BUSINESS BRIEFS

Legal Developments Affecting Business

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SPRING 2011

HEALTH CARE LAW UPDATES

By Wayne Kinkade

2010 Health Care Fraud and Abuse Control Program Report

On January 24, 2011, the Office of Inspector General ("OIG") issued the 2010 Health Care Fraud and Abuse Control Program Report. According to this report, the federal government's health care fraud prevention and enforcement efforts recovered over $4 billion during 2010. The OIG credits its success to the Health Care Fraud Prevention & Enforcement Action Team program (HEAT), created in 2009, and the Medicare Fraud Strike Force teams. These Strike Force teams, in 7 locations across the U.S., use advanced data analysis techniques to identify high billing levels in certain health care fraud "hot spots."

In 2010, Strike Force team activity resulted in 140 indictments involving charges filed against 284 defendants (who collectively billed the Medicare program more than $590 million); 217 negotiated guilty pleas; 19 jury trials, resulting in guilty verdicts against 23 defendants; and sentencing for 146 defendants (averaged more than 40 months of incarceration).

Including Strike Force matters, federal prosecutors opened 1,116 criminal health care fraud investigations as of the end of 2010, and filed criminal charges in 488 cases involving 931 defendants. A total of 726 defendants were convicted for health care fraud-related crimes during the year.

In addition to criminal enforcement, 2010 was a record year for recoveries obtained in civil health care cases brought under the False Claims Act ("FCA"). According to the OIG report, over $2.5 billion was recovered under the FCA – the largest recovery by the Department of Justice in a single year. Most of the cases resulting in civil recoveries (approximately 75%) were brought to the government by whistleblowers under the FCA. Under FCA, such whistleblowers are entitled to recover between 15 and 30% of the proceeds of a successful government lawsuit.

Several health care fraud cases set records during 2010, including a $2.3 billion settlement with Pfizer Inc., the largest health care fraud settlement in history, and a $108 million settlement with The Health Alliance of Greater Cincinnati (and a former member hospital, The Christ Hospital), the largest ever under the Anti-Kickback Statute for the conduct of a single hospital. In addition, FCA recoveries from the pharmaceutical and medical device industries accounted for $1.6 billion in settlements, including $669 million from Pfizer Inc., $302 million from AstraZeneca, and $192.7 million from Novartis Pharmaceutical Corporation.

In March 2010, a jury returned a split verdict in a case against Tuomey Hospital located in Sumter, South Carolina. In this case, prosecutors alleged that Tuomey violated the Stark Law by paying physicians in excess of fair market value under contracts that were not commercially reasonable and took into account the volume or value of the referrals.

Tuomey argued that the agreements were proper due to a shortage of physicians in the area. The jury found that Tuomey's part-time physician contracts violated the Stark Law but did not violate FCA. An appellate court will decide whether Tuomey must pay Stark Law damages of $44.8

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million. The FCA case was ultimately remanded for a new trial and a new jury will decide whether Tuomey must pay additional damages of $227.5 million on that claim. The FCA case will hinge, in part, on whether Tuomey knew that the structure of the arrangement was improper (and thereby resulted in false claims being submitted for reimbursement).

New Affordable Care Act Rules

On January 24, 2011, the Department of Health and Human Services announced new rules authorized by the Affordable Care Act (ACA) intended to target health care fraud. The provisions of the ACA include new provider screening and enforcement measures, including:

- New screening processes for providers and suppliers enrolling in Medicare, Medicaid or CHIP (children's Medicaid). Certain providers and suppliers that have been identified as posing a higher risk of fraud, for example durable medical equipment suppliers, will be subject to a more thorough screening.

- New enrollment processes for Medicaid and CHIP providers. Basically, states will have to screen providers who order and refer to Medicaid beneficiaries to determine if they have a history of defrauding government.

- Temporarily freezing enrollment of new providers and suppliers. Medicare and state agencies will use advanced predictive modeling software (similar to that used to detect credit card fraud). If a trend is identified in a category of providers or geographic area, the program can temporarily stop enrollment.

- Temporarily stopping payments to providers and suppliers in cases of suspected fraud.

Reminder: Stark In-Office Ancillary Services Exception Disclosure Requirements

Effective January 1, 2011, the so-called "Stark In-Office Ancillary Services Exception" provisions require physicians or group practices relying on this exception to provide the following written disclosures to any patient receiving MRI, CT or PET:

- Written notice at the time of the referral (not time of service) that the Medicare patient may receive the same services from another supplier.

- The written notice must include a list of at least five suppliers ("suppliers" refers to physicians, group practices, and freestanding imaging, but not hospitals) located within a 25-mile radius of the referring practice location. The notice may also indicate that the inclusion of the alternate suppliers is not an endorsement or recommendation. The original proposed rule would have required a list of 10 suppliers.

- The notice must be written in a manner sufficient to be reasonably understood by all patients. The notice must include, at a minimum, each supplier's name, address, and telephone number. While CMS removed the previously proposed requirements that the practice obtain the patient's signature on the notice, and maintain a copy in the patient's medical record, the disclosure must be documented (perhaps in the patient chart).

These rules only apply where a referral subject to the Stark Law is made and where the referring physician is relying upon the in-office ancillary services exception. In those cases, failure to comply could result in liability and monetary penalties under both Stark and the FCA. Please contact a member of our Health Care Practice Group if you have questions about how the changing landscape of health care law may affect your practice.

PENDING EMPLOYMENT LEGISLATION: SHOULD EMPLOYERS BE WORRIED?

By Randy Sutton

The Oregon Legislature is back in session. As in prior years, the new session brings many bills that should give employers cause for concern. Given the even number of Republican and Democrats in the House of Representatives, it is likely that the need for compromise may prevent or mitigate both highly undesirable and employer-friendly bills. Nevertheless, employers should stay informed about the progress of pending legislation.

Here is a summary a few of the significant employment-related bills on the slate for 2011:

Disabled Employee Definition (HB 2036)

The Americans with Disabilities Act (ADA) was recently amended to make it easier for employees with physical or mental impairments to find protection under the law. If an employee has a "disability" as defined by the ADA, the employer must work to provide reasonable accommodations that allow the employee to do his or her job. HB 2036 would lower the standard for what constitutes a "disability" under Oregon's version of the ADA even further, by allowing virtually any impairment, whether or not the impairment significantly restricts the employee, to be sufficient to meet the definition. This change in the law could require employers to engage in a reasonable accommodation dialog about minor or insignificant impairments that employees have or claim to have.

<u>Short-Term Disability Insurance Program (HB 2355)</u>

Leaves of absence for sickness, disability and other health-related reasons are typically unpaid once an employee uses up any employer-provided paid time off. In prior sessions, the legislature has considered "Baby UI" bills that would provide paid family leave benefits by tapping the state's unemployment insurance fund. This bill is a variation on that theme, in that it would create a new short-term disability program, funded through employee contributions, to pay employees who are unable to work. If the bill passes, it is likely to increase absenteeism by ensuring that a portion of employees' wages will be paid while on family and medical leave.

<u>Job References (HB 2360)</u>

This bill is helpful to employers who wish to give honest references regarding former employees. Under current law, a "bad faith" reference can result in liability for the employer, and the standard for proving bad faith is not very employer-friendly. This bill would make it much more difficult for an employee to prove that a job reference was made in bad faith.

<u>Minimum Wage Rate Adjustment</u>

Oregon law currently adjusts the state minimum wage rate each year to account for inflation. This bill would link annual minimum wage rate adjustments to Oregon's rate of unemployment. If Oregon's monthly average unemployment rate is higher than the national average, the minimum wage rate would remain static whether or not there is an increase in the cost of living index. This bill would fix or mitigate the current one-way ratchet in minimum wages, which recently caused the minimum wage rate to rise despite a two year average drop in the cost of living.

<u>Family Leave Expansion</u>

In every session, there are attempts to expand the coverage of the family leave laws. In this session, there are bills seeking to give employees up to two weeks off for bereavement purposes (SB 506) and to include siblings in the definition of a "family member" under the Oregon family leave laws. Another bill (HB 2905) would allow employees to take up to 18 hours of family leave to attend school conferences to discuss academic and disciplinary issues. Although many employers allow time off for all of these purposes, it is important for employers to be able to structure attendance and leave of absence policies to best accommodate their business needs and the needs of their employees. These legislative mandates would severely restrict such flexibility for employers with 25 or more employees.

<u>Captive Audience Law</u>

Oregon law currently makes it unlawful to discharge, discipline or otherwise penalize an employee who declines to attend an employer-sponsored meeting, if the primary purpose of the meeting is to communicate the employer's opinion about religious or political matters. The law defines "political matters" to expressly include discussions about supporting or joining labor unions. The captive audience bill was pushed hard by labor unions in the 2009 session, and was viewed by employers as an attempt to tie their hands when speaking to employees during a union organizing campaign. There are at least two bills seeking to modify this law. HB 2446 would eliminate mandatory back pay awards and limit penalties now allowed under the law. HB 2771 would repeal the captive audience law in its entirety.

These are only a few of the many employment-related bills pending before the Oregon Legislature. If you are an employer who is interested in participating in the legislative process by writing letters or testifying before legislative committees, we can help by directing you to organizations that would appreciate your assistance. In addition, our firm closely monitors legislative developments through its involvement with Associated Oregon Industries' Employment Practices Steering Committee and statewide volunteer leadership roles with the Society for Human Resource Management (SHRM) Oregon State Council. If you are interested in receiving regular updates about the status of pending employment law bills, please contact Randy Sutton at rsutton@sglaw.com.

LEGAL ALERT: "RED FLAG" RULES UPDATE

In the Fall 2009 edition of Business Briefs, we published an article entitled "What is Your Business Doing to Prevent Identity Theft?" In that article, we explained that the Federal Trade Commission's "Red Flag" rules required financial institutions and certain "creditors" to implement written identity theft prevention programs. At the time of the article was published, the term "creditors" was not well-defined, and we believed that the Red Flag rules could apply to any business that did not receive payment in full from their clients at the time services were provided (e.g., lawyers, doctors, and accountants).

Thankfully, President Obama recently signed into law the "Red Flag Program Clarification Act of 2010." This act amends the Red Flag rules to limit the definition of a "creditor" to a business that "regularly and in the ordinary course of its business obtains or uses consumer reports in connection with a credit transaction, furnishes information to consumer reporting agencies in connection with a credit transaction, or advances funds." According to the sponsors of the legislation, this change makes it clear that lawyers, doctors, dentists, orthodontists, pharmacists, veterinarians, accountants, social workers, and other professional service providers are no longer classified as "creditors'' for purposes of the Red Flag rules.

OREGON'S COMPLEX LITIGATION COURT: IS IT A GOOD OPTION FOR YOU?

By Shannon Raye Martinez

The landscape of how the Oregon state courts function through case procedures has been shifting in the last year. The latest change is the creation of the "Oregon Complex Litigation Court" (OCLC). This article discusses what the OCLC is, how it is different from the previous system, and some potential benefits and pitfalls.

How Do Oregon Courts Work?

If you need to file a lawsuit in Oregon, you have the option of filing in either a Circuit Court located in one of the counties, or Small Claims Court. Currently, if the amount at issue in the lawsuit is more than $7,500, you must file in Circuit Court. Typically, the lawsuit will be filed in the county where one or both of the parties are located, or where the dispute occurred.

While all Oregon Circuit Courts follow a similar set of rules, each county can also establish their own procedural rules and standards. Most counties have enacted their own rules, and cases are sometimes handled very differently between counties. For example, Marion County assigns a judge to handle a case from the start of the lawsuit through trial. Multnomah County, on the other hand, does not assign a judge. Instead, judges are assigned, depending on availability, to each motion, hearing or trial. It is not uncommon in Multnomah County to have a different judge at the various stages of a case.

With some exceptions, when a judge is assigned in a particular county, the judge is randomly assigned. Judges are not chosen for their expertise or because they have handled certain types of cases before. Judges with no experience or knowledge of corporate law may have to decide who wins a complex case involving stock sales and company mergers. Or, judges who previously practiced solely in employment law may resolve a marriage dissolution proceeding.

What is Oregon Complex Litigation Court?

OCLC is a program seeking to provide litigants with judges who have expertise in a particular kinds of cases. The Chief Justice of the Oregon Supreme Court has appointed three current Circuit Court Judges to a managing panel for the program. The panel will decide which judges will be accepted to the program, which judges will be assigned to particular cases, and generally oversee the program. Any current judge may submit a resume to the panel to be considered for OCLC. The resumes submitted are required to state, in detail, what the particular judge's civil trial experience is, both on the bench and previously as a practicing attorney. The panel then reviews and evaluates the resumes, and decides which judges will be accepted to OCLC.

If you participate in OCLC as a litigant, you may have a specific judge assigned to your case that has had experience with the particular legal issues in your case or has heard the same type of case before. The judge will decide all issues in the case and who will prevail at trial. No cases are automatically transferred to OCLC. In order for litigants to participate in OCLC, a lawsuit must be commenced in the appropriate county. After the case is filed, the parties may request that the case be transferred to a judge in OCLC. All parties to the case must consent to it. It is a voluntary program and cannot be forced on any of the parties. If you choose to participate in OCLC, you may be waiving your right to have a jury decide your case. As a result, the court cannot require you to participate and waive this constitutional right.

If the parties consent to OCLC, the current judge in the case will then meet with the parties and evaluate and decide whether your case merits transfer to OCLC. It is not automatically transferred to OCLC if the parties agree. In order to be transferred to OCLC, your case must qualify as a "complex" case. The court will evaluate aspects of a case to determine if it is complex, such as the complexity of the legal issues, complexity of the factual issues, length of the trial and issues with discovery (i.e., exchange of testimony and documents prior to trial).

If the judge determines that your case merits transfer to OCLC, the parties must have a case management conference with the judge no later than 30 days after the case has been transferred to discuss any issues in anticipation of trial, deadlines for various filings prior to trial, scheduling of a trial date and potential settlement of the case. In addition, the parties must exchange their exhibits no later than 10 days before trial. Lastly, the parties are required to confer and try to either settle the case or resolve some of the issues in the case before involving the judge.

The procedure of how the case is conducted once transferred to OCLC is very different than the current system in Oregon Circuit Courts. In a typical Circuit Court case, the parties are not required to have a case management conference or share exhibits prior to trial. Some counties, and some specific judges, set their own deadlines and requirements for trial which may include similar deadlines, but this is not always the case.

Should You Consider Complex Litigation Court?

There are potential advantages and disadvantages to OCLC depending on the type of case. The most important benefit to this program is the ability to have one judge assigned to your case with expertise regarding the issues or facts in your case. This could be beneficial for both sides of the case if the case is unique or very complex. Additionally, the parties have a streamlined timetable and procedure, which will likely result in an OCLC case being tried sooner than if the case remained in Circuit Court.

However, keep in mind that you may be giving up the right to have a jury decide your case. There are multiple advantages and disadvantages to a jury trial that need to be evaluated on a case by case basis, depending on the parties involved, the equities on each side of the case, whether the legal issues are too complex and the position of the parties.

Some commentators to this program have voiced concern that the OCLC will adversely affect the cases in Circuit Court that are not transferred to this program. For example, if too many judges in one county participate in OCLC, this could reduce the amount of judges available for other cases, and delay handling of the general Circuit Court caseload.

The OCLC, however, could be beneficial and cost effective for all litigants involved in complex cases. Nonetheless, it is important to evaluate all of the circumstances of a case before deciding whether this program is suited for the particular issues in your case. If you have questions regarding this program or how our litigation team can help you evaluate whether the OCLC is right for your dispute, please contact us.

In-Plan Roth Conversions – FAQs from Employers

By Christine Moehl

In prior issues of Business Briefs, we explored the estate and retirement planning opportunities created by "Roth" (i.e., post-tax) accounts. The primary benefit of a Roth account is that "qualified distributions" from the account, including investment earnings, are distributed tax free. Recently, Congress added a new weapon to our Roth arsenal through the Small Business Jobs and Credit Act of 2010 (SBJCA). Under the SBJCA, Congress created the ability to convert non-Roth accounts into designated Roth accounts within 401(k) and 403(b) plans. Prior to the passage of the SBJCA, plan participants could only convert non-Roth accounts held in 401(k) or 403(b) plans to Roth accounts by taking an in-service distribution from the plan and rolling the amount directly into a Roth IRA. This was problematic for plans that did not offer in-service distributions. It was also problematic for participants earning over $100,000, since prior to 2010 such individuals were not eligible to roll into Roth IRAs.

The new Roth in-plan conversion option has piqued the interest of employers who want to keep plan assets in the plan for pricing and convenience reasons. In addition, many employers feel that income tax rates are likely to rise in the future and are therefore looking for opportunities to maximize tax-free growth within their retirement plans.

Here are the most frequently asked questions from employers who are considering adding a Roth in-plan conversion option to their retirement plan:

Can the in-plan Roth conversion option be added to any 401(k) or 403(b) Plan?

No. In order to allow Roth conversions within a 401(k) or 403(b) plan, the plan must offer participants the option to make Roth salary deferrals. If your plan does not currently offer participants the ability to make Roth deferrals, you can add that option to the plan at the same time that you add the in-plan Roth deferral option.

What accounts within a plan may be converted to Roth?

Only accounts that are otherwise distributable in a direct rollover to an IRA can be converted to Roth. This means that, with regard to pre-tax salary deferral accounts and safe harbor contribution accounts, participants must be age 59-½ or older. With regard to all other employer contribution accounts (i.e., matching or non-elective contributions) the amount in the account must have accrued for at least two years, or the employee must have participated in the plan for at least five years. Although a distributable event is required in order to convert an account to Roth, the plan is not required to offer in-service distribution options to participants who are not interested in converting their accounts. Thus, for example, a plan can offer participants with over five years of service the opportunity to convert their non-Roth employer contribution accounts to Roth, but at the same time still prohibit participants from taking an actual distribution of the account.

What are the tax consequences of an in-plan Roth conversion?

Plan participants who convert their non-Roth accounts into Roth accounts will pay state and federal income taxes on the converted amount in the year of the conversion. However, the 10% early distribution penalty tax that normally applies to early distributions from qualified plans is waived, as long as the converted funds stay in the plan for at least five years following the conversion. Another important point is that, unlike with IRA conversions, "recharacterization" is not available for in-plan Roth conversions. This means that once the participant has elected to convert his or her pre-tax plan account into Roth, the conversion cannot be undone.

If I want to add an in-plan Roth conversion option to my Plan, does the Plan need to be amended?

Yes, plans must be amended to add an in-plan Roth conversion option. However, if you wish to allow in-plan Roth conversions immediately, you can do so as long as your plan document is amended prior to the end of 2011. You must notify all of the participants in your plan when the option becomes available.

Should I do an in-plan Roth conversion?

Whether an in-plan Roth conversion is right for you is dependent on many factors. Generally, Roth conversions are good for plan participants who can afford to pay the income tax generated from the conversion from other (non-retirement) assets. In addition, as noted above, amounts that are converted to Roth and then quickly withdrawn from the plan are subject to a 10% early distribution penalty tax. Therefore, only participants who do not expect to spend from their Roth assets for many years should consider converting. Finally, Roth conversions are excellent for participants who intend to transfer their Roth assets to a family member and thereby maximize the tax-free earnings potential of a Roth account.

If you have any additional questions regarding in-plan Roth conversions or if you would like to add the option to your retirement plan, please contact a member of the firm's Employee Benefits Group.

Legal Alert: Discounted Correction Fee for "Non-Amender" Retirement Plans

As we have reported in prior Business Briefs articles, most retirement plans were required to be updated for legislative changes by April 30, 2010. This update was referred to as the "EGTRRA Restatement," and was required to maintain a plan's tax-qualified status. Unfortunately not all employers restated their plans by this deadline. In order to encourage those employers to "come in from the cold," the IRS is offering their "non-amender" correction program at a discounted rate. Under the non-amender program, an employer will be forgiven if they confess to the IRS that they failed to restate their retirement plan by the EGTRRA deadline, complete the EGTRRA restatement now, and send in a "compliance fee." Ordinarily the compliance fee under this program is $750. However if the non-amender application is postmarked by May 2, 2011, the IRS will reduce this fee to $375. In order to be eligible for the reduced fee, the plan must cover 20 or fewer employees.

Firm Seminars and Announcements

The ***Employment Law Group*** at Saalfeld Griggs have been busy over the last few months presenting in-house management training sessions for our clients on employment law compliance. These training sessions take place at your facility and are interactive sessions with supervisors and management teams to discuss harassment and discrimination, documentation, and how to avoid employee lawsuits. If you are interested in learning more, please contact our Employment Law and Litigation Practice Group.

On May 20th, **Randy Sutton** and **David Briggs** will be part of the team presenting "HR Basics," a seminar designed to help avoid the traps, potholes and landmines of employment law. The seminar is sponsored by the Salem Human Resource Management Association. To register for this event, please visit www.shrma.org.

Jeff Moore, one of our Estate Planning attorneys was recently honored by Martindale Hubbell with the prestigious AV rating. Congratulations Jeff!

The Saalfeld Griggs ***Land Use Group*** served as legal counsel throughout the 4 ½ year development process of a large area of land in South Salem which was formerly occupied by the Battle Creek Golf Course. On February 17th, the Salem Association of Realtors selected this project as its "Commercial Transaction of the Year" for the area. Special congratulations go to Stew Stone, the realtor and recipient of the award, and Terry Kelly and Mary Rentfro, the property owners.

Hunter Emerick recently presented "Protecting Your Business Form Recent Lien Law Changes" to the Home Builders Association of Marion & Polk Counties. The presentation explored how recent changes in Oregon lien law take away construction lien rights from material suppliers and subcontractors that supply materials to, or work for, unlicensed contractors on most residential remodel projects.

David Briggs recently gave a presentation to the Chemeketa Small Business Management Class on employment laws and another to the Salem chapter for the Society for Human Resources Management on wage and hour law.

Erich Paestch and ***Shannon Martinez***, will present "MERS, Robo-Signers and the Foreclosure Mess: What does it all mean?" at Ticor Title on April 20th. The presentation will cover pertinent issues surrounding MERS, the Mortgage Electronic Registration System, and the recent robo-signing controversy.

Our own ***Bob Saalfeld*** attended the annual meeting of American College of Trust and Estates Counsel this month. ACTEC is a national organization of lawyers elected to membership by demonstrating the highest level of integrity, commitment to the profession, competence and experience as trust and estate counselors.

Saalfeld Griggs recently sponsored the "Sperry Van Ness 2011 Commercial Real Estate Economic Forum" on February 16th. The forum presented an overview of our local commercial real estate markets (office rental, retail, industrial, etc.).

Nate Boderman was recently appointed to the Family Building Blocks Young Leaders Council.