Holifield & Associates, PLLC

Legal Update for Employers

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As a service to our clients, Holifield & Associates, PLLC periodically issues a newsletter to keep you informed of developments in statutes, regulations, and case law that may impact you.

If you would like assistance or further information about any of the matters described in this update, please contact us and we will be happy to discuss these issues with you further.

LOOKING AHEAD - AFFORDABLE CARE ACT DEADLINES AND EFFECTIVE DATES FOR 2014, 2015 AND BEYOND

Provisions taking effect in 2014

Although some of the provisions of the Affordable Care Act have been delayed, many provisions went into effect in 2014. Employers and insurers have been aware of these provisions for some time and have taken steps to ensure compliance by January 1, 2014. Provisions that took effect January 1, 2014 include:

- No limits on annual coverage;
- Essential health benefits - policies offered in the Exchange and plans sold in states' small group and individual markets must provide coverage for 10 categories of benefits; cost sharing on these plans is limited to $6,350 for individual coverage and $12,700 for family coverage (2014 limits);
- Out-of-pocket maximums are limited to $6,350 for individual coverage and $12,700 for family coverage (2014 limits);
- Annual deductible limits - $2,000 for single coverage and $4,000 for family coverage (2014 limits);
- Waiting periods for coverage cannot exceed 90 days; and
- Guaranteed availability and renewability of insurance coverage regardless of health status (no pre-existing condition exclusions).

In addition, several ACA provisions regarding individual coverage went into effect on January 1, 2014. As of that date the individual mandate requires all individuals to have qualifying coverage. In addition, the ACA provisions providing for health insurance premium and cost-sharing subsidies became effective. These programs provide premium subsidies for families with incomes between 133% and 400% of the federal poverty level. Cost-sharing subsidies are provided for those with income up to 250% of the federal poverty level. The health insurance "exchange" also went into effect to allow individuals to purchase qualifying coverage to meet the individual mandate.

Looking ahead to 2015

The most publicized ACA provision scheduled to go into effect in 2015 is the employer mandate, more commonly known as "pay-or-play". This provision was originally scheduled to go into effect in 2014. However, its effective date was delayed until January 1, 2015 giving employers additional time to determine whether they are covered by the mandate and, if so, bring their plans into compliance. One important determination for employers is measuring their employees' hours of service to determine whether they are "full-time" employees (working more than 30 hours). The proposed regulations issued with regard to the employer mandate contained a transitional rule regarding stability periods and measurement periods. Generally, employers establish a measurement period during which employee hours are tracked to determine whether they qualify as a full-time employee. The employer will also establish a stability period following the measurement period during which an employee's status as full-time or part-time (as determined during the preceding measurement period) is set. Generally, a stability period cannot be longer than the measurement period. The transitional rule in the proposed regulations allowed employers intending to use a 12-month stability period for 2014 to use a measurement period that is less than 12 months. The purpose of the transitional rule was to allow employers to use a 12 month stability period for 2014 even though there was not sufficient time after the proposed regulations were issued to establish policies and procedures to measure employees' hours for a 12-month measurement period prior to January 1, 2014.

Now that the implementation of the employer mandate has been delayed, the timing issue which brought about the transitional rule is no longer present. Employers have sufficient time to establish policies and create procedures to measure hours of service during a full 12-month measurement period. Employers should not anticipate that the IRS will issue a similar transition rule for 2015. An employer that wishes to use a 12-month stability period beginning January 1, 2015 may need to use a measurement period that begins sometime in October or November of 2013, depending on the length of the administrative period.

For example, if an employer wishes to use a 12-month stability period for 2015 (January 1 through December 31, 2015) and an administrative period of 45 days prior to the beginning of the 2015 plan year (October 15 through December 31, 2014), the measurement period for that employer for the 2015 plan year will have to be October 15, 2013 through October 14, 2014.

IRS Issues Guidance on Cafeteria Plans, FSAs and HSAs Regarding Same-Sex Spouses

The IRS issued Notice 2014-1 on December 16, 2013 providing guidance to employers on specific issues under cafeteria plans, flexible spending arrangements (FSAs) and health savings accounts (HSAs) regarding benefits provided to same-sex spouses. The IRS previously adopted the "state-of-celebration" rule in relation to same-sex marriages, which, for Tennessee employers, means that same-sex couples who are legally married in a jurisdiction which recognizes same-sex marriage must be treated the same as opposite-sex couples for federal tax purposes, even though the couple resides and/or works in Tennessee (which does not recognize same-sex marriage).

Do You Have an Exit Strategy? Business Succession Planning in 2014

Estate and succession planning for a professional can present a set of challenges since professionals are required to be licensed, and state professional regulatory authorities limit ownership to licensed professionals. Therefore, a professional does not have the ability to pass ownership to future generations unless the professional's children happen to follow in his footsteps. In most cases, the professional will need to plan an exit strategy that involves the transfer of his ownership interest to other partners or an associate.

A well-drafted Buy-Sell Agreement among business owners will set forth both the procedure for computing a buyout price as well as the various triggering events that would cause a buyout, such as retirement, death, disability, a desire to practice with another group, the loss or suspension of professional license, or for other reasons. The buyout price can differ among the various scenarios, and the price can be expressed as a percentage of the buyout valuation. The agreement should also set forth how and when payments will be made to the professional exiting the practice. As discussed below, choice of entity does affect the form a buyout can take, as well as the income tax consequences for both the remaining professionals and the retiring professional.

Succession planning for other business owners can also be simplified with Buy-Sell Agreements, as well as other estate planning tools. These methods can clearly set out procedures for transfer of ownership to partners or family members. The beginning of the year is a great time to determine how best to ensure the continuation of your business.

Tennessee Phases Out Inheritance Tax

Over the next few years, the inheritance tax exemption in Tennessee will increase until the inheritance tax is totally phased out in 2016. The Tennessee inheritance tax is only assessed on an estate when the total value of the estate exceeds the exemption. The total estate could include real estate in Tennessee, vehicles, bank accounts, investment accounts, retirement account fund, business interests, proceeds from life insurance, assets held in a revocable living trust, along with other assets. The inheritance tax exemption in Tennessee will increase until 2016, as set out below:

2014	**$2,000,000**
2015	**$5,000,000**
2016	**No tax for decedents dying in 2016 and thereafter**

The Tennessee inheritance tax exemption must be considered along with the federal estate tax exemption, which is set at $5.34 million for individual decedents dying in 2014 pursuant to the American Taxpayer Relief Act. The unused portion of the first spouse's full exemption is now preserved for use by the second spouse, effectively doubling the exemption for most couples. The maximum estate tax rate is 40% in 2014.

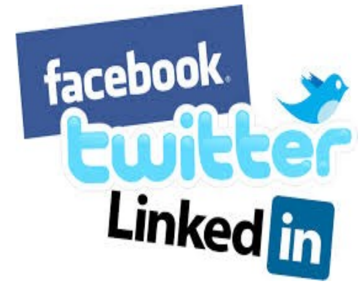
Annual Evaluation of Estate Plans

The beginning of the year is the perfect time to perform an annual evaluation of your estate plan. Even minor changes in circumstances can impact an estate plan. In performing this annual evaluation, consider the following:

- Did you recently move? (new house, city, or state)
- Have you purchased or sold real estate or other property?
- Did a loved one pass away?
- Has your health deteriorated substantially since the creation of your estate plan?
- Does your Living Will and Health Care Directive accurately reflect your wishes?
- Have you had any children since your will was last executed?
- Have you recently been married?
- Have any of your children become recently married?
- Have you become a grandparent recently?
- Has contention developed between you and a loved one? Specifically, persons you named as executors or beneficiaries?
- Are your beneficiary forms up to date?

Estate Planning

A New Social Media Policy for a New Year



Consider for a moment how social media affects your business. Do employees use it to help build and manage your company's brand and image? Is it utilized as a way for the company to interact with its customer base? If so, your company has likely invested a fair amount of time and resources in creating and maintaining a presence on social media platforms such as Facebook, Twitter, and LinkedIn. As such, you like many other business owners will undoubtedly consider your company's social media page or profile, along with its associated followers, friends, and other connections, to be valuable business assets. But how have you protected these business assets? Moreover, who owns these assets – the company or the individual employee who manages the social media page or profile?

The inherent issue lies in the fact that an employee may act as a "voice" of the company through these social media platforms. As such, the success and popularity of a company's social media presence may be due to the individual employee's style or personality. This can cause the line between "company brand" and "personal brand" to become blurred and possibly problematic with regard to ownership and valuation of business-related social media accounts when the employee and company part ways.

Consider a 2011 case out of California where an employee of the mobile news and reviews website PhoneDog had created the Twitter handle "@PhoneDog_Noah" to provide product reviews. Over four and half years, he eventually accumulated 17,000 Twitter followers. When the employee left the company, he refused to relinquish the account to PhoneDog and changed the handle to "@noahkravitz."

The California court permitted PhoneDog to assert civil claims for trade secret misappropriation, conversion, and interference with economic advantage. PhoneDog further claimed that it had an ownership interest in the content posted on the account and an intangible property interest in the Twitter account's list of followers, which PhoneDog related to a business customer list. But who *actually* owned the account? Unfortunately, the case was settled out of court and such issues were never answered.

However, in a similar case out of New York, a former employee had been hired as a "Video and Social Media Producer." Following her termination, she refused to relinquish the login information and passwords for the social media accounts she had managed during her employment. In contrast to PhoneDog, when the former employee was hired, she was required to execute an agreement which stated that all work created or developed by her shall be the sole and exclusive property of the company and she would be required to return all confidential information to the company upon request. Under this agreement, the court found that the businesses owned the social media account access information and were likely to prevail on a conversion claim.

Other cases out of Pennsylvania and Illinois have seen individuals sue their former employers who had taken over and started using social media accounts that the individuals had considered to be personal accounts. The courts in these cases, however, disagreed as to whether the individuals may assert an invasion of privacy claim. The Pennsylvania court also found that having language in an employment agreement that did not specifically discuss the company's ownership rights of the social media accounts was not enough to establish a property right.

Although there is a lack of clear applicable law concerning the ownership of social media accounts, there are proactive steps that companies can take to protect such valuable assets. Clearly addressing the ownership of company social media accounts in employee agreements should be a new a year's resolution for all companies maintaining social media pages or profiles. That being said, regardless of whether your company utilizes social media to promote its business, all employers should establish clear guidelines regarding an employee's personal social media accounts and posting statements, comments, etc. that are contrary to the interests of the employer or could reflect negatively on the company.

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