Knoxville Bar Association

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- **Call or email Paul E. Wehmeier at 546-7000 or pwehmeier@adhknox.com**

  Marsha Wilson at 522-6522 or mwilson@knoxbar.org.
- **Submit an article for consideration.**
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FROM THE CO-CHAIRS

By: Marcia A. Kilby
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There is an old holiday tune that proclaims this as "the most wonderful time of the year." I think that this is undoubtedly true. The time spent with family and friends (and let's not forget the good eats) are indeed wonderful! However, for corporate counsel, this time of year also means strategizing for 2015 and determining what new issues are waiting for us on the horizon. In my opinion, if there is one issue that will require attention from corporate counsel in the upcoming year it is this: Cybersecurity.

It goes without saying that 2014 has been the year of the cyberattack. Major retailers, banks, e-commerce sites and even a movie studio have all been victims, with each instance resulting in turmoil for customers, employees, and corporate images. However, a company doesn't have to be huge and high-profile to become a target. With so much at stake, how can we help manage the cyber risks at our companies?

I think that the first step is to understand that managing this inevitable risk will be more than just a technology solution. At a minimum, companies will also have to manage this risk as part of its day-to-day operations by:

(1) Establishing employee security roles and responsibilities;

(2) Determining which company assets are critical and require additional oversight;

(3) Developing a cybersecurity plan that not only helps reduce the risk of a cyberattack but also serves as a guide for responding to a cyberattack; and

(4) Restoring normal operations and corporate image as soon as possible following a cyberattack.

The Federal Communications Commission has published a cybersecurity "Planning Guide" that is intended to help companies develop their own

EMPLOYEE BENEFITS: HEALTH PLAN IDENTIFIERS

the ACA absurd. While the Court recognized the magnitude of its decision and its effect on "millions of individuals," it stated that it must defer to the Court's limited role when interpreting statutes enacted by Congress – "to ascertain the meaning of the words of the statute."

The Court of Appeals for the Fourth Circuit addressed the identical question but came to the opposite result. In a unanimous opinion of the three judge panel issued just hours after the decision in *Halbig*, the Court found the language of Section 36B of the ACA "ambiguous and subject to multiple interpretations." In ruling to affirm the judgment of the lower court, the Court of Appeals deferred to the Internal Revenue Service and upheld the regulation "as a permissible exercise of the agency's discretion."

The full implications of these decisions remain to be seen. The Department of Health and Human Services has filed a petition for an *en banc* hearing regarding the *Halbig* decision. Therefore, the federal government is asking for the full D.C. Court of Appeals, not just a three judge panel, to reverse the decision. *King* has filed a petition for certiorari with the Supreme Court regarding the Fourth Circuit case. The *Halbig* plaintiff in the D.C. Court of Appeals case filed a response to the motion for *en banc* hearing on August 18, 2014 stating that the petition should be denied and that this matter should be resolved by the U.S. Supreme Court. The impact of these decisions is substantial for the ongoing sustainability of the ACA. As everyone knows, the employer play or play mandate issues certain penalties if employers do not offer health insurance or offer health insurance that does not meet certain requirements and an individual employed by such an employer obtains a tax subsidy through an exchange. If the reasoning of *Halbig* is sustained by the Supreme Court, individuals in thirty six states will not be eligible for a tax subsidy. Therefore, there will be no penalties under the play or pay mandate as currently drafted under the ACA. We will be keeping a close eye on these matters and will update you when there is more news.

By: Ashley Trotto
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Health Plan Identifiers: Are Your Clients Prepared for Implementation?

If you ask an employer about compliance obligations under the Affordable Care Act ("ACA"), he or she will likely tell you about the Employer Mandate. If you ask a particularly astute employer, you may also hear about additional fees and taxes required by the ACA. You are not likely, however, to have a discussion on the ACA's changes to the administrative simplification rules of the Health Insurance Portability and Accountability Act of 1996 ("HIPAA").

Although these rules are important for employers to understand, they have not received the same exhaustive attention as other aspects of the ACA. One of these changes is immediately relevant as the deadline for complying is quickly approaching. In fact, the deadline may have come and gone for some employers by the time this article hits your inbox.

The ACA requires certain health plans to have a unique Health Plan Identifier (HPID).[1] The final regulations require all Controlling Health Plans ("CHPs") to obtain HPIDs. A Controlling Health Plan is defined as a health plan that controls its own business activities, actions, or policies or is controlled by an entity that is not a health plan.[2] The regulations also describe Subhealth Plans ("SHPs") which are eligible for, but are not required to obtain an HPID. These entities are health plans whose business activities, actions, or policies are directed by a CHP.[3]

The distinction between these entities can generally be boiled down to whether a health plan is fully insured or self-insured. If the plan is fully insured it is more than likely an SHP and is not required to obtain an HPID. However, the CHP that controls it may separately require that an HPID be in place. In this case, the CHP would either apply for an HPID on the SHP's behalf or direct the SHP to apply for its own. On the other hand, if a plan is self-insured, it is required to obtain its own HPID.

Health plans that are not subject to HIPAA's administrative simplification rules are exempt from the HPID requirement. Exempted health plans are those under which benefits for medical care are secondary or incidental to other insurance benefits.[4] For example, coverage for accident or disability income insurance, liability insurance, and workers' compensation are excepted benefits. [5] In addition, the HPID requirement does not apply to any self-funded, self-administered group health plan with fewer than fifty participants.[6]

Like many other employer-related provisions of the ACA, size matters. Generally, CHPs must obtain an HPID by November 5, 2014.[7] However, "small health plans" do not have to comply with HPID requirements until November 5, 2015. A "small health plan" for this purpose is defined as one that has annual receipts of $5 million or less.[8] All CHPs, small or otherwise, must use their HPIDs in transactions with other covered entities as of November 7, 2016.

The regulations do not specify penalties for failing to obtain an HPID. However, it appears that a violation of HPID rules may lead to penalties under HIPAA's administrative simplification rules. Under HIPAA rules, plans that do not obtain an HPID could be subject to penalties ranging from $100 to $1.5 million, depending on the assessed degree of culpability, for failing to obtain an HPID.[9]

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[1] A "health plan," as defined in 45 C.F.R. § 160.103, includes a group health plan, health insurance issuer, or HMO.
[2] 45 C.F.R. § 162.103.
[3] Id.
[4] 42 U.S.C.A. § 300gg-91(c)(1) (West).
[5] Id.
[6] 45 C.F.R. § 162.103.
[7] 45 C.F.R § 162.504.
[8] 45 C.F.R. § 160.103.
[9] 42 U.S.C.A. § 1320d-5(a) (West).

In this ever growing labyrinth called the ACA, it is crucial for counsel to make sure his or her clients are aware of these looming HPID requirements. As complicated as it is, employers, with assistance of counsel, need to ensure they are meeting ACA compliance obligations.

INTELLECTUAL PROPERTY: INTER PARTES REVIEWS

INTELLECTUAL PROPERTY

By: William Fortunato
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A New Shield Against Questionable Patents: *Inter Partes* Reviews

A strong patent portfolio can create a competitive advantage for your company in the marketplace, but what happens when someone seeks to enforce their patent against your company? In many cases, you might consider licensing or buying the patent to avoid patent litigation. These options work fine if the patent in question is of high quality and the holder is willing to negotiate reasonably, but what if the threat of patent litigation is based on a patent of questionable quality?

To combat this threat, the America Invents Act has given innovators and their businesses a new shield against patents of questionable quality: the *inter partes* review (IPR). An IPR is a proceeding in the United States Patent and Trademark Office that allows third parties, who did not initiate patent litigation over the patent's scope and validity, to challenge any patent that has been issued for at least nine months.[10] If the third party has been sued by the patent holder, an IPR is still available to determine the scope of the patent, and will stay proceedings in the trial until the IPR has concluded. This effectively allows innovators to strike down patents that should not have been issued, and avoid the threat of a lengthy lawsuit over a questionable patent.

An IPR produces a binding decision on the scope of a patent, just like a decision from a court in patent litigation, but the procedures involved in an IPR are simpler, faster, and generally less expensive than determining the scope of a patent during patent litigation. This is primarily because of the accelerated timetable for an IPR compared to a federal trial; an IPR is statutorily required to be completed within one year of institution (or up to 18 months when good cause is shown). Patent litigation, in contrast, can last for years.

Due to these time constraints, an IPR proceeds much like a streamlined trial. Both the petitioner and the patent holder will have the opportunity to seek (limited) discovery, negotiate a possible settlement, and present their respective

[10] This time period may be extended if a Post-Grant Review that began during the first nine months of issuance has not yet terminated.