BUSINESS BRIEFS

Legal Developments Affecting Business

Saalfeld Griggs PC

Third Quarter 2015

So Remind Me—What Exactly is an "Estate Plan"? (And why do I need it?)

By Jeff Moore

In simple terms, an "estate plan" is a collection of legal documents that puts your financial and personal directives into action when you cannot do so personally—whether because you're out of the country, incapacitated or have passed away.

Most people think of an estate plan as the parched scroll some old lawyer reads to a group of greedy relatives. Granted, an estate plan does provide testamentary directions on how you want your assets to pass, to whom you want them to pass (or to whom you don't), how much you want to pass to them (or how little), and in what manner (immediate and restriction free, or conditional use for life with guaranteed passage to those cute grandkids).

However, an estate plan is much more than the parched scroll. It is a plan for both financial and personal health matters during life as well as after death; it is a plan for your spouse and your minor, adult or disabled children; it is a plan to designate who gets what heirlooms and avoid family contention; it is a plan for the succession of your business; it is a plan for minimizing taxation, protecting assets from potential creditors, and administering in an efficient manner what you took a lifetime to accumulate. And the plan should be read annually—not just at the time of your demise.

There are several key documents that play a critical role in the estate plan:

1. Durable Power of Attorney

- Allows your agent to act on your behalf with respect to financial and business matters either upon your request or upon your inability, such as incapacity or travel.
- A Power of Attorney terminates upon your death and has no effect following death; thus the need for a Will or Living Trust (see below).
- However, without a signed Durable Power of Attorney, your family member or other party would be required to petition the court for a Conservatorship as to your own individual assets—a process that is subject to court oversight and requires annual court reporting. A Durable Power of Attorney is a much, much cheaper solution.

2. Advance Directive

- Allows your representative to act on your behalf with respect to health matters when you are incapacitated, whether temporary or permanent.
- Sets forth your wishes for or against life support and tube feeding once you are suffering from a pronounced terminal condition.
- Similar to the Conservatorship without a Durable Power of Attorney, your family member or other party would be required to petition the court for a Guardianship as to your person and health matters—again, a process that is subject to court oversight and requires annual court reporting. An Advance Directive is a much, much cheaper solution.

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3. Universal Health Information (HIPAA) Authorization

- This document permits named persons to receive information regarding your current health status. Without such an authorization, it is very difficult if not impossible for your family to obtain protected health information.
- The HIPAA Authorization you signed at your physician's office or at the hospital does not authorize the release of information from a different health care institution—such as the Honolulu Hospital following that shark incident. This is a "universal" HIPAA Authorization. In other words, it allows the authorized recipients to receive protected health care information regardless of location or source.

4. Will

- Yes, the Will is like that parched scroll that is read following your death and spells out who gets what and when. However, it is also the document in which you name the guardians forany minor children. Is your mother-in-law still healthy enough to care for those kids?
- A Will is only effective upon death—your "executor" under the Will has no authority to act on your behalf during your life.
- Any assets passing under your Will are subject to the administration of the Probate Court. The Probate process often lasts a year or more and comes with a more significant administration cost. This delay could be detrimental to business sales demanding immediate action.
- Even if you have a Living Trust, you still have a Will that "pours over" assets that were un-intentionally left out of the Trust back to the Trust.

5. Living Trust

- A Living Trust is effective the moment you sign it. So you, as Trustee, continue to have control over your assets as long as you are able. If you are unable, your successor Trustee manages the assets. Thus, there is management for incapacity and without court involvement.
- No probate is necessary for assets in a Living Trust.
- There are some tax efficiencies for estate-tax planning purposes if you and your spouse's combined estate exceeds the Oregon or federal estate tax exemptions ($1 million and $5.43 million, respectively).

6. Disposition of Remains

- Cremation or burial? Sprinkle the ashes at Mt. Everest's summit, at the family cabin, or in that sand trap you couldn't get out of during life anyway? Do your children or friends really know your intentions?

7. Asset Titles and Beneficiary Designations

- If you have a Living Trust, are your real estate, bank accounts, investment accounts, business interests, etc. titled in the Trust?
- Are your life insurance policies and retirement accounts coordinated with your plan? Do they name the people or organizations (or trust) you actually want to benefit as opposed to your ex-spouse? Are minor children named on such policies or accounts without any subsequent trust or management provisions until a certain age past majority?

So pull out that parched scroll and take a closer look. If some critical components of your estate plan are lacking, we will work with you to put things in order. Your heirs may even thank you.

HIPAA Enforcement Continues to Expand

By Wayne Kinkade

The Health Insurance Portability and Accountability Act (HIPAA) was passed in 1996 but really only became a familiar topic in the healthcare industry upon the implementation of the Privacy Rule in 2001 (and the HIPAA Security Rule that followed in 2003).

From April 14, 2003 to June 30, 2015, there have been 117,474 HIPAA breaches reported to the Office of Civil Rights (OCR). Of those cases, less than 2,000 involved breaches of more than 500 individuals. Since HIPAA enforcement actions

started, several noteworthy violations have made the news (though usually involving large hospitals and health systems).

Mass General Case
Some might recall the HIPAA settlement in 2011 involving The General Hospital Corporation and Massachusetts General Physicians Organization, Inc. (a.k.a., Mass General) where it agreed to pay the U.S. government $1,000,000 to settle potential violations of the HIPAA Privacy Rule. The case involved an employee inadvertently leaving documents containing protected health information (PHI) of 192 patients on a subway in March 2009. The lost information was from Mass General's Infectious Disease Associates outpatient practice, including patients with HIV/AIDS.

The missing records were never recovered. In fact, in the two years between the loss of the information and the settlement, there was never evidence that information was actually compromised (no doubt the documents were lost, but they may well have ended up in a landfill).

The Office of Civil Rights opened its investigation of Mass General after a complaint was filed by a patient whose PHI was lost. OCR's investigation indicated that Mass General violated HIPAA because of its failure to implement appropriate safeguards to protect the privacy of PHI when removed from Mass General's premises and that it impermissibly disclosed PHI.

The Mass General case is an example of an early reported case involving a very large player that was, theoretically, in a better position to monitor and enforce their own HIPAA compliance than most medical practices. At that point, it was not entirely clear how OCR would apply these rules to a small practice.

First Small Practice Case
In 2012, the perception that OCR would focus its HIPAA enforcement efforts on large hospitals and health systems quickly changed. That year, OCR announced a settlement with a small five (5) physician practice in Arizona (Phoenix Cardiac Surgery). The practice unfortunately became the first small practice to enter into a settlement that included a civil money penalty as a result of alleged HIPAA violations. The practice agreed to pay the government $100,000 and to take corrective actions. In that case, the government's investigation found that the practice failed to implement adequate policies and procedures to protect patient information; failed to document training on HIPAA Privacy and Security Rules; failed to identify a security official within the practice and conduct a risk analysis; and failed to obtain any business associate agreements for its Internet-based email and scheduling services.

The facts in the Phoenix Cardiac Surgery case were admittedly egregious. The OCR's investigation arose out of a report that the practice was posting clinical and surgical appointments for its patients on an Internet-based calendar that was publicly accessible.

Prior to the Phoenix Cardiac Surgery settlement, complaints filed with the HHS Office of Civil Rights against small practices only resulted in "corrective plans" but no further action or penalties were imposed. This case marked the first settlement with a small practice since the Privacy and Security Rules got greater enforcement powers with the enactment of the Health Information Technology for Economic and Clinical Health Act of 2009 (HITECH Act).

Failure to Adopt Policies & Procedures
A 2013 "small practice" case involved Adult & Pediatric Dermatology, P.C., of Concord, Mass., where the practice agreed to settle HIPAA violations for $150,000. Here, OCR investigated the practice upon receiving a report that an unencrypted thumb drive containing protected health information (ePHI) of approximately 2,200 individuals was stolen from a vehicle of a staff member. In this case, OCR determined that the practice had not conducted a proper risk assessment. In addition, it failed to fully comply with requirements of the Breach Notification Rule (in particular, if failed to have written policies and procedures and failed to train its staff).

As part of the settlement, the practice was required to implement a "corrective action plan" for

deficiencies in its HIPAA compliance program. This case was the first settlement with a small practice resulting from its "failure to adopt policies and procedures" to address the breach notification provisions of the HITECH Act.
While this dermatology practice had other alleged shortcomings, had the data on the lost thumb drive been encrypted, there would have been no breach to report in the first place and there would have been no investigation and no penalty (under the HITECH Act, encryption and destruction are two sure methods for securing PHI and preventing a breach reporting obligation).

Private Actions
Earlier this year, Midwest Women's Healthcare Specialists in Kansas City, Missouri, reached a $400,000 settlement agreement in a "private class action" case involving 1,532 patients whose PHI was compromised. In this case, the small practice consisting of seven (7) physicians, improperly disposed of its patients' medical records in a dumpster outside of Research Medical Center. The practice will also provide credit monitoring services for affected patients.

For the moment, the case is still under investigation by OCR and the practice may be subject to additional penalties on top of the $400,000 settlement and attorney fees that it has already paid out.

Next Expansion: HIPAA Audits
At present, if you do have a breach involving 500 or more individuals (in other words, a large breach requiring notice to HHS within 60 days), there is a 100% chance that you will be investigated by OCR. To date, OCR investigations of HIPAA compliance are limited to those situations initiated by the required breach reporting.

In 2012, OCR conducted a pilot HIPAA audit program for 115 covered entities that was performed by an outside contractor (KPMG). At that time, OCR issued an audit protocol offering a detailed breakdown of the issues the audits covered. OCR is in the process of revising the protocol to reflect changes brought by the HIPAA Omnibus Rule. Early in 2014, OCR planned to resume compliance audits of covered entities (by the fall of 2014) but OCR later said the audit launch was stalled because of a delay in the rollout of technology. Suffice it to say, we should expect random audits to be coming soon. Regulators have hinted that audits may not be entirely random. That is, OCR may put special focus on both those with too many small breaches and also on those with too few (in other words, a large provider that never reports a breach may be a target for audit).

The good news is that each practice can (and should) perform its own preliminary HIPAA audit (basically, a risk analysis) before the government comes calling. The even better news is that we already have a good idea of the issues that will be covered (since they are listed at the following link): http://www.hhs.gov/ocr/privacy/hipaa/enforcement/audit/protocol.html

Steps to take today to avoid a HIPAA breach:

- Ensure encryption is properly used on all types of portable devices (include thumb drives, phones, laptops and tablets).
- Confirm that privacy and security policies and procedures are in place and actually observed.
- Train all staff on privacy and security policies (and document training activities).
- Perform a regular and thorough risk analysis of threats and vulnerabilities (use OCR's preliminary audit protocol to guide and document the analysis).

If you have questions about becoming HIPAA compliant or need help preparing for an internal audit, please contact Wayne Kinkade or David Briggs of the Saalfeld Griggs Health Law team.

Evaporating Resource: Drought, Climate Change, and the Importance of Water Rights
Part I (Water Right Maintenance)
By Alan Sorem

July was the hottest month on record in the Willamette Valley dating back to 1893. The July

2015 average monthly temperature for Salem was 73.1 degrees, which surpasses the old record of 72.5 degrees for hottest of any month set in both July and August 2014. Along with the record heat, Oregon's drought is exacerbating. Benton, Clatsop, Columbia, Lane, Lincoln, Multnomah, Polk, Washington, and Yamhill Counties joined Marion County and the rest of the counties in Oregon as federally-declared disaster areas due to ongoing drought and declining snow-packs. These climate changes are affecting our local agricultural business practices and real estate market. Farm management practices in the Willamette Valley must include careful water right maintenance to assure future uninterrupted use of existing practices and preservation of highest and best property values.

The importance of a farmer's right to use irrigation water is second only (if at all) to the farmer's right to use his or her land. The following list of questions and answers represents the basics of water right maintenance.

Why does matter? Don't I own my water? The State of Oregon owns all the waters of the state. Irrigation and domestic water-use is authorized in Oregon by one of three types of uses: 1) state exemption, 2) permit, or 3) certificate. The Oregon Water Resources Department (WRD) and Commission regulate these uses of water.

Is my water use exempt from regulations? Exempt uses in agriculture are limited. 15,000 gallons per day of groundwater may be used for domestic purposes, such as household uses and non-commercial gardens and lawns not exceeding one-half acre in area. Commercial or industrial uses of exempt wells are further restricted to 5,000 gallons per day. Exempt use of surface rights in farms are generally limited to historic reservoirs that existed before 1995, store less than 9.2 acre-feet of water or via a dam or impoundment structure less than 10 feet in height, and were timely registered with the WRD on or before January 31, 1997.

What if I have a water use permit? A water use permit gives the applicant the right to construct a well, pump, and other related improvements, use the water, and perfect the water right within the authorized time period. However, a water permit may not be transferred without WRD approval until the WRD issues a water certificate. Permits are also subject to expiration. Water use based on a water permit alone requires the attention of the farmer and justifies a greater level of due diligence.

I have a water use certificate, so I am OK, right? A perfected water certificate does not expire and transfers with the real property. Ideally, all non-exempt irrigation water uses will be pursuant to a water certificate. However, even water certificates must be used pursuant to their terms and conditions of approval, which include the following:
Perfection Date – The perfection date or priority date relates back to the date of the initial permit application. This date should be expressly stated on the certificate. The older the perfection date of the certificate, the greater its value. In the event there is a shortage of water, senior water users have the first right to such uses.

Point of Diversion – The point of diversion is a fixed place where the well or pump may be located. Certificates and permits are accompanied by a legal description and survey map of the point of diversion. Users should review these records and ensure the actual use complies with the historical permitted point of diversion. If the point of diversion is not located on land owned by the user, a written well/pump and pipeline easement and maintenance agreement should be executed by the parties and recorded in the real property records. The need for such an easement often arises when multigenerational farms transferring properties from one generation to the next.

Point of Use – The point of use is the area legally described as the property benefitting from the water certificate. As many farms grow or contract over the decades, actual point of use sometimes varies from the originally permitted point of use. In such an event, the water right user should consider applying to the WRD for an amendment or transfer.

Amount of Use – Water certificates are only for a finite amount of water. Water consumption is

measure both in rate and total amount. Surface rights are often measured in units of cubic feet per second while wells are most often measured in gallons per day. These rates are especially important in water right disputes where a user's consumption causes a drop in other users' water pressure. Total consumption may also be limited to an annual basis, "irrigation season," or other specified time period.

Beneficial Use – The limitation of beneficial use is a question of fact. However, the general concept is that if water consumption has changed due to construction efforts or crop changes, previously certified water rights may need to be amended.

This article addresses only basic water right maintenance issues. Water permits are subject to expiration, and water certificates are subject to forfeiture if they have not been used, in whole or in part, for a period of five (5) consecutive years. Part II of this series will address what a farmer must do to ensure his or her right is not forfeited unintentionally, what documentation is needed in a farm sale including water rights, and what additional tools are available to modern farm operator for temporary or permanent water right transfers.

The New Oregon Mandatory Sick Time Law—It's Nothing to Sneeze At

By Jennifer Paul

For employers, mandatory sick time was likely the most talked about piece of legislation during the 2015 Oregon session. The proposed bill had many working drafts, with significant amendments throughout the session. Now that the dust has settled, and the legislative session has closed, what does the passage of Oregon's mandatory sick time law mean for employers, and what should employers do now to prepare for the law's effective date of January 1, 2016?

Below is a summary of Oregon's Paid Sick Time Law and some initial suggestions for compliance:

Covered Employers: Yes, the new law applies to your business. Every business that has one or more employees working in the state of Oregon is subject to Oregon's mandatory sick time law, regardless of size.

Covered Employees: "Employee" is broadly defined to include all persons paid on an hourly, salary, or commission basis, and also expressly includes those individuals paid on a piece-rate basis. There are a few narrow exceptions. For example, independent contractors are not eligible, nor are participants in certain work-study programs, or individuals employed by their parent, spouse, or child. It is important to note that there is no minimum number of hours an employee must work to be eligible for sick time, and there is no carve-out for seasonal employees or part-time employees. If your existing Paid Time Off (PTO) policy excludes part-time or seasonal employees, you will need to adjust the policy to comply with the new law.

Amount of Leave and Accrual: At a minimum, an employer's sick time policy must allow employees to earn and use up to 40 hours of sick time per year. Sick time shall accrue at the rate of 1 hour for every 30 worked or 1-1/3 hour for every 40 hours worked. An employee begins accruing sick time on the first day of employment, but is not eligible to use sick leave until their 91st day of employment. Employers also have the option to front-load an employee's sick time at the start of the leave year.

Paid vs. Unpaid: Generally, employers with 10 or more employees must provide paid sick time for their employees, while employers with fewer than 10 employees can provide unpaid sick time. The number of employees is determined based on the per-day average number of employees for each of the 20 workweeks in the calendar or fiscal year of the employer immediately preceding the year in which the leave is to be taken. For employers located in Portland, Oregon, an exception applies, which requires paid sick leave so long as the business employs at least six employees.

Covered Types of Leave: Covered leave includes the following: the employee's own mental or physical illness, injury or health condition, need for medical diagnosis, care or treatment of a mental or

physical illness, injury or health condition or need for preventative medical care, including the care of a qualifying family member's mental or physical illness, injury or health condition; existing leave covered by Oregon Family Medical Leave Act (which includes bereavement leave, and parental time); leave related to protected time-off for dealing with domestic violence, harassment, sexual assault or stalking; due to a public health emergency; or when the law otherwise requires that the employer exclude the employee from the workplace due to health reasons.

Carry-over Rights and Reinstatement Rights: An employer must allow for carryover of up to 40 hours of accrued but unused sick time from year-to-year; however, employers can cap total accrued sick time at 80 hours and can limit sick time use to 40 hours per leave year. So long as the employee consents, the employer can agree to pay for unused sick leave at the end of the year. At termination of employment, while the law does not require payout of accrued but unused sick time, the bank of unused leave must be reinstated if the employee returns to work within 180 days of separation.

Local Ordinances: The new law preempts existing local ordinances addressing mandatory sick time in Oregon. However, until January 1, 2016, employers subject to the Portland ordinance must comply with the Portland sick leave law. Eugene delayed the roll-out of its local ordinance related to mandatory sick time, so the statewide law will preempt the Eugene requirements.

Compliance of Existing PTO & Sick Time Policies: An employer's existing sick time and PTO polices will be considered complaint under the new law if the policies at least meet the minimum requirements set forth in the new law. Your policy is almost certain to require revision, as the new law imposes a variety of new requirements related to notice (no more than 10 days' notice can be required for the use of foreseeable sick time), when verification can be required by the employee (generally only after the employee takes off more than three consecutive sick days or when the employer suspects abuse), and various other requirements. These examples demonstrate how detailed the legislature was in mandating certain aspects of an employer's sick time policy, so it is important to review your existing policies for compliance.

The new sick time law does not go into effect until January 1, 2016, and civil penalties will not be enforced until January 1, 2017. This means that employers have time to make their existing PTO and sick time policies complaint with the new law. Saalfeld Griggs can help you review your policies and practices to ensure they are compliant with the new sick time law and other legal updates that resulted from the 2015 legislative session.

FIRM ANNOUNCEMENTS & SEMINARS

Super Lawyers has recognized our attorneys for their high degree of peer recognition and professional achievement: **Robert Saalfeld** and **Hunter Emerick** have been named as Super Lawyers; and **Shannon Raye Martinez, David Briggs and Jennifer Paul** have been named as Rising Stars.

Best Lawyers has selected these attorneys for inclusion on this year's highly-respected peer review guide: **Robert Saalfeld, Jim Griggs, Douglas Alexander, Hunter Emerick, Randall Cook, Randall Sutton**, and **Jeffrey Moore**.

The firm hosted the **Oregon Bankers Association** Legislative Wrap-up Session on September 3.

The women attorneys will host the 6th Annual **Celebrating Women in Business** event on September 24. The keynote speaker will be **Susan Sokol Blosser** – founder of Sokol Blosser Winery, entrepreneur, speaker, and author of *Gracious & Ruthless, Letting Go, and At Home in the Vineyard*. We look forward to an evening of networking, shopping, and inspiration.

Randall Sutton will present at the **NW Human Resource Management Association Conference** on October 6 in Portland. The topic: Protecting Against Corporate Raiding by Former Employees.

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