EMPLOYMENT LAWSCENE ALERT: REMEMBER MARCH 1 DEADLINE FOR REPORTING A "SMALL" HIPAA BREACH

Employers who are classified as covered entities under HIPAA are required to report any 2018 breach of protected health information that affected fewer than 500 individuals (also known as a small breach) by March 1, 2019. This current breach notification requirement arises from amendments made to HIPAA under the Health Information Technology for Economic and Clinical Health (HITECH) Act, as finalized in 2013. HIPAA defines a covered entity as either (1) a group health plan, (2) a health care clearinghouse, or (3) a health care provider who electronically transmits any protected health information. A covered entity may be an individual, an institution, or an organization.

Background

Under applicable rules, a breach is defined as an impermissible use or disclosure under the HIPAA Privacy Rule that compromises the security or privacy of the protected health information. Some exceptions apply, so that not all incidents will rise to the level of a breach. Still, an impermissible use or disclosure of protected health information is generally presumed to be a breach unless the covered entity demonstrates that there is a low probability that the protected health information has been compromised based on a risk assessment of several specified factors.

Notification Requirement

Upon the occurrence of a confirmed (or in some cases, suspected) breach, the affected individuals must be provided with detailed notification letters without unreasonable delay and no later than 60 days after the discovery of the breach. While the covered entity, most often, provides the required notifications, the final rules permit the delegation of reporting duties to a business associate.

A HIPAA breach also triggers an obligation to notify the Office of Civil Rights (OCR) of the U.S. Department of Health and Human Services (HHS).

- When a breach affects 500 or more individuals, the reporting entity must notify OCR contemporaneously with the notification to individuals (and must also notify local media outlets).
- Where a breach affects fewer than 500 individuals (also known as a small breach), however, a reporting entity must maintain a log or other documentation of all breaches occurring during the year, and annually report all such breaches no later than 60 days after the end of that calendar year.

For a small breach occurring any time in 2018, the deadline to report that breach to OCR is March 1, 2019.

Small Breach Reporting Details

A reporting entity is not required to wait until the March 1 deadline to report a small breach. Small breaches may be reported as early as contemporaneously with the occurrence of the breach. Regardless of timing, all small breaches must be reported to OCR in the same manner. Specifically a reporting entity must report the breaches online through the OCR's "Breach Portal."

Note that even when a covered entity delegates the reporting function to a business associate, the covered entity retains ultimate legal responsibility for proper reporting. Accordingly, covered entities who delegate reporting may want to require proof of timely reporting.

Be aware that, while the reporting entity may report all small breaches on a single date, each separate breach incident will require a separate submission. Instead of simply uploading a log of breach incidents occurring in the prior year, the reporting entity must complete a six-section questionnaire to provide: (1) general information; (2) identification of the covered entity, business associate, and relevant contact information; (3) the nature of the breach; (4) a summary of related notices provided and actions taken; (5) an attestation, and; (6) a summary. Multiple fields must be completed within each of these six sections. The HIPAA status of a reporting party (as either a HIPAA covered entity or a business associate) must be indicated on the "Contact" tab of the online filing form.

The online reporting form also requires the reporting entity to indicate the level of pre-breach HIPAA compliance status, including whether or not HIPAA Privacy Rule safeguards and HIPAA Security Rule safeguards were in place.

Because filing the breach notice can be time-consuming, parties tasked with reporting 2018 small HIPAA breaches of unsecured protected health information are advised to gather and prepare the content to be reported before actually logging on to the OCR Breach Portal. Because any changes or updates to the submitted information must be entered as a separate entry, it is preferable to ensure that each submission is fully accurate. Moreover, because the content of Breach Notifications to OCR can form the basis for a future OCR investigation and enforcement action, it is advisable to have legal counsel review content prior to submission.

In addition to ensuring that 2018 breaches affecting fewer than 500 individuals are reported by March 1, covered entities and business associates should continue to ensure that HIPAA Policies and Procedures, as well as the applicable administrative, physical and technical safeguards are up to date and periodically reviewed.

EMPLOYMENT LAWSCENE ALERT: IT’S TOO COLD TO WORK – HOW EMPLOYERS SHOULD HANDLE WAGE DEDUCTIONS IN INCLEMENT WEATHER

Employers in Wisconsin may be closed this week due to the extremely cold temperatures that are predicted on Wednesday and Thursday. If an employer makes that decision, they may be wondering whether or not they need to pay their employees for the days they choose to be closed. For non-exempt employees, the answer is simple: employees must be paid only for time worked. Therefore, if the employer closes and the employee does not perform any work, the employee does not need to be paid. However, the answer is a bit more complicated for exempt employees.

Under the Fair Labor Standards Act (“FLSA”), an employee is considered exempt if they meet certain duties tests and receive compensation on a “salary basis.” The FLSA regulations provide that, for an exempt employee to be paid on a “salary basis,” the employee must receive his or her full salary for any week in which the employee performs any work without regard to the number of days or hours worked. An employee will not be considered to be paid on a “salary basis” for any week if deductions are made from an employee’s salary for any absence occasioned by the employer or by the operating requirements of the business. However, a deduction may be made when an exempt employee is absent from work for one or more full days for personal reasons, other than sickness or disability.

So, can an employer deduct the day’s wage from an exempt employee’s salary when the employer closes its business due to inclement weather (e.g., extreme cold)? The short answer is no. It is the U.S. Department of Labor’s (“DOL”) position that an employer must pay an exempt employee his or her full salary for any week in which work was performed if the employer closes its operations due to a weather-related emergency or other emergency, such as a power outage. The DOL’s position is based, in part, on the FLSA’s regulation that provides that deductions may not be made for time when work is not available. When it is the employer’s decision to close its business because of an emergency, including severe weather, the DOL presumes that employees remain ready, willing, and able to work. Under such circumstances, deductions may not be made from an exempt employee’s salary when work is not available. If deductions are made under such circumstances, the employer risks losing the exemption, thus subjecting it to potential overtime liability. If the employer’s operation are closed for a full workweek, no salary must be paid.

Employers are permitted to require that employees utilize their available paid time off during an employer-mandated office closure, whether for a full day or a partial day. However, if the employer does not provide paid time off or if the employee does not have available paid time off, the employer may not deduct from the employee's salary for the closure. The employer may not require that the employee have a negative leave balance or make an already negative leave balance more negative as the result of requiring the employee to take paid time off for an office closure.

On the other hand, when an emergency causes an employee to choose not to report to work for the day, even though the employer remains open for business, the DOL treats such an absence as an absence for personal reasons. Consequently, an employer that remains open for business during inclement weather may lawfully deduct one full day's wages from an exempt employee's salary if that person does not report for work for the day due to adverse weather conditions or otherwise require the employee to utilize paid time off. Such a deduction will not violate the "salary basis" rule or otherwise affect the employee's exempt status. If, however, the employee works only a partial day because of weather-related issues, the employer may not make deductions from the employee's salary for the lost time because an exempt employee must receive a full day's pay for the partial day worked in order for the employer to meet the "salary basis" rule.

EMPLOYMENT LAWSCENE ALERT: COMPANY HOLIDAY PARTIES AND TIPS FOR AVOIDING LIABILITY

The holidays are upon us, and that means holiday parties. While holiday parties are a good time to reflect on the year and gather employees to boost morale and camaraderie, they also have potential employment law pitfalls that employers should plan to avoid. If throwing a company-sponsored holiday party, employers should keep the following in mind:

1. Prevent Sexual Harassment. Although the #MeToo movement has not changed the legal requirements related to sexual harassment, it has certainly brought such issues to the top of employer's minds, and it should stay there during the holiday season and any holiday parties. Ensure that your employees are aware of your anti-harassment policy and that they understand that harassment involving any employee at any time, including at a holiday party, will not be tolerated. Remind your employees that, while they are encouraged to have a good time at the holiday party, it is a company-sponsored event where all of the policies and rules of the company apply. If you become aware of inappropriate conduct that occurs at the holiday party, you should deal with it appropriately. Additionally, if you receive complaints about activities related to the holiday party, you must document the incident and do a proper investigation to

deal with those issues.
2. Reduce the Risk of Alcohol-Related Incidents. Employers may be subject to liability for injuries caused by employees who consume alcohol at employer-sponsored events. To avoid potential liability, employers should promote responsible drinking and monitor alcohol consumption appropriately. Employers may want to consider hosting their holiday parties at a restaurant or other off-site location where alcohol is served by professional bartenders who know how to recognize and respond to guests who are visibly intoxicated.
3. Minimize the Risk of Workers' Compensation Liability. Workers' compensation benefits may be available to employees who suffer a work-related injury or illness. To avoid this liability at a company-sponsored holiday party, the employer should make it clear that there is no business purpose to the event, that attendance is completely voluntary, and that they are not being compensated for their attendance at the event. Illnesses caused by contaminants found in food or beverages may create legal exposure if the providers are not properly licensed, so companies should use licensed third-parties who have their own insurance coverage to provide food and beverages.
4. Prevent Wage and Hour Claims. Non-exempt employees must be paid for all work-related events that they are required to attend. Therefore, to ensure that the time spent at a holiday party is not considered compensable under state or federal wage and hour law, employers should make it clear that attendance is completely voluntary, hold the party outside of normal working hours, and ensure that no work is performed during the party and that employees are not under the impression that they are performing work.

EMPLOYMENT LAWSCENE ALERT: VOTING LEAVE IN WISCONSIN – WHAT YOU NEED TO KNOW

With the Wisconsin general election coming up next week on November 6, 2018, now is the time for employers to brush up on their obligations surrounding voting.

All Wisconsin employers are required to provide employees who are eligible to vote up to three consecutive hours of unpaid leave to vote while the polls are open (from 7 AM until 8 PM), and employees must request the time off prior to the election. Voting leave cannot be denied on the basis that employees would have time outside of their scheduled work hours to vote while the polls are open, but employers can specify which three hours an employee is permitted to utilize. Other than the time being unpaid, employers may not penalize employees for using voting leave. However, employers should remember that, under the FLSA, they may not deduct from an exempt employee's salary for partial day absences.

Additionally, all Wisconsin employers are also required to grant an employee who is appointed to serve as an election official 24 hours of unpaid leave for the election day in which the employee serves in his or her official capacity. Employees must provide their employers with at least seven days' notice of their need for this leave. Other than the time being unpaid, employers may not penalize employees for using election official leave.

Finally, Wisconsin employers are not permitted to make threats that are intended to influence the political opinions or actions of their employees. Specifically, employers cannot distribute printed materials to employees that threaten business shut down, in whole or in part, or reduction in salaries or wages of employees if a certain party or candidate is elected or if any referendum is adopted or rejected.

EMPLOYMENT LAWSCENE ALERT: EMPLOYERS MUST REVIEW THEIR BACKGROUND CHECK PROCESSES TO ENSURE COMPLIANCE WITH NEW RULES

The Fair Credit Reporting Act ("FCRA") requires that employers who request "consumer reports," which include background checks, criminal histories, driving records, and credit reports, from a third-party service about employees and applicants follow certain rules. These rules contain specific requirements for notice, disclosure, and consent both in conjunction with obtaining a report and taking adverse employment action because of information in the report.

One requirement is that an employer must make certain disclosures **before** the employer takes an adverse action based on information discovered in the consumer report. This includes providing the employee or applicant with a written summary of consumer rights under the FCRA. Recently, the Bureau of Consumer Financial Protection updated its model disclosure to reflect recent legislative changes to the FCRA, such as the consumer's right to place a security freeze or fraud alert on their credit report. The new model form can be found here.

Employers must ensure that their authorizations and disclosures meet all FCRA requirements and that they are providing the correct notifications, including the updated summary of rights.

#METOO: SEXUAL HARASSMENT CLAIMS AND MISCONDUCT

Wisconsin attorneys Sara Geenen and Erica Reib discuss the duties and risks for both employers and employees seeking to protect themselves.

EMPLOYMENT LAWSCENE ALERT: WAGE AND HOUR LIABILITY—THE HIDDEN DANGER IN ASSET ACQUISITIONS

One of the critical keys to a successful asset acquisition is recognizing potential liabilities and negotiating around those liabilities through a well-drafted asset purchase agreement (“APA”). However, certain liabilities that may attach to the buyer following the sale may not be apparent from the seller’s balance sheet or from a typical due diligence review—making the risk a hidden liability. One such potential hidden liability in an asset acquisition is the seller’s past wage and hour violations under the federal Fair Labor Standards Act (“FLSA”). Even when the potential liability is identified by the buyer and the parties have negotiated contractual terms in the APA for the buyer not to assume such liability, the buyer may still have exposure for such wage claims when it is deemed a successor under federal common law.

Wage and hour claims under the FLSA can result in significant liability to an employer. Most FLSA claims are brought as a collective action (similar to a class action) on behalf of all similarly situated employees which can result in penalties up to double back wages for up to three years for willful violations plus the opportunity for the recovery of attorney’s fees. This can oftentimes lead to hundreds of thousands of dollars in liability and even millions of dollars if the collective class is large enough and the violation involves significant underpayment of lawfully required wages. Typical claims under the FLSA include: (i) misclassification of employees as exempt; (ii) failing to pay employees for hours worked such as for travel time, donning and doffing, meals and rest periods; (iii) failure to properly calculate an employee’s “regular rate” of pay in the calculation of overtime; and (iv) improperly classifying workers as independent contractors rather than as employees.

Many business people operate under the general assumption that when a company is sold in an asset sale, as opposed to a stock sale, the buyer acquires the company's assets "free and clear" of the seller's liabilities unless expressly or implicitly assumed by the buyer. However, many federal circuit courts have recognized that when liability is based on a violation of a federal statute involving labor relations or employment, then application of successor liability under federal common law is appropriate in suits to enforce federal labor or employment laws, like the FLSA, to prohibit employers who violated those laws from avoiding liability by selling, or otherwise disposing of, their assets and dissolving. For example, we previously addressed in this blog (click here for the post) the Seventh Circuit's decision in *Teed v. Thomas and Betts Power Solutions, L.L.C.* where the Seventh Circuit imposed successor liability upon the buyer in an asset acquisition for the seller's FLSA violations despite language in the APA that expressly disclaimed such liability by the buyer.

Because a buyer could be held liable as a successor for the seller's past wage and hour violations, it is incumbent upon the buyer to perform a thorough due diligence of the seller's compliance with wage and hour laws. If potential wage and hour compliance issues are detected, then the buyer can take necessary steps to protect itself by: (i) drafting appropriate representations and warranties regarding the seller's compliance with labor and employment laws; (ii) shifting the potential obligation back to the seller through a carefully drafted indemnification provision that properly defines "losses" to include all potential liabilities under the FLSA; (iii) either negotiating a reduced basket (a threshold amount of losses or damages the buyer must incur before it is entitled to indemnification from the seller) or excepting any FLSA liability imposed on the seller from the basket; (iv) negotiating an increased escrow fund to cover any potential indemnification obligation created from any past wage and hour liabilities that may be imposed on the buyer as a successor; and (v) negotiating a purchase price adjustment.

Having an experienced law firm with both transactional and employment attorneys on your side who can recognize and address a buyer's potential exposure to FLSA liability can make the difference between a successful acquisition or an acquisition where the buyer is saddled with a liability it never saw coming. Click here to meet your OCHD&L business law team.

EMPLOYMENT LAWSCENE ALERT: SHOULD I USE E-VERIFY OR NOT?

E-Verify is an internet-based system that is operated by the Department of Homeland Security (DHS) in conjunction with the Social Security Administration (SSA). In theory, the program simplifies the process of ensuring new employees have the appropriate work authorization. After registration, employers enter sections 1 and 2 of the new employee's I-9 Employment Eligibility Verification Form into the system, allowing the system to cross-reference the employee's information with information stored by the SSA. After entering the information, employers would receive either an initial confirmation or a "tentative non confirmation" in seconds. The program sounds like an easy way to navigate the dark waters of unintentional unauthorized employment; however, the program, with many advantages and disadvantages is not for everyone.

The question then becomes—should I use E-Verify or not?

In some cases, the answer is simple. All federal contractors are required to use the program. Similarly, Arizona and Mississippi have passed laws requiring all employers to use the program while South Carolina "encourages" but does not mandate its use. Colorado, Georgia, Missouri, Nebraska, Rhode Island, and Utah have passed legislation that required the use of E-Verify for all public contractors and state agencies while Idaho, Minnesota, and North Carolina require state agencies to use the program.

If your company falls into one of these categories, you must use the program, regardless of the well-documented downfalls. If, however, you live in any other state or are not otherwise required to use E-Verify, each employer must balance the pros and cons of the program before deciding whether to enroll.

Benefits of E-Verify

Simply put, E-Verify is a quick way of receiving an initial determination of a new employee's authorization to work. By entering information from the employee's I-9, the employer receives an automatic reference which provides the employer protection against inadvertently hiring an individual without work authorization. Although the program does not provide complete immunity, it does create a rebuttable presumption that the employer has not violated INA section 274A(a)(1)(A) ("Unlawful Employment of Aliens").

Moreover, if an employer hires a foreign national who recently received a degree in science, technology, engineering, or mathematics (i.e., the STEM fields), voluntary usage of the E-Verify program may make those new employees eligible to work an additional 17 months before the employer is required to file an H1-B petition on their behalf.

Finally, there have been efforts on the federal level to make E-Verify mandatory nationwide. Should these proposed bills turn into law, those employers who have already been using E-Verify will already be familiar with the program. If E-Verify becomes mandated nationally, the program would likely experience technical issues and the error-rate would likely expand. Being familiar with the program would thus be an advantage.

Downfalls of E-Verify

DHS claims that E-Verify is free to use; however, there are some built in costs to consider. First, E-Verify is an “all-or-nothing” program. In other words, employers may not use the program intermittently. Rather, signing up for E-Verify represents an organizational shift that may require extra time, money, and effort to train and supervise staff on how to properly use the system. Depending on the size of the company, this shift may involve significant costs.

Importantly, e-Verify is far from perfect. There have been many reports of e-Verify providing tentative or final non confirmation notices to employees who have proper work authorization—even to U.S. Citizens. Moreover, the issuance of a tentative non confirmation notice requires the employer to provide adequate notice to the new employee, allowing them the opportunity to challenge the determination. Failure to provide adequate and timely notice may open the employer up to legal action by the new employee. Additionally, the system can be cumbersome and difficult to manage, particularly for smaller businesses. For example, with E-Verify, employers may only accept an I-9 List B document if it bears a photograph and employees must possess a social security number. Neither of these requirements is needed to prepare an I-9 outside of the E-Verify program.

Moreover, the government is able to use E-Verify to ensure that employers are timely filing I-9s on behalf of new employees and to correct any errors in a timely fashion. E-Verify provides the government with a swath of information about employers and employees and allows the government to mine this information for employer violations. Voluntarily entering information into this database, in other words, increases the risk that the employer may be investigated and fined for intentional or unintentional violations.

Finally, many immigration reform advocates criticize the program as a means of shifting the burden of immigration enforcement from the government to private employers. Immigration enforcement has always been the responsibility of the federal government. As with the debate behind the implementation of 287(g) agreements by some local law enforcement agencies, critics of the program argue that E-Verify shifts one aspect of enforcement from the government onto private businesses.

In conclusion, employers should weigh the benefits and disadvantages of enrolling in E-Verify before doing so. What may seem like an easy way to ensure the proper work authorization of employees may actually create significant human and financial costs.

For more information on the E-Verify program and to discuss whether enrollment is right for your business, please contact us.

EMPLOYMENT LAWSCENE ALERT: RULING ON MARQUETTE PROFESSOR CONTAINS LESSONS FOR PRIVATE EMPLOYERS

On Friday, July 6, 2018, the Wisconsin Supreme Court determined that Marquette University had breached its contract with tenured professor John McAdams when it suspended him for discretionary cause after he authored a controversial blog post. McAdams claimed that the blog post fell within his rights to protected speech and academic freedom, whereas the University claimed that it was an unprofessional attack that was outside of those protections. Because the Court determined that the blog post was protected by the doctrine of academic freedom, which was guaranteed under the professor's contract and could not be used as a basis for discretionary cause, the Court held that the University had breached the contract because the blog post was a "contractually-disqualified basis for discipline."

The University argued that the Court had to defer to its internal procedures for suspending and dismissing faculty members and could not second-guess its choices unless the University had abused its discretion, infringed on the faculty member's constitutional rights, acted in bad faith, or engaged in fraud. However, the Court found that "the University's internal dispute resolution process is not a substitute for Dr. McAdams' right to sue in our courts" and that it did not have to defer to the disciplinary procedure because 1) it was fundamentally flawed due to the unacceptable bias on the Faculty Hearing Committee (the "Committee"); 2) the Committee had no authority to bind parties to its decision, because the parties had not agreed that the internal dispute process would replace or limit the adjudication of a contract dispute in court, as can be done with an arbitration agreement; and 3) there was no required procedural process to defer to because, although the Committee makes a recommendation, it is the University president that ultimately makes the disciplinary decision, and there were no rules, procedures, or standards that describe how the president was to make his ultimate decision.

This case should serve as a reminder to all private employers that, while courts generally defer to the decisions of an employer, they will not do so if those decisions or the processes underlying the decisions violate a contractual or statutory right of the employee. For example, if your disciplinary process is tainted by improper and illegal bias on the basis of protected class, the court will not disregard that simply because a disciplinary procedure was followed. Employers should make sure not only that they are following their internal disciplinary procedures but that procedures are fair and impartial and that the decisions stemming from those procedures do not violate the contractual or statutory rights of employees.

EMPLOYMENT LAWSCENE ALERT: NLRB'S GENERAL COUNSEL ISSUES GUIDANCE ON HANDBOOK RULES POST-BOEING

On June 6, 2018, the NLRB's General Counsel issued a memorandum (GC 18-04) to all NLRB Regional Directors providing regional offices general guidance on the new standard regarding the lawfulness of handbook rules under Section 7 as established by the NLRB in *The Boeing Co.*, 365 NLRB No. 154 (2017). In *Boeing*, the NLRB overturned the onerous "reasonably construe" standard that was previously established by the NLRB in *Lutheran Heritage Village-Livonia*, 343 NLRB 646 (2004).

In *Lutheran Heritage*, the NLRB held that employers can't maintain workplace policies that workers could "reasonably construe" as barring them from exercising their Section 7 rights. Section 7 provides that "[e]mployees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities…"

The *Lutheran Heritage* standard was criticized as rendering unlawful every policy, rule and handbook provision—such as rules governing workplace civility, open door policies, fraternization, use of recording devices, use of cameras, confidentiality, use of social media, interactions with media, and use of logos and trademarks—that an employee might "reasonably construe" to prohibit any type of Section 7 activity. Simply, the *Lutheran Heritage* standard was unworkable for employers in drafting legitimate and effective workplace policies.

Under the new *Boeing* standard, however, the NLRB will apply a balancing test (balancing employees' Section 7 rights with employer's legitimate business interests) in evaluating whether an employer's facially neutral policy interferes with employees' Section 7 rights by considering two things: (i) the nature and extent of the potential impact on NLRA rights, and (ii) legitimate justifications associated with the rule.

In applying this new balancing test, the NLRB will delineate three categories of facially neutral employment policies, rules and handbook provisions:

- Category 1 includes rules that the NLRB will designate as lawful to maintain, either because (i) the rule, when reasonably interpreted, does not prohibit or interfere with the exercise of NLRA rights; or (ii) the potential adverse impact on protected rights is

outweighed by justifications associated with the rule.
- Category 2 includes rules that warrant individualized scrutiny in each case as to whether the rule would prohibit or interfere with NLRA rights, and if so, whether any adverse impact on NLRA-protected conduct is outweighed by legitimate justifications.
- Category 3 includes rules that the NLRB will designate as unlawful to maintain because they would prohibit or limit NLRA-protected conduct, and the adverse impact on NLRA rights is not outweighed by justifications associated with the rule.

The above three categories will represent a classification of results from application of the new *Boeing* balancing test. The categories are not part of the test itself.

The NLRB's June 6th memorandum will assist NLRB regional offices in assessing on how to handle or process unfair labor charges alleging that a particular employer's policy or handbook rule violates employees' Section 7 rights. In addition, the NLRB's General Counsel's memorandum will guide regional offices regarding the placement of various types of rules into the three categories set out in *Boeing* providing the regional offices a balanced common sense approach in evaluating and processing such unfair labor practice charges against the new standard set forth in *Boeing*.