# Holifield & Associates, PLLC

# Legal Update for Employers

APRIL 2014

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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.*

## HIPAA AUDITS ON THE HORIZON

On February 24, 2014 the Department of Health and Human Services ("HHS") issued a notice announcing plans to conduct a "HIPAA Covered Entity and Business Associate Pre-Audit Survey" in which it will survey up to 1,200 HIPAA covered entities and business associates to determine suitability for the Office for Civil Rights ("OCR") HIPAA Audit Program.

The HITECH Act requires OCR to conduct periodic compliance audits. During 2011 and 2012 OCR conducted a pilot audit program which concluded in December 2012. Since that time OCR has been evaluating the audit program and making revisions to the audit protocols to account for changes made by the HIPPA/HITECH Omnibus Rule. A copy of the previous audit protocols can be found at www.hhs.gov/ocr/privacy/hipaa/enforcement/audit/protocol.html. While these protocols do not include the updates for the HITECH Omnibus Rule, they are instructive regarding what OCR looks for in conducting a HIPAA compliance audit.

The notice issued in February 2014 by HHS sets in motion the revitalization of the HIPAA audit program. According to the notice, OCR plans to submit a new information collection request to the Office of Management and Budget for approval and seeks comments on the proposed survey. The proposed pre-audit survey will request information from 1,200 covered entities and business associates to assess the size, complexity, and fitness for audit. Items included in the survey include requests for data regarding the number of patient visits or insured lives, the use of electronic information by the covered entity or business associate, revenue, and business locations. OCR will use this information to "assess the suitability of respondent covered entities and business associates for audits." Notably, the proposed audit will cover not only covered entities but extends to business associates as well. OCR has also informally stated that the new audits will not be based on the previous protocols. Instead there will be a more targeted approach based on findings made during the audit pilot phase. Specifically, there will be an increased focus on risk assessments.

The deadline to submit comments on the proposed survey is April 25, 2014. It is expected that the formal audit program will begin sometime in the fall of 2014.

In preparation for the possibility of a HIPAA audit, we recommend that you review your HIPAA policies and procedures, focusing particularly on workforce training and risk assessment procedures. As always, documentation of your efforts to test your entity's HIPAA compliance and train your workforce are critical in demonstrating compliance. If you need assistance in any of these areas, please contact us at 865-566-0115.

**HIPAA PLAN IDENTIFIER NUMBER AND CERTIFICATION REQUIREMENT**

As part of the HIPAA Standard Transaction regulations issued in 2012, health plans are required to obtain a Health Plan Identifier ("HPID") by November 5, 2014. "Small health plans" – those with annual receipts of $5 million or less – have until November 5, 2015 to obtain an HPID. These regulations were issued pursuant to provisions in the Patient Protection and Affordable Care Act ("ACA") which require the institution of a health plan identifier system similar to that previously adopted for employer and health care providers. The HPID is to be used by health plans in any HIPAA standard transaction conducted with another covered entity. The HPID can be obtained through a website established by HHS (http://www.cms.gov/Regulations-and-Guidance/HIPAA-Administrative-Simplification/Affordable-Care-Act/Health-Plan-Identifier.html).

The ACA also instituted a requirement that health plans provide certification to HHS that the plan is in compliance with the applicable standard transaction requirements of HIPAA. These requirements apply to both insured and self-insured health plans and mandate that certain categories of electronic transactions be performed using standards and codes set by HHS establishing what data must be provided and fields that must be used when transmitting electronic health information. Health plans should already be in compliance with the standard transaction regulations. The new mandate implemented by the ACA requires that health plans file two one-time certifications with HHS establishing compliance with standard transactions regulations. The penalty for failing to provide the certifications is $1 per covered life per day until the certification is completed with a maximum penalty of $20 per covered life. An additional penalty of up to $40 per covered life is imposed if a health plan knowingly provides inaccurate or incomplete information with regard to a certification.

The first of the two certifications must be provided by December 31, 2015 (small plans have until December 31, 2016). Under this requirement, the health plan must file an attestation with HHS demonstrating compliance with 3 of the 8 standard transactions (eligibility, claim status and electronic funds transfer-remittance advice). Currently, the second certification must also be provided by December 31, 2015; however, because no regulations on this certification have been issued, it is probable that this deadline will be delayed. The second certification must demonstrate compliance with the remaining 5 categories of standard transactions (claims & encounter information, enrollment-disenrollment, premium payments, claims attachments and authorizations/referrals). Health plans must obtain certification from an outside vendor evidencing that the plan performs the required standard transactions and has tested these transactions with a required minimum number of third parties.

Because of the length of time needed to perform the required testing, we recommend that health plans begin the process now to ensure compliance by the December 31, 2015 deadline. Proposed regulations regarding the first certification requirement were issued on January 2, 2014. Until these regulations are finalized, we will not know exactly what the certification will entail. However, it is likely that health plans will be required to perform testing involving a minimum number of transactions. Such processes may be quite lengthy and in some cases will involve business associates. We recommend that health plans familiarize themselves with the general requirements of the certification and communicate with business associates to lay the ground work for testing compliance. This will ensure that once the regulations are finalized, you have sufficient time to perform the required testing prior to the compliance deadline.

## IS AN I-9 INVESTIGATION IN YOUR FUTURE?

With investigations by the U.S. Immigration and Customs Enforcement ("ICE") at an all-time high, the answer may not be what you expect. The Association of Corporate Counsel reported over 3,000 audits to have taken place in 2012. This number was up from a mere 250 in 2007. As reported by ICE, the total amount of fines increased from $1 million to $13 million between 2009 and 2012, while the number of arrests of company managers increased to 238.

Very recently in June 2013, the retail giant Macy's entered into a settlement agreement after the Office of Special Counsel for Immigration-Related Unfair Employment Practices concluded that Macy's had committed unfair documentary practices. Macy's electronic I-9 system had limited the employee's choice of I-9 documents that could be presented and required more or different verification documents from individuals based on immigration status or national origin. This was a violation of the Immigration and Nationality Act. As such, Macy's was ordered to pay a civil penalty of $175,000 and create a back pay fund of $100,000.

The Macy's settlement was a warning to all employers that despite the move to an online I-9 environment and process, it remains the employers' responsibility to ensure its compliance with all I-9 requirements. With this in mind, now is a good time for employers to examine current I-9 forms and review company processes and procedures. Here are a few tips to consider:

- Employees must be able to choose which documents to present for verification and may not be limited to certain documents by their employers;
- Do not request more documents than necessary;
- The person who physically examines the documents must be the same person who signs Section 2 of Form I-9;
- The examiner of the documents and the employee must both be physically present during the examination;
- Provide the employee's first day of employment under "Certification";
- Make a copy of the original verification documents that were presented;
- Refrain from using pre-populated information for Section 1 if using electronic software for I-9 completion, storage, and compliance; and
- Tennessee employers are required to maintain a copy of such documents for either three years after the date the employer receives the documentation or for one year after the employee ceases to provide labor or services for the employer, whichever is later.

## SAME-SEX MARRIAGE IN TENNESSEE

On March 14, 2014, a federal district court in Nashville, Tennessee ruled that Tennessee officials must recognize the marriages of three specific same-sex couples who moved to Tennessee after legally marrying in other states. The ruling provides immediate protection for the couples while the suit they filed in October, challenging Tennessee's failure to recognize same-sex couples' marriages, proceeds toward a final resolution. The couples argued that such an order was necessary because Tennessee's refusal to respect their marriages deprives them of critical legal protections and benefits that they previously enjoyed, many of which are designed to protect couples in an emergency. For example, one of the couples is expecting a child in the spring, and they need the court to ensure that both parents will be authorized to make decisions regarding their child and to protect and care for her. The court found that Tennessee's refusal to recognize the couples' valid marriages fails to protect them and likely violates the United States Constitution. In granting the couples' request, U.S. District Judge Aleta A. Trauger in Nashville, Tennessee, emphasized she wasn't making a final judgment on whether the legal challenge has merit.

The temporary order only applies to the three specific couples involved in the lawsuit. Once the suit is resolved, we will provide guidance on the effects the ruling may have on Tennessee employers offering benefits to their employees.

## PRIVATE COMPANY EMPLOYEES COVERED BY WHISTLEBLOWER PROTECTIONS OF SOX

In the wake of the Enron scandal Congress enacted the Sarbanes-Oxley Act of 2002 ("SOX") in an effort to safeguard investors in public companies and restore trust in the financial markets. Under the provisions of SOX, a public company or any officer, employee, contractor, subcontractor, or agent of a public company is prohibited from discharging, demoting, suspending, threatening, harassing, or otherwise discriminating against an employee for engaging in whistleblowing activity. For years, it was widely held that this provision only applied to employees of the 5,000 or so companies with publicly traded securities in the U.S. This, however, was vastly changed on March 4, 2014 by the U.S. Supreme Court in *Lawson v. FMR, LLC.*

The *Lawson* case involved two former employees of certain private companies that advise and manage publicly traded mutual funds. Because it is common in the industry for mutual funds to have no employees, the funds retain private contractors to advise them. When the two former employees allegedly blew the whistle for fraud concerning the mutual fund's cost accounting methodologies, they claimed to have suffered retaliation by their employer. The private companies countered that the former employees were not protected under SOX, as it only protects employees of public companies. As such, the Supreme Court was faced with the question of whether SOX shields only those employed by the public company itself, or does it also protect employees of privately held contractors and subcontractors - such as investment advisers, law firms, or accounting firms - who perform work for the public company?

As a premise to its opinion, the Supreme Court first considered the legislative history of SOX and, in particular, the fact that SOX arose out of the Enron scandal. As many still remember, both employees of Enron and employees of Enron's outside accounting firm, Arthur Anderson, faced retaliation when they attempted to report corporate misconduct. With this in mind, the Supreme Court in a 6-3 vote held that employees of contractors and subcontractors who carry out work for public companies were protected under the provision, thereby, vastly expanding the whistleblower protection of SOX.

The impact of the Supreme Court's decision means that employees of law firms, accounting firms, and other contractors of publicly traded companies may be protected by SOX for raising issues relating to public company corporate misconduct. Therefore, such employers affected by this decision should act now to carefully evaluate their whistleblower policies and ensure effective procedures are in place for receiving, processing, and investigating internal whistleblower claims. Training sessions should be implemented for management and any personnel who may be responsible for the intake, investigation, and resolution of whistleblower claims to ensure they are instructed on how to properly handle such claims.

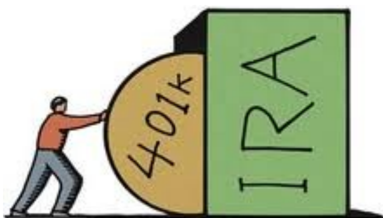
## LOOKING AHEAD: *THE USE OF E-CIGARETTES IN THE WORKPLACE*

The use of e-cigarettes has been a hot topic in recent years. While studies have yet to produce any conclusive results on their long term effects, some states are considering amending state statutes to ban their use in public places. Although some states may have statutes banning the smoking of tobacco products in the workplace, this definition does not cover e-cigarettes because they are not a tobacco product and produce only a vapor rather than smoke. Employers may be faced with questions from employees who seek to use e-cigarettes in the workplace. This may raise the question of whether an e-cigarette is considered a "reasonable accommodation." At this time, the future of e-cigarette legislation and litigation remains unclear. As such, employers should be careful when implementing new policies relating to the use of e-cigarettes at work. We will continue to monitor state legislation and keep you updated on this issue.

## MULTIPLE IRA ROLLOVERS PENALIZED

A U.S. Tax Court opinion issued earlier this year undermines guidance issued for decades by the IRS. Internal Revenue Code §408(d)(3)(B) provides that nontaxable rollover treatment is not available if the taxpayer has already received a nontaxable rollover distribution from an IRA in the previous year. (The once-per-year restriction does not apply to direct transfers from one IRA to another—only to distributions that are reinvested in an IRA within 60 days in accordance with rollover rules.) Practitioners previously interpreted this rule to apply separately to each IRA an individual owns, and the IRS appeared to support this view.

In *Bobrow v. Commissioner*, T.C. Memo 2014-21, a taxpayer received a distribution from his traditional IRA (IRA1) on April 14, 2008, followed by a distribution from his rollover IRA (IRA2) on June 6, 2008. Bobrow claims that the distribution from IRA1 was repaid on June 10, 2008, and the distribution from IRA2 was repaid August 4, 2008, both within the 60-day period allowed for qualified rollovers.




The court held that the once-per-year limitation disqualified the rollover from the taxpayer's second IRA, concluding that the rule applies to all of a taxpayer's IRA accounts: "Regardless of how many IRAs he or she maintains, a taxpayer may make only one nontaxable rollover contribution within each one-year period." Last week, the IRS issued a notice stating that it intends to adopt the *Bobrow* decision and limit 60-day rollovers to one per taxpayer a year, but only beginning on January 1, 2015, in order to give IRA custodians time to change their materials.

Janet Novak of Forbes gives the following handy tips to prevent any extra tax or penalties on IRA distributions:

- Whenever possible, move IRA money only in a trustee-to-trustee transfer – ask your current investment company to transfer the funds directly to your new investment company. Such transfers do not count against the once a year 60-day rollover provision.
- Don't do more than one 60-day rollover a year after January 1, 2015, even if the transactions involve different IRAs.
- If you receive a distribution from an IRA or 401(k)—even one that qualifies for a rollover and isn't taxable—be sure to fill out lines 15A and 15B on your 1040, reporting the distribution and the taxable part, since these distributions are reported by the custodian to the IRS on a 1099R and will be computer matched by the IRS.
- If you take a distribution before age 59 ½, even one you believe meets one of the exceptions to the 10% penalty for early withdrawals, attach Form 5329 *Additional Taxes on Qualified Plans (Including IRAs) and Other Tax-Favored Accounts*. The form requires you to plug in a code to explain why it wasn't subject to the 10% penalty. The form is required and full disclosure helps protect you against penalties.
- If you're using a rollover to borrow from your IRA, don't expect the IRS to like it. As tax lawyer Ed Morrow observed in a *Wealth Strategies Journal* analysis of the case: "Some of the harsh treatment of the Bobrows undoubtedly occurred due to the abusive tint of the transactions – these were not rollovers to facilitate transition to another IRA provider or a different plan after retirement – they appear to be back door attempts at getting short-term, interest-free loans."
- Whenever you do a 60 day rollover, track it diligently and keep copies of any instructions to your IRA trustee.

http://www.forbes.com/sites/janetnovack/2014/03/25/gotcha-tax-court-penalizes-ira-rollover-that-irs-publication-says-is-allowed/

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