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HEALTH CARE REFORM: 2012 & 2013 EMPLOYER ACTION ITEMS

By Christine Moehl

In June the U.S. Supreme Court released its highly-anticipated ruling on the Patient Protection and Affordable Care Act (also known as "health care reform" or the "ACA"). The Court found the majority of the ACA to be constitutional. Many employers had adopted a "wait-and-see" approach while the Supreme Court considered the constitutionality of the ACA and this decision has now spurred those employers to action. This article is intended to provide employers with a list of items to accomplish in 2012 and 2013 in order to comply with the current law.

Determine Which Plans are Affected: Health care reform applies to all "group health plans" sponsored by employers. The definition of a group health plan is broad and includes both fully-insured and self-insured major medical plans, including mini-med and limited benefit plans. It also applies to other employer-sponsored health plans, such as employee assistance programs (EAPs), certain wellness plans, and most health reimbursement arrangements (HRAs). Some group health plans are specifically exempt from health care reform, such as plans that cover only one person and retiree-only plans. Most (but not all) stand-alone dental and vision plans are also exempt from health care reform.

Consider the Small Business Tax Credit: Starting in 2010, certain small employers that offer health insurance coverage to their employees became eligible for a tax credit of up to 35% of the health insurance premiums that they pay on their employees' behalf. According to the U.S. Government Accountability Office, only about 10% of all employers that were eligible for the credit actually claimed the credit on their 2010 returns. To be eligible for the tax credit an employer must (1) have no more than 25 "full-time equivalent" (FTE) employees during the tax year; (2) have average annual wages of less than $50,000; and (3) pay at least 50% of their employees' premiums for group health insurance coverage. The maximum tax credit is available for employers with no more than 10 FTEs and average wages of $25,000 or less. The credit is phased out for employers with between 11 and 25 FTEs and average wages between $25,000 and $50,000.

Distribute Summaries of Benefits & Coverage (SBCs): All employers with group health plans must provide new enrollment disclosures, called SBCs, to their plan participants. The SBCs must be provided for the first open enrollment on or after September 23, 2012. This means that employers with calendar-year plans must begin preparing their SBCs very soon in order to have them available for 2013 open enrollment. SBCs must also be provided to new enrollees in the plan on or after September 23, 2012.

The SBCs must conform to a specific template designed by the Department of Labor's (DOL) and they must be provided for each "benefit package" offered by the employer. For example, if an employer offers health coverage for both a PPO and an HMO, both of these "benefit packages" need a separate SBC. The penalties for failing to provide an SBC is significant – up to $1,000 per violation per participant – along with an additional

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excise tax of $100 per day per participant. Luckily, a "good faith" compliance standard will apply during the first year that the requirement is in place.

Ultimately, the employer is responsible for complying with the SBC requirement. However, in the case of fully-insured plans, the insurance carrier will likely provide the SBC to the employer. In the case of self-insured plans, most employers will rely on their third-party administrators (TPAs) to comply with the SBC requirement. Employers should identify each "benefit package" for which an SBC is required, and should ask for assurances from their insurance carrier or TPA that the SBC will be prepared prior to the next open enrollment. Employers with employees residing in Marion, Morrow or Hood River counties must also provide a translation assistance statement in Spanish on their SBCs and have a fully translated version of each SBC available upon request.

Report the Cost of Health Insurance on Employee W-2s: Employers that filed 250 or more Form W-2s in 2011 will be required to report the aggregate cost of employer-sponsored health coverage on all 2012 Form W-2s. This is for educational purposes only and no amount reported on the Form W-2 as the cost of group health coverage will result in additional taxes to either the employee or employer. Employers that utilize an outside payroll service should confirm that their service has access to the necessary information to comply with this requirement. If an employer does "in-house" payroll, the system will need to be modified to track and report the cost of employer-sponsored health coverage.

Extend Full Coverage for Women's Preventive Health Care Services: Effective for plan years beginning on or after August 1, 2012 (i.e., January 1, 2013 for calendar-year plans), group health plans must cover certain women's preventative health care services without cost-sharing or deductibles. Such services include wellness visits and contraception prescriptions and counseling (subject to a religious-employer exemption). It also includes domestic violence counseling. Employers should ensure that their plan documents and participant communications are amended to conform to these new requirements.

Deal with Medical Loss Ratio Rebates: Insurance carriers must issue rebates to employers that sponsor fully-insured health plans if the "medical loss ratio" for the group health plan exceeds a certain threshold. Employers start receiving these rebates in July 2012. To complicate matters, the Employee Retirement Income Security Act (ERISA) provides that if employees pay any portion of the premium, then a proportionate share of the rebate must be allocated for their benefit. Because the rebates are generally taxable if distributed to the employee or retained by the employer, in most cases employers will want to set up accounting policies that use the rebates to reduce future premium costs. The rebates are likely to be small, and the accounting involved with allocating them between employer and employee may be tedious. As a practical matter, the easiest and most cost-efficient way to apply the rebates may be to credit the entire rebate to the employee premium cost.

Cap Flexible Spending Arrangement (FSA) Deferrals: Effective for plan years beginning on or after January 1, 2013, participants in health FSAs will no longer be able to make salary deferral contributions in excess of $2,500 per year. This limit will be adjusted for inflation in future years, and is only applicable to salary deferral contributions in FSAs, not to employer contributions. Employers that sponsor health FSAs must: (1) ensure that communications to participants in the FSA reflect the $2,500 limit for the plan year beginning after January 1, 2013; and (2) ensure that the FSA plan document is amended for the limit by the end of 2014.

Withhold Additional Medicare Taxes from the Wages of Higher-Income Individuals: The ACA increases the employee portion of the Medicare tax (currently equal to 1.45% of wages) by an additional 0.9%. This additional tax applies to wages paid on or after January 1, 2013. Unlike the current Medicare tax, this additional tax is only imposed on higher-income individuals. Employers are required to withhold this amount from any wages paid to an individual in excess of $200,000. Employers should coordinate with their payroll providers or in-house payroll staff to make sure that the new Medicare tax will be applied to wages earned after January 1, 2013 in excess of $200,000.

Get Ready for 2014: In 2014 the "Play or Pay" penalty is scheduled to take effect. Beginning that year, all employers with 50 or more "full-time equivalent employees" will be subject to the "Play or Pay" penalty if they do not offer a group health plan to their employees or if the group health plan that they do offer is considered to be "unaffordable" or does not meet "minimum essential coverage" standards. In order to avoid (or limit) penalties, employers that offer group health coverage to their employees will need to work closely with their advisors to make certain that their plans are affordable and meet the required standards. Employers that do not offer any group health insurance should estimate the penalty that they will pay under this provision and then compare this amount to the cost of offering acceptable coverage. An employer that does not offer any health insurance coverage will pay a monthly penalty equal to the number of full-time employees (i.e., employees who work over 30 hours per week), minus 30, multiplied by $167. One important consideration in this regard is that the cost of sponsoring a group health plan is a deductible business expense, while penalty payments are not.

Undoubtedly, politicians in Washington D.C. will continue to debate – and posture over – the viability of health care reform. However, following the Supreme Court's ruling, employers no longer have the luxury of adopting a "wait-and-see" approach to health care reform compliance. In fact, DOL audits of health and welfare plans now require employers to demonstrate that they have complied with the ACA provisions in effect at the time of the audit. Employers of all sizes should work with their plan advisors to construct a comprehensive health care reform action plan that ensures compliance with these complicated rules. If you would like assistance in developing a health care reform action plan that is tailored to the specifics of your business, please contact a member of the firm's Employee Benefits & Executive Compensation group.

THE IRS GETS GENEROUS: THE NEW & IMPROVED "PORTABILITY" OF ESTATE TAX EXEMPTIONS

By Jeff Moore

Generous? The IRS? Yes! But relax, it's only temporary. And, unfortunately, you have to die to take advantage of the kindness.

When the 2010 Tax Relief Act was enacted, a new federal estate tax benefit called "portability" emerged. In short, portability is the ability of a surviving spouse to add a deceased spouse's unused estate tax exemption to their own estate exemption available upon their own death. Under prior law, the exemption of the first spouse to die was lost if it was not used. So portability effectively allows the surviving spouse to sponge up the unused excess and then use it for themselves.

Here's a simplified illustration of the benefit:

> Bob is married to Susan. Bob dies in 2012 when the federal estate tax exemption is $5.12 million. Bob has taxable assets of only $2.12 million at death. Thus, $3 million of Bob's exemption goes unused. With portability, Susan can elect to add this unused $3 million to her own estate exemption, which further reduces the federal estate tax liability upon Susan's death.

There is good news and bad news about this benefit. The bad news first: unless Congress acts to extend the portability benefit, portability is only available for estates of decedents who die in 2011 and 2012. The good news: Congress is considering either an extension of this benefit or a possible inclusion of portability in new estate tax reforms, and there seems to be some bipartisan support for the idea. For example, President Obama's current budget proposal includes retaining portability.

Despite the recently-released, favorable IRS Regulations on portability, the good news of portability comes with some complexities and a few hoops to jump through. For example, if the surviving spouse remarries and then that new spouse also predeceases the surviving spouse, the portability of the first deceased spouse's exemption vanishes. Remarriage alone does not revoke portability. It is the death of the new spouse that does so. In other words, the portability is only available for your "last deceased spouse." Thus, if your "last deceased spouse" were to pass away in 2013, or any other year when portability did not exist, the portability exemption of the first deceased spouse is permanently lost.

In addition, to claim portability you must file a federal estate tax return (Form 706) and make the portability election. Normally, such a return is not required unless the decedent spouse's estate exceeds the estate exemption threshold (i.e., $5.12 million in 2012). But if the surviving spouse desires to elect portability, he or she must file the Form 706 regardless of the amount of the deceased spouse's estate. But here's where the IRS's generosity pops up again. The IRS Regulations provide that if the estate executor is not otherwise required to file the

Form 706, the executor does not have to report the precise value of certain property that wholly passes to the surviving spouse or charities. In other words, the IRS will permit a good-faith value estimate, which significantly reduces administration costs if the executor can verify such property in fact wholly passed to the spouse or a charity. As a practical matter, however, executors in Oregon will still need to value most assets because: (1) portability is a federal benefit that is not applicable in Oregon, (2) Oregon's estate tax exemption threshold is only $1 million, and (3) precise valuations are usually necessary to determine the new adjusted income-tax basis of the property.

Perhaps the most generous element of the new IRS Regulations is that the surviving spouse does not need to wait until his or her death to use the "decedent spouse's unused exemption amount" ("DSUEA"). The Regulations provide that the DSUEA can be used against gifts made by the surviving spouse. Furthermore, and this is a big deal, when such gifts are made, the IRS treats the DSUEA as being used first instead of the surviving spouse's own exemption. A quick illustration:

> Same facts as the first illustration, above. Bob dies leaving Susan a $3 million DSUEA. Susan still has all of her own $5.12 million gift and estate exemption (in 2012). With Bob's DSUEA, Susan has $8.12 million available. Susan decides to make a gift to her children of $3 million. There is no gift tax. The gift is completely absorbed by Bob's DSUEA and Susan still has all of her own $5.12 million gift and exemption available for future gifts or upon her death (assuming the exemption remains $5.12 million).

With portability, the temptation is that the estate plan can seemingly be simplified. A married couple can will everything outright to the surviving spouse who then elects portability—no need for a "bypass" or "credit-shelter" or "A/B" trust type plan. But this is not the ideal approach because portability potentially expires at the end of this year. In addition, a bypass trust plan has several other advantages:

- If everything is left to the surviving spouse outright, it is possible that it could be bequeathed to the new spouse or other unintended beneficiaries (e.g., someone other than the children of the first marriage).
- The assets of the bypass trust, as well as the appreciation on such assets, are perpetually out of the surviving spouse's taxable estate. The bypass trust hedges against a decreasing federal exemption (which is scheduled to go to $1 million in 2013) as well as inflation on having all of the assets in the surviving spouse's estate. The DSUEA is not indexed for inflation.
- With a bypass trust, the assets can be protected from creditors. If the assets pass outright to the surviving spouse, they are subject to the claims of the surviving spouse.
- The generation-skipping tax exclusion is not portable. If the surviving spouse wants to bequeath an amount to grandchildren that exceeds the surviving spouse's generation-skipping tax exclusion, the unused generation-skipping exclusion of the first deceased spouse cannot be used. With a bypass trust plan, the generation-skipping exclusions of both spouses can be used.

Instead of relying solely on portability as the primary estate planning tool, portability should be viewed as an additional tool to be used in conjunction with a bypass trust plan. The bypass trust uses the necessary estate exemption, and portability sponges up the unused portion and saves it for later. It is potentially the best of both worlds. Perhaps Congress and the IRS will keep the generosity streak going. Stay tuned.

Recent Oregon Court of Appeals Decision Calls Into Question MERS System and Foreclosures

By Shannon Raye Martinez

Foreclosure stories and talk of "MERS" are prevalent in today's headlines. All across the country courts have differing opinions as to whether the "Mortgage Electronic Registration Systems" or "MERS" is valid. On July 18, 2012, the Oregon Court of Appeals gave its opinion on this issue in *Niday v. GMAC Mortgage, LLC*. The Court's decision raises a lot of questions and doubts as to the state of MERS foreclosures in

Oregon. The Court's decision may quickly lead to a future of delayed and prolonged foreclosures, additional lawsuits and increased short sales. This article explains the Court's decision in *Niday* and what it means for foreclosures in Oregon.

What is MERS?

MERS was created in the 1990s to avoid recording fees and streamline the recording process for lenders and mortgage holders. When mortgage-backed securities gained popularity, this drastically changed the landscape of home lending. This resulted in the multiple assignments of homeowners' promissory notes and trust deeds securing homes to multiple companies. Previously, these assignments would be recorded in the mortgage records for the county where the property was located. However, with the creation of MERS, the lender no longer had the hassle and large recording fees associated with those assignments. MERS created an online database and signed lenders up as members. The lender could put the information into MERS' online system, and then it would not have to worry about recording any assignments. To try to legally avoid the recording requirements, MERS replaced the lender as the beneficiary on the trust deed, and described its role as simply acting as agent or nominee for the lender. Many banks participated in this process, including most of the large national lenders, such as Chase and Freddie Mac.

What Does it Mean to Have a Trust Deed?

Historically, if you were to take out a loan to buy a home, the bank loaning you the money would receive a mortgage on your home, not a trust deed. Many years ago, this shifted to a trust deed instead of a mortgage. Although it is still typically called a "mortgage," a trust deed provides different remedies and advantages to the lender over a traditional mortgage. The main advantage of a trust deed is that it allows the lender to foreclose by a trustee's sale or non-judicial process, which, in Oregon, means that the lender must record, publish and send required notices, and then can conduct a foreclosure sale on the courthouse steps in about 120 days after the initial notices were sent. In addition, the borrower cannot "redeem" or buy back the property after the foreclosure sale. By contrast, a mortgage can only be foreclosed by filing a lawsuit and allowing the sheriff to conduct a foreclosure sale. In addition, the borrower has 180 days after the foreclosure sale to "redeem" or buy back the property for the price bid at the foreclosure sale. Practically speaking, the lender may not sell the property until the redemption period has expired. Typically, a mortgage foreclosure may take a year or longer due to the potential delays in court and the 180-day redemption period.

What Did the *Niday* Court Decide?

The *Niday* Court looked at whether MERS could be a beneficiary of a trust deed in Oregon, and whether the lender could take advantage of the trustee's sale foreclosure process instead of bringing a lawsuit to foreclose. In Oregon, the statutes relating to trust deeds dictate who can be a "beneficiary" of a trust deed and how a trust deed can be foreclosed under the trustee's sale process, so the lender can avoid having to file a lawsuit to complete their foreclosure. The Court of Appeals looked at these issues and said the following:

- MERS isn't the beneficiary of the trust deed because the homeowner does not owe his or her loan obligations to MERS. The beneficiary must be the party to which the obligations are owed.
- Simply putting information into the MERS online system is not good enough. If the original lender or beneficiary has changed, then the current lender foreclosing must record assignments showing all assignments of the note and trust deed from the original lender or beneficiary to the current one.
- If the lender cannot record the proper assignments, it must foreclose judicially, by filing a lawsuit.

Unanswered Questions

There is confusion and speculation based on the Court of Appeals' decision in *Niday*. While the Court clearly does not like the MERS system as an alternative to recording assignments of trust deeds, it is unclear what this means for MERS and banks that have used MERS. The *Niday* Court never says that trust deeds that list MERS as the beneficiary are invalid. The Court also does not say that a trust deed listing MERS as the beneficiary cannot be foreclosed by the non-judicial or trustee's sale process. So, this leaves the question – must all banks that have utilized MERS as their beneficiary foreclose by filing a lawsuit?

According to a statement published by MERS to its members, MERS believes that the *Niday* Court did not invalidate the trust deed or call into question whether the MERS system is valid. Instead, MERS states that, as a result of this decision, lenders who have utilized MERS should now file a lawsuit to foreclose instead of the non-judicial or trustee's sale foreclosure process.

Future Predictions
Litigation will continue over the MERS battle. MERS indicated it intends to appeal the *Niday* decision to the Oregon Supreme Court. For the time being, however, banks are likely to follows MERS' instructions and now shift to filing lawsuits to foreclose. Practically speaking, this means that our state court system will likely be backlogged and foreclosures will be delayed, and in turn, house sales may be delayed. Bank-owned property will likely continue to grow in numbers, as banks may need to hold onto properties for 180 days after the sale to allow the redemption period to expire. There are also predictions that we will see more short sales, so banks can reduce the amount of property they are holding. It is hard to predict what the future will hold for foreclosures, but we can certainly expect to see a changing landscape in the months and possibly years to come.

If you have a question about the issues in this article or about foreclosures in general, please contact Shannon Martinez or another member of the firm's Creditor's Rights Practice Group.

"AMAZON" LAWS AND SMALL BUSINESS RETAILERS

By Amy Geerhart

Over the last several years, states have grown increasingly aggressive in their efforts to collect revenue. As part of this effort, many states are seeking to tax online retailers located outside of their states. You may have read about states adopting so-called "Amazon" laws in order to tax sales of online retailers, most notably in populous states like New York and California. Over the last year, many other states followed suit. At this point, a majority of the states have either adopted or are in the process of adopting such a law. Despite how these laws are being labeled—Amazon laws—the laws affect many online retailers, including small businesses that conduct online sales. Any business, big or small, that sells its products online could be subject to additional tax in these states, and should determine whether it has an obligation to collect sales tax in order to avoid getting caught off-guard in an audit. This article provides a brief description of these Amazon laws, what activities put your business at risk, and finally what steps you can take to protect your business and manage its tax obligations.

Amazon Laws
Traditionally, online retailers were not required to collect sales tax on online sales to customers in states that impose a sales tax unless the retailer had a physical presence in that state. In every state, a retailer must have nexus in order for that specific state to impose a sales tax collection obligation. Nexus is triggered by the retailer having a physical location in the state. To get around this limitation, states have crafted Amazon laws to redefine what constitutes a physical presence, for purposes of nexus, in order to impose tax on businesses that are not physically located there.

There are two types of Amazon laws, and each redefines physical location in a different way. The first type of Amazon law, currently effective in Texas for example, targets businesses that have a subsidiary physically located in a state. If a retailer owns another company, a subsidiary, that operates a warehouse, distribution center, or other physical location in that state, then the retailer is deemed to have nexus and thus required to collect sales tax. The subsidiary's physical location in the state is imputed to the parent retail company.

The second type of Amazon law redefines physical location by targeting "affiliate relationships". This type exists in multiple states, including New York and California (by September 2012). A retailer has an affiliate relationship with another company ("affiliate") if the affiliate collects a fee or commission for directing a sale to the retailer. If a business sells its products online through a marketplace (like Amazon or eBay) and the company that operates the marketplace collects a commission on that sale, then the company is deemed an affiliate of the retailer. The Amazon law imputes that affiliate's physical location to the online retailer. By imputing that physical location to the retailer, the retailer has nexus, and the state can then impose sales tax collection obligations on all sales made by the retailer to customers in that state. This means that even though an online retailer never steps foot outside of Oregon it could be subject to sales tax in multiple states.

Risk Factors
Despite the fact that states are targeting large online

retailers like Amazon, Amazon laws affect businesses of all sizes that sell products online, even where the online portion of that business is relatively small. Following is a brief description of activities that may put your business at risk of having to collect sales tax for online sales.

Selling Products Online: If your business conducts any sales online, however minimal, there is some risk of incurring a sales tax collection obligation. Even if a business does the majority of its business in person in Oregon, a small amount of online activity can put that business at risk. Some states have minimum revenue thresholds built in to the Amazon laws, which can be relatively modest. New York's threshold for example is $10,000 of gross receipts from sales into New York.

Third-Party Affiliate Relationships: If you conduct online sales through a marketplace such as Amazon or eBay, you have a significant sales tax risk. When another website facilitates a sale, or directs online traffic to your site and collects any sort of fee based on the ultimate sale, your business has an affiliate relationship under these laws. If the affiliate is located in a state with an Amazon law, your business now has a sales tax collection obligation.

Subsidiaries Outside of Oregon: If your business owns a subsidiary in a state outside of Oregon, you are at risk for sales tax obligations on sales made into that state. This includes a subsidiary owned by your company, or a company under common ownership. These types of relationships are targeted by the first type of Amazon laws described above.

Moving Forward

The internet allows businesses to tap into an ever expanding retail market, and has become a crucial component of most retailers, either as a primary business model or as a supplement to in-person sales. While Amazon laws provide a challenge to online retailers due to the cost of determining the obligations and the administrative burden of sales tax collection, they are not a bar to conducting online sales. Businesses can continue to grow and utilize the online marketplace, but should proactively determine their sales tax obligations in other states. If your business ignores these states' laws and is the subject of an audit, the state can impose staggering penalties, fees, and interest in addition to the amount of uncollected sales tax.

Your business can avoid these excessive penalties, and accurately determine the cost of conducting online sales as a part of your business model by analyzing the sales tax risk before a state revenue agent comes knocking at your door. The status of Amazon laws throughout the country is rapidly developing, but can be closely tracked to determine the impact on your business's specific activities. By proactively determining your tax obligations, and monitoring the status of these laws, your business can take full advantage of online sales.

If you would like assistance in analyzing whether your business may be obligated to collect sales tax, please contact our Business and Taxation Practice Group.

Firm Seminars and Announcements

Saalfeld Griggs is proud to share with you some exciting news. We had several attorneys recently selected for inclusion in SUPER LAWYERS 2012, presented by Thomson Reuters. **Robert Saalfeld** was selected for the seventh year in a row for his work in Estate Planning. **Erich Paetsch** and **Shannon Martinez** were both included on the *Rising Stars* list for their work in Bankruptcy & Creditor/Debtor Rights and Business Litigation. We are honored to have our attorneys recognized as this year's SUPER LAWYER and RISING STARS. Congratulations Bob, Erich, and Shannon!

James Griggs and **David Myers** will be presenting at the Mid-Valley Tax Forum on **October 16, 2012**. Jim and David will be discussing domicile and multistate taxation issues.

Christine Moehl will be a panelist at a special seminar hosted by the Salem Chamber of Commerce on **October 11th** from 9 to 11 AM. The seminar will address Health Care Reform and its impact on Salem area businesses. If you would like more information regarding this seminar, please contact the Salem Chamber of Commerce.

The **Saalfeld Griggs Employment Law and Litigation Team** is hosting an Effective Workplace Investigations Seminar on **September 13** at the Saalfeld Griggs office. If you would like to attend, please email kfranz@sglaw.com