer” (by taking the total monthly hours worked divided by 120).¹⁹

For example, an employer with 40 full-time employees and 20 part-time employees (each working 24 hours per week, or 96 hours per month) is considered “large employer” by the following calculation:

- 20 part-time employees x 96 hours per month = 1920 /120 = 16 FTE’s + 40 full-time employees = 56

In the above example, if the employer did not offer health insurance coverage to its full-time employees, it would be assessed the following penalty:

- 40 full-time employees – 30 (subtract the first 30 full-time employees from the calculation) = 10 x \$2,000/employee = \$20,000 / 12 = \$1,667 per month.

Other Changes for Employers

The following are additional PPACA changes (with corresponding effective dates) significant to employers:

- Tax Year 2010. Small employers (those with 25 or fewer full-time employees and average wages of less than \$50,000) purchasing health insurance coverage for employees will be eligible for a credit equal to 35% of the employer’s contribution (phase out for employers

-
- between 10 and 25 employees and average wages greater than \$50,000).²⁰
 - Tax Year 2011. Employers will be required to notify employees of the cost of employer-sponsored health coverage on each employee's W-2.²¹
 - January 1, 2014. Waiting periods in excess of 90 days are no longer permitted.²²
 - January 1, 2014. Employers with 200 or more employees are required to auto-enroll full-time employees into the employer's health plan (if employer offers health insurance).²³
 - January 1, 2014. New reporting requirements for employers offering coverage (similar to 5500 reporting for retirement plans).²⁴

Status of PPACA

Although many changes recently went into effect, the Departments of Treasury and Health & Human Services, among others, have issued extensions and waivers extending the timeline for enforcement of some requirements.

For instance, the Department of Health & Human Services issued a bulletin describing the process to obtain waivers for the PPACA requirement called the "minimal medical loss ratio" (mini-med plans). These mini-med plans require employers to meet a new \$750,000 minimum cap on annual benefit payouts for plan or policy years beginning on or after September 23, 2010, but before September 23, 2011 and are required to spend between 80-85% of premiums on medical services.²⁵ However, mini-med plans often have annual limits well below this limit. Many plans also fail to meet the 2011 requirement and spend and spend more than 20% of premiums on overhead services.

On September 3, 2010, the Department of

Health & Human Services issued a bulletin describing the process to obtain waivers for this requirement.²⁶ In late September, Health and Human Services Secretary Kathleen Sebelius issued the first 30 waivers to the minimal medical loss ratio requirement to low-wage employers such as: McDonald's (BCS Insurance) (115,000 enrollees); CIGNA (265,000 enrollees), and; the United Federation of Teachers Welfare Fund (351,000 enrollees). The waivers are good for one year and granted to entities that would otherwise be forced to drop employee's coverage because of noncompliance with the minimum loss ratio requirement.

Additionally, on December 22, 2010, the IRS, as well as the Departments of Labor, Treasury, and Health & Human Services published Notice 2011-1 regarding the non-discrimination requirements, within PPACA.²⁷ Notice 2011-1 stated that due to a lack of clarity, the non-discrimination requirements will not be enforced until regulations or other guidelines have been issued to help employers.²⁸ Furthermore, on October 12, 2010, the IRS issued Notice 2010-69 stating that it would not enforce the W-2 requirement for tax year 2011.²⁹ The IRS issued Notice 2010-69 because it wanted to ensure employers have enough time to make necessary changes to their payroll procedures prior to implementing this burdensome reporting requirement.

Legal and Legislative Challenges to PPPAC

As support for PPACA is divided by party lines, the recent change in the political landscape of the House of Representatives resulted in the January 19, 2011 passage of the "Repealing the Job-Killing Health Care Law Act" bill.³⁰ The two-page bill set out to repeal PPACA in its entirety. It passed the House by a vote of 245-189. On February 2,

2011, the Senate failed to pass the companion bill by a 47–51 vote.

Additionally, on March 23, 2010, the day PPACA was signed into law, there were a number of lawsuits filed challenging the law. The main challenge concerns the “individual mandate.” The “individual mandate” allows for monetary penalties on individuals for not having health insurance.³¹ In October 2010, a judge in Michigan ruled that the Act is constitutional, including the provision requiring all individuals to purchase health insurance.³² On December 13, 2010, a judge in Virginia ruled the mandatory coverage section unconstitutional but severable from the rest of PPACA requirements.³³ On January 31, 2011, a judge in Florida ruled PPACA unconstitutional and not severable. The judge stated, “the individual mandate seeks to regulate economic inactivity, which is the very opposite of economic activity. And because activity is required under the Commerce Clause, the individual mandate exceeds Congress’ commerce power”.³⁴ In his conclusion the Florida judge held the individual mandate was “absolutely necessary and essential” for PPACA to operate and therefore the entire law must be struck down. This differs from the Virginia judge, who ruled the individual mandate was unconstitutional, but it could be severed from PPACA therefore the remaining provisions were still valid. Most recently, on February 22, 2011, a judge in Washington D.C. ruled PPACA constitutional.³⁵ There are approximately 24 lawsuits pending in federal court regarding the issue of the constitutionality of the PPACA.

Though the Supreme Court denied certiorari on the issue a few months ago, as more challenges work their way through the court systems, it is expected that the Supreme Court will eventually grant certiorari. This will be the only avenue available to

opponents to overturn PPACA as the democratically controlled Senate is not likely to find the votes necessary for repeal.

Notes

¹ Patient Protection and Affordable Care Act, Pub. L. No. 111-48, §2719, 124 Stat. 119 (2010).

² *Id.* at §2713(a)(2–3).

³ *Id.* at §2706.

⁴ *Id.* at §2714(a).

⁵ *Id.* at §1201 (amending the Public Health 6 Service Act §2704); *Id.* at §10103(e).

⁶ *Id.* at §1302(b)(1)(A–J).

⁷ *Id.* at §2711(a)(2).

⁸ *Id.* at §2712.

⁹ *Id.* at §9003(a–d).

¹⁰ *Id.* at §1251 (a–e)

¹¹ Interim Final Rules for Group Health Plans and Health Insurance Coverage Relating to Status as a Grandfathered Health Plan Under the Patient Protection and Affordable Care Act, 75 Fed. Reg. 34538, 34543–45 (June 17, 2010).

¹² *Id.*

¹³ *Id.*

¹⁴ *Id.*

¹⁵ Patient Protection and Affordable Care Act, Pub. L. No. 111-48, §1513, 124 Stat. 119 (2010) (amending I.R.C. §4980H(a)).

¹⁶ *Id.* at §114(amending I.R.C. §6056)

¹⁷ *Id.* at §1513 (amending I.R.C. §4980(H)(d)(2)).

¹⁸ *Id.* at §1513 (amending I.R.C. §4980(H)(d)(4) (A)).

¹⁹ *Id.* at §1513 (amending I.R.C. §4980(H)(d)(2) (C)).

²⁰ *Id.* at §1421 (amending I.R.C. §45(R)(b)).

²¹ *Id.* at §9002(a) (amending I.R.C. §6051(A) (14)).

²² *Id.* at §1514 (amending I.R.C. §6056)).

²³ *Id.* at §1511 (amending the Fair Labor Standards Act, 29 U.S.C. 201).

²⁴ *Id.* at §1514 (amending I.R.C. §656).

²⁵ *Id.* at §1304(b).

²⁶ OCIO Sub-Regulatory Guidance (OCIO 2010-1): Process for Obtaining Waivers of the Annual Limits Requirements of PHS Act Section 2711 (Sept. 3, 2010), *available at* http://www.hhs.gov/ociio/regulations/patient/ociio_2010-1_20100903_508.pdf.

²⁷ Internal Revenue Service Notice 2011-1, available at <http://www.irs.gov/pub/irs-drop/n-11-01.pdf>.

²⁸ *Id.*

²⁹ Internal Revenue Service Notice 2010-69, available at http://www.irs.gov/irb/2010-44_IRB/ar13.html#d0e1960; IRS Releases Draft W-2 Form for 2011; Announces Relief for Employers, IRS Information Release IR-2010-103 (Oct. 12, 2010).

³⁰ Repealing the Job-Killing Health Care Law Act, H.R. 2, 112th Cong. (2011).

³¹ Patient Protection and Affordable Care Act, Pub. L. No. 111-48, §1501, 124 Stat. 119 (2010) (amending I.R.C. §5000A).

³² *Thomas More Law Center v. Obama*, 720 F.Supp.2d 882 (E.D. Mich. 2010).

³³ *Cuccinelli v. Sebelius*, 728 F.Supp.2d 768 (E.D. Va., Dec. 13, 2010).

³⁴ *Florida ex rel. Bondi v. U.S. Dept. Of Health and Human Services*, ___ F.Supp.2d ___, (N.D. Fla. 2011).

³⁵ *Mead v. Holder*, ___ F.Supp.2d ___, (D. D.C., 2011).

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