

Five Laws Employers Must Know



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Presenters

William T. Wilson, Esq.

Laurie Wyche-Abele, Esq.

James C. Bailey, LL.M.

Donna K. Shopulski, Esq.

LANCE NELSON: Good morning. My name is Lance Nelson. I'm the Managing Partner of MacElree Harvey. We're very happy to be doing this series of four seminars again with the Chamber this year. If you did not receive the e-mail listing the dates and topics of the other seminars, there will be one more before the summer and two in the fall. We have several attorneys from our employment law group here today, as well as a special guest star. Bill Wilson and Jim Bailey are both in our employment law group at MacElree Harvey, and Laurie Abele, who has been delayed on her way here, will be joining us shortly. We also have Donna Shopulski with us this morning, who is with the law firm of Thomas & Libowitz in Baltimore, Maryland, and specializes in employee benefits. We're fortunate that Donna woke up very early this morning and was able to join us. So, without further ado, I'll turn the program over to these folks.

DONNA SHOPULSKI: I'm going to be talking about two issues today. The first is the HIPAA privacy rules, which are such a hot topic that actually the deadline for compliance is today. So, if you have never heard of HIPAA or if you haven't done anything about it, you might want to leave right now and get started. HIPAA stands for the Health Insurance Portability and Accountability Act. It was first enacted a number of years ago and there are several parts to it. The privacy rule is in one portion of the Act -- the administrative simplification portion. And, if you know anything about our government, the minute you hear simplification, what that usually means is we're going to get 8 or 9 million pages of regulations to simplify our lives. That's what happened with the privacy rules. They started out really not because of concerns over privacy, but because of the administration and to try to streamline some things that companies were doing, but then they sort of got forced into a lot of changes. They received more comments than any other proposed regulations that were ever issued because of concerns about privacy of health information. Particularly with electronic transmittal and how quickly our private health information can be transmitted around the world these days. I'm going to just give you a brief overview of what they do. We can't possibly cover all of the rules or how to conform these rules to your particular situation, but you just need to know they are out there. You need to figure out how to structure your office so you protect the information as required under this law.

Large health plans, which are defined as plans that if fully insured, have premiums in excess of \$5 million during the prior year or, if they were self-insured, had paid more than \$5 million in

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claims during the prior year of the plan had to be in compliance with the HIPAA privacy rules by last April 14th. Some people still aren't there and they haven't done what they are supposed to do; a lot of my clients are still working on it. Small plans, anything that was not covered by the \$5 million rule, are required to comply by today, April 14, 2004. Mainly, what the privacy rules are designed to do is to make sure that health plans are being administered for the benefit of the participants of those plans and that the health information has not been used for any other purpose. Particularly, the concern is that health information, medical information, is not being used to make decisions about hiring and firing people. So, what happens is the rules govern what they call protected health information, how it is transmitted, what you have to do to use protected health information. You need to know what protected health information is so that you know, if you sponsor a plan as an employer, whether or not you are subject to these rules. Protected health information or PHI, is any information that is created, (and I'm just going to read this definition), is created or received by a healthcare provider or health plan employer or healthcare clearing house, relates to the past, present or future physical or mental health or condition of an individual or the provision of healthcare for that individual or payment of healthcare for the individual, and it has to identify the individual. There are ways to strip out the identification of the person which then takes the information out of the definition of what has to be protected. If you de-identify information so that you can't possibly tell who that individual is, the information does not have to be protected. Now, with a small company it is harder, because if somebody had to be taken out of work awhile and you're getting billed and you're paying for your health care, you kind of know when your rates are going up and down who is causing it. In a very small company, it becomes a little bit harder to administer information and keep information separate. We have a lot of situations where companies have one Human Resources person. So, it's a little trickier to try to separate the information so that you can prove down the road if there is a problem, that the information was not used for an employment purpose. The privacy rules affect any employer who sponsors a group health plan. That includes flexible spending arrangements, cafeteria-type plans. Employers are not covered by the rule, but their health plan is. Before anybody gets information from a health plan, the plan sponsor has to comply with certain requirements which again has to be by April 14th this time last year or today depending on their size. It requires an amendment to the health plan, stating that the plan is only going to use protected health information in the performance of administrative functions relating to the health plan and the plan has to be amended to identify those employees in the company who will have access to protected health information as part of their job duties in administering that plan. It's a pretty simple amendment. The employers have to provide certification to insurers that the health plan has been amended and employers need to appoint a privacy officer, which again is a little tricky if you've got one person in the HR Department. The privacy officer is to oversee the internal HIPAA privacy compliance and to provide training to any other employees who may be working with this protected information, show them how it needs to be handled, how it needs to be separated from other employment records and

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sort of to create firewalls to ensure that this information is kept separate. The employer is also required to establish a grievance procedure so if somebody feels that their rights have been violated, they know the procedure to go through and each employer has to have a process in place to fix any problems that do occur, any violations that do occur. Employers whose health plans have third party administrators need to have business associate contracts with any of their business associates as defined under the rules, and that includes attorneys who handle protected health information. Third party administrators are typical ones. Sometimes brokers. It does not include the group insurance plan itself, but employers must make sure they have contracts with business associates. If the employer is the fiduciary, they must make sure that their business associates are properly handling information. Ultimately, if the employer is the fiduciary responsible for the plan, they need to make sure that whatever parties they are using to help them run the plan are following the rules. Employees who are covered under the plans and their spouses or dependents also have certain rights. They have a right to get a notice of the privacy practices that are in place and there are sample notices available through the Department of Health and Human Services on the Web. Plan participants have a right to restrict uses and disclosures of their own protected health information. People have a right to access their own protected health information, which is pretty much common sense. People have a right to amend their protected health information. If they think something is wrong, they have a right to show that it is wrong and ask that it be changed. People have a right to an accounting of the disclosures of the protected health information. So, if I come to you as my employer and say, show me where you've disclosed it and when, you need to have that tracked in detail. One thing you need to know is that state law is not preempted by HIPAA. If the state law is more restrictive and more protective, then state law will apply. Pennsylvania has a lot of specific privacy rules that are generally set out in different statutes. Maryland has a privacy rule that has been in place for some time. Pennsylvania may end up doing that eventually, but right now you just have a lot of different privacy statutes out there. Probably, the insurers are already complying with them, hopefully, but to the extent that they are more restrictive, they would still govern.

If anyone wants more information, I have outlines that Lance said he'll e-mail up and they will have my phone number and contact information if anybody wants further information or if you want to discuss specifics. I'll be happy to do that with you.

The other thing I want to talk to you about this morning, this is a hot issue right now, is in the context of fiduciary duties under ERISA. Has anybody here, I guess all of you unless you live under a rock, heard about the mutual fund scandals? They have been all over the *Wall Street Journal* and every financial magazine in the country. They impact fiduciary duties under ERISA because there are a lot of retirement plans heavily invested in mutual funds, so this has become a big hot issue. ERISA provides for a number of fiduciary standards. Under ERISA, if you are sponsoring a plan, you have three main duties. You have to make sure you have a written plan document and that it is being followed. You have to make sure that your investments are

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appropriate and you have to make sure that the plan administration is done properly, all the testing required by law is met, and that the plan is being administered in accordance with all the governing documents. Those are the three big issues. Now, you can farm out some of those, but you can never, ever get rid of all your fiduciary responsibility because you have an obligation to oversee people that you hire to make sure they are competent people.

Generally, under ERISA, you are a fiduciary if you have any discretionary authority or discretionary control over the management of the plan, or you exercise any control over the plan assets. If you render investment advice for a fee (now that takes a lot of employers, hopefully all employers out of it), you are a fiduciary. That's if you have any discretionary control of the investment. If you have ever negotiated a contract with a third party record keeper or an investment advisor, they will always want the language in there saying I'm not a fiduciary under ERISA. Whether they like it or not, they often are. Maybe to a limited degree they may be a directed trustee so their liability is more restricted or limited. But, generally, they want this language that says we're not a fiduciary. You can put the language in, but if they are a fiduciary under ERISA, they still are. We always try to get that language a little more fleshed out so that it is clear who has what responsibility. If you have any discretionary responsibility, discretionary is the key word here, or control over the administration of the plan, you are a fiduciary. People don't realize in small companies a lot of times there are people in your HR Department who are fiduciaries who do not know they are fiduciaries because they are making a lot of decisions about plans and they have discretion about interpreting things in the document and they don't realize they are a fiduciary. You just need to be careful that a lot of you may be fiduciaries and not realize it. When we are talking about plan investments - that falls under management. As a manager of a plan and as a fiduciary responsible for the management of the plan going to hire out to investment advisors, but when you are...and even if you are a 404(c) plan, does everybody know what that means? Under ERISA 404(c), you can limit your liability for bad investments by allowing participants to choose from an array of investments. And you have to follow, of course, a set of other rules. You have to tell people that you intend to be a four or four C plan, you have to have language in your summary plan description, and on the Form 5500, the Department of Labor now wants to know if the plan is a 404(c), and there are certain rules that you have to follow. You have to give people information about each investment so they can make intelligent choices about what they're picking, they understand the risks associated with each one. Every time someone enters into a new investment, you have to give them information about that particular investment -- enough that they can make informed decisions. And there are some other associated rules, basically giving information so they can make choices. You limit your fiduciary liability if they pick something -- they've done it. However, if you pick ten funds, it is a fiduciary act to pick those ten funds, so they need to be good funds. They need to be diversified funds. You don't give people ten high risk funds to pick from. A lot of that is common sense, and you can hire an investment advisor and further limit your liability, but it is a fiduciary act to pick the funds.

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Last year there were two big scandals that came out related to mutual funds, which the whole world is invested in. One is late trading problem which means that investors were purchasing or canceling quarters from mutual fund shares the market at four o'clock Eastern time when the market closes the prices are set for funds. People were buying or selling mutual fund shares after four o'clock closing once the value was set but doing at the earlier price of the day. If they wanted to purchase and said this looks like a good price, I'm going back and getting the earlier price, that is illegal. Once four o'clock hits, buying at the next price. A lot of mutual fund companies have been implicated in that. The second problem is market timing which isn't always illegal, but it can be a problem from a fiduciary standpoint. And some people are making mutual fund share trades to take advantage of discrepancies in the market. Like foreign markets follow the American market, so sometimes people were timing their buying and selling so they are taking advantage of changes in timing of the market and what the market is going to do. It is similar to having inside information.

The Department of Labor, as you might imagine has been all over this because ERISA fiduciaries have duties to make sure that investments in their plan are prudent; to make sure that you are operating according to governing documents; and to disclose certain things to plan participants to allow them to make informed decisions.

Because you have to invest prudently as a fiduciary when you know that certain mutual fund companies are engaging in practices that are problems, you need to investigate the companies that you are investing with to make sure you know what their trading practices are and you need to ask questions. Again, I will be e-mailing a list of some of the questions that you should be asking people when you are investigating what funds to look at for your plan.

In some of these cases when we are talking about timing issues, forgetting the blatantly illegal thing of buying and selling after four o'clock, we're talking about people who go out and time the market so that they're getting an advantage of things like foreign market changes, generally, people who know that information if you were savvy enough to trade on that kind of information and time the market, are people who are the CEOs of companies. They are people with the largest amount of money in the plan. Transactional costs for buying and selling on the foreign market are very high, so the other participants are often suffering from the plan having to pay these large transaction fees. You need to make sure that the activities of a few people, particularly when they are highly compensated people, are not adversely impacting other participants in the plan. Sometimes in these cases what is happening is fiduciaries can be sued for breach of their fiduciary duty because they have not disclosed to participants what is going on, they have not properly investigated the mutual fund company to see what is happening. And let me say that with all this hype over mutual fund company issues, now the whole world is focused on it, so a lot of these practices will stop. It doesn't mean you don't have a duty to investigate, but it is probably going to become less of a problem because the SEC is all over it and talking about regulating heavily.

There is still another issue and if you look at all of the information you get when you pick funds and investment companies, the problem we've been having when we try to help clients pick advisors, we can't get information about what these funds are costing. It is all so varied, that you try to ask them what is this fund costing and you just get all kinds of, I mean you think lawyers are bad, I can't

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understand half the lingo. You know, you ask them a set of questions and you get back general comments, rather than specific answers. You want to know how much a fund is costing relative to other funds. That will continue to be a big fiduciary issue and lately the Department of Labor is making a lot of noise that it is going to investigate the overcharging of fees for investments and good luck to those figuring it out because we have really spent about three months with one investment advisor just trying to get a straight answer on what fees are hidden because you know that even with no load funds there is no such thing. There is a cost hidden. It is reflected in the market share. I mean you've got to make money. Nothing is free. So, you need to be asking a lot of questions and document what you are asking because as a fiduciary documentation will show that you are doing your due diligence and document the answers you get and document the reasons for your decision. I can't say enough about that. That is critical. Have some investment policy in place to show what your rules are, how you are picking funds, what you do to pick your funds. With the mutual fund selection and monitoring investigate it early, investigate the news, look at obviously if the fund you are considering is implicated in a scandal, you might want to think twice before getting into a new investment. Ask people what procedures they have in place to prevent improper market timing trading. Just find out what their policies are. Find out how they're responding to specific allegations. Find out from people funds that have not been implicated, what do they do differently? What are their practices? How are they addressing this in response to the news and response to the FCC investigations, and look at all the alternatives. Document what you are looking at, how it compares, make a list of comparative criteria and document how you are choosing these funds. And monitor. Once you do choose funds, don't just pick them and walk away. Monitor the funds on an ongoing basis. As a fiduciary you have that obligation as well to make sure that the funds are still relevant, they are still valid, they're still good funds.

The DOL did issue guidance. I'm not giving that to you because their guidance is, basically, be prudent and you should already be doing that as a fiduciary.

BILL WILSON: If anybody has a question, we want to make sure nobody is falling asleep in the back or anything, but if you have a specific question, general question, clever quip, just speak right up.

LANCE NELSON: Like we did at our last seminar, I'm going to pass a basket around, put your card in it. We are going to have a drawing for a gift certificate to the Dilworthtown Inn.

JIM BAILEY: When you were talking about business associate contracts that they don't apply to the broker, do they only not apply to the broker if all they're doing is really brokering your benefits?

DONNA SHOPULSKI: I think you're saying I said that business associate contracts do not apply to the broker. You misunderstood me. That's not what I said. They do apply to any third party who has protected health information and they're using it, because you need to make sure that they are protecting it. But, a lot of times brokers are just getting the de-identified information where they are just pricing and only have like male/female and just basic information.

They should be giving you a contract that you can then review and approve.

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JIM BAILEY: Does everybody here know what a business associate agreement is? The Health Insurance Portability and Accountability Act (HIPAA) creates rules that employers and others have to follow to protect health information. That is so people don't know that you went to the doctor or what you went to the doctor for and, if you are going to share this information with third parties, you have to have an agreement that you will protect this information. You are a business associate of somebody who collects the medical information.

Donna spoke about ERISA. Does everybody know what ERISA stands for? It is the Employee Retirement Income Security Act and ERISA is everywhere. Unlike many other statutes, such as Title VII, which governs race discrimination, sexual harassment, a great number of these anti-discrimination statutes only apply to companies over a certain number of employees. ERISA applies to everyone who has a function with respect to a plan.

What is a plan? How many people here have a retirement plan at work? The difference there, you might have a defined contribution plan versus a defined benefit plan. I would bet you, except for a company of over 100, no one here has a defined benefit plan. They're really going the way of the blacksmith. Donna, what's the difference between a defined benefit plan and a defined contribution plan?

DONNA SHOPULSKI: The defined benefit plans are the old style plans where you have a projected benefit that I promise you I'm going to pay you. For example, I promise to pay you \$100 a month when you hit retirement age 62, 65, or whatever the plan provides. Defined contribution plans are the account balance plans in which you put a certain amount of money aside. You may have profit-sharing contributions or 401(k) plans, your own employee deferrals, and the plan may include an employer match, but I have an account and the value of that account, whatever I'm vested in, in that value, is exactly what I'm going to get and it fluctuates with the market depending on where the investments are.

JIM BAILEY: So, basically a 401(k).

DONNA SHOPULSKI: A 401(k), a traditional profit-sharing plan.

JIM BAILEY: What about a SEP IRA?

DONNA SHOPULSKI: A SEP IRA is just an IRA. They are literally just a series of IRAs, they are not a qualified plan.

JIM BAILEY: But even a small business that has a SEP IRA, are they covered by ERISA?

DONNA SHOPULSKI: Yes. Now let me go back and discuss something on the HIPAA rules for small employers. There is an exception under HIPAA when you are talking about these rules, for employers with fewer than 50 participants, not employees, participants in a plan. In my

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company, we don't have all that many employees, but when you add in spouses and kids and everything, we are over the 50. If they are self-administered by the employer who created and setup the plan and its fewer than 50 participants, you don't have to worry about HIPAA requirements. It is impossible when you are administering and doing everything.

JIM BAILEY: Now, when you say they are exempt from the HIPAA requirements, does that impact the fact that they have to sign a business associate agreement and protect information?

DONNA SHOPULSKI: Yes. They are doing their own administering. They're doing everything so they probably don't have anybody outside the company unless they have other outside insurance or plans.

JIM BAILEY: So what if I sent an employee for a fit for duty exam, if they are a driver and I want them to get a blood test, or there is some agreement that we're allowed to get that. Would I have to have a business associate agreement in that circumstance?

DONNA SHOPULSKI: No.

JIM BAILEY: Why not?

DONNA SHOPULSKI: If you are exempt, you don't have to have a business associate agreement with anybody. You're exempt from the privacy rules. It's an exception.

We're talking about the privacy rules. You've got different employment related issues when you are firing somebody because of disability or something like that which you would have to judge, we're only talking about HIPAA right now. Whether you have to have a contract in place, whether you have to have to get authorizations of consent from people. That is all we are talking about here.

BILL WILSON: The Americans with Disabilities Act, for example, has some privacy regulations or privacy sections relating to medical information that apply to all employers covered by that Act and even if you are too small to be covered by the ADA, I wouldn't be casual about disseminating health information because of simple common law rules about privacy.

One thing I would like to say about ERISA since Jim sort of steered us to broader discussion of ERISA, is it doesn't cover just pension-type plans. There are a number of other kinds of benefits that you might provide to employees that are covered by ERISA called welfare benefit plans. And, although those don't usually implicate the investment sort of issues that Donna was talking about, they do carry with them all of the other fiduciary duties that employers have. So a severance pay plan or the health plan, which was discussed, or an apprenticeship plan, for example, that is covered by ERISA has those fiduciary duties that might apply to an employer

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as plan administrator and, again, many employers don't seem to be conscious of the fact that they are named fiduciaries and those obligations and potential liabilities fall on them.

QUESTION: What if you allow somebody to come in and make a presentation to your employees about purchasing additional disability insurance or life insurance or something like that. Are there ERISA implications to those presentations?

BILL WILSON: There are implications and one of my colleagues might be helpful if I get off base, but there is a carve-out for employers whose participation in that is merely allowing an outside vendor of insurance to come in and make the presentation and they are not otherwise participating as administrator of the plan, then the employer doesn't take on any fiduciary duty. But there are implications if you get outside the perimeters of that carve-out.

QUESTION: Relating to HIPAA and technology, one of my customers found out a few months ago that they thought they had been sending employee information related to their health benefits directly to a doctor. They were actually faxing them to an auto body shop. They only found out by accident and they were really nervous that they could, under the HIPAA, have been liable.

DONNA SHOPULSKI: There are provisions under HIPAA for when you find out there is a violation that you take steps to correct it and I would have to look at those specifically to tell you how to correct that. But, typically, even if you find out...was this from the office from the employer itself?

QUESTIONER RESPONSE: No. The doctor's office had requested information and the employer faxed it, but they were one digit off. They did this for about three months. Consistently sending information to the auto body shop, who read it and then actually posted it on the bulletin board. They got a big kick out of it. Only because somebody worked at this employer and saw the information on the bulletin board and knew something was wrong. That's how they found out and they've since corrected the problem. If the employee had wanted to cause a problem...

BILL WILSON: Yes. Cows got out of the barn. You can't always collect them back.

DONNA SHOPULSKI: How do you correct something like that? Sometimes you can't just make a business decision and say your prayers every night before you go to sleep. You know, you hope the statute of limitations runs and you're not in any trouble, and nobody has any ill effects from it.

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QUESTION: Along the same lines, from what he was saying, if you have a disclaimer on the bottom of your fax cover page, does that afford you some degree of protection?

DONNA SHOPULSKI: Not likely. No.

JIM BAILEY: Lawyers put that on their e-mail too. They have the little disclaimer and I've read some articles on that. I haven't had a chance to litigate that or actually address it, but I've read some articles that say that's not really worth much. One thing is it is kind of diluted because you put it on every e-mail to your buddies. This is privileged and confidential if you get it in error so I think that it's a good precaution to take, but I wouldn't hang my hat on it.

DONNA SHOPULSKI: We actually had opposition send us their whole case strategy by e-mail. But they just hit "reply to all" and we said, you know, well, thanks.

JIM BAILEY: Donna had mentioned the "fiduciary act" in picking funds. Does anyone here have a 401(k) plan where there is a certain array of funds that you can pick from? That was the context which you were talking about.

What was the problem in the Enron case with the 401(k) selection or was there a problem?

DONNA SHOPULSKI: Enron had a whole lot of problems and a lot of it was, again, when you've got the executives of a company... from what I understand from the Enron case and I knew I wasn't going to be litigating it so I haven't done a thorough study of all of the paperwork, but generally the problem was that they were blocking trades for people who were like the lower paid people, but the highly compensated executives had the ability to still trade. Still move their funds, still do things with their funds. What has resulted from that is the...has anybody had to deal with blackout notices yet with your plans? Sarbanes-Oxley Act passed a lot of legislation as a result of the Enron scandal. One of the big things from employee plans that came from that is that if you are going to have a blackout period, where people can't trade, they can't either take loans from the plan, they can't change their investments in the plan for a certain period of time, you have to give them a blackout notice -- here's how long the period is going to be -- so they have an opportunity to move things before the blackout period starts and they can't move funds. Now there is an exception. I think it is three days. If it is only going to be three days, you're okay.

JIM BAILEY: Why would you need a blackout?

DONNA SHOPULSKI: If you were doing a wholesale move, let's say, to a new investment advisor or new investment firm, you know, like I had a client recently move from Putnam to ING or something and moving all your funds, so your mapping your funds over to comparable funds

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with the new investment house. There is a time lag there where you can't trade anymore here because you have to stop trading and move all the funds over. So, you may have a blackout period of maybe a week, two weeks. At some point it becomes an unreasonable period too and you need to be careful that you stay on top of the people moving the funds. I just had an incident with that where we just couldn't get anybody to move anything and you start to panic, but you know you gave this blackout notice hoping it was going to be eight days and your up on the seventh day and things aren't done.

JIM BAILEY: So, Enron was more than separate companies designed to hide losses. When the whole Enron ERISA scandal was coming about, you heard a lot of talk and a lot of articles that Enron wouldn't let the participants sell their shares in their 401(k) plan. They had these blackout periods and they just wouldn't let them sell while the stock was plummeting and most of these people were investing in purely Enron stock because even the people at the low end of the ladder were trying to make a lot of money and they thought, well, Enron is posting great numbers -- and who knew why they were posting great numbers -- but they were posting these great numbers so if you have a choice between the Vanguard S&P 500 or your own company stock, Enron, which is going through the roof, let me put it in Enron. Then when it started to go down, the Enron stock, the plan administrators instituted a blackout period. Now, I believe they would defend that by saying a blackout period is a normal course of business for a 401(k). We didn't do this to deprive the 401(k) participants in their stock, but the timing is very suspect and, as Donna mentioned, new rules have come about that impact every one of us in this room who has a 401(k) with respect to blackout periods so it is not some cerebral concept. It is something that actually affects all of us who have 401(k)s.

DONNA SHOPULSKI: What happened here is they did an inside information. The executives knew that the value was inflated. They knew that the books were not right. They're getting out. Then they stop trading on the fund for other employees.

JIM BAILEY: Bill Wilson mentioned something about a severance plan. Donna mentioned earlier the word "plan" and she is using around the word "plan". Donna, what is a "plan" under ERISA?

DONNA SHOPULSKI: Plan is broadly defined as any employee benefit is a plan. Health and welfare plans are included. Any of your group health plans are ERISA plans. ERISA basically was enacted to give people disclosure protection so they know what's going on and what benefits they are entitled to, and to provide for contractual rights that this document says I'm entitled to this employee benefit, this health benefit, this retirement benefit, sometimes severance benefit, then I get what the document says.

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JIM BAILEY: Does it require an employer to have a plan?

DONNA SHOPULSKI: No. You're not required to have a plan. You're not required to have a health plan, you're not required to have any plan. You can offer no benefits and probably have no employees.

JIM BAILEY: But if you do have a plan, you have to follow ERISA?

DONNA SHOPULSKI: If it falls under ERISA, there are exemptions. And in the insurance world it gets really ugly. Self-insurance plans are governed by ERISA. Group insurance plans - nobody says you have to have one. If you have one, state law imposes requirements on the insurers themselves. It is still an ERISA plan, but you have this interplay between them.

JIM BAILEY: Well, ERISA rears its head in all the wrong places when you are an employment lawyer. As the MacElree Harvey employment law team we have a pretty good ERISA facility. Bill Wilson and I, and Laurie as well, and we represent both employers and employees. Sometimes an informal employment agreement can be considered an ERISA plan. Bill, you've recently studied the elements of that haven't you?

BILL WILSON: Well. Yes, but I wouldn't want to over-emphasize the significance of an informal plan like that. If it is not an ERISA plan and you hand some employee a document that promises him severance, it may or may not be an ERISA plan. But, if its not an ERISA plan, it is probably going to be a contract and you're going to be liable to honor that agreement if he relied on it either way. The liability you incur under ERISA wouldn't be any greater than if it was just a contract, except under ERISA if he is successful, you are going to have to reimburse him for his attorney's fees as well as getting stuck for your own whereas that wouldn't happen under a common law contract. ERISA, as Jim mentioned, is a vast statute that penetrates the employer-employee relationship in all kinds of ways that people would not suspect if you think of it as something that was primarily intended to regulate pensions. That was its primary intent when Congress passed it, but it goes a lot further and is a lot more pervasive in the employment law area than any of us are aware of until a question comes up.

JIM BAILEY: Laurie, could you talk about ERISA and a QDRO and how it even finds itself in divorce?

LAURIE ABELE: I practice family law as well as employment law, and ERISA can even come up in the aspect of settling a divorce case where we have to get a Qualified Domestic Relations Order approved by the Plan Administrator. Very often when you are settling your divorce case, the only way to pay off one side or the other is to give them a portion of your pension benefits, your 401(k), things like that. So, say the wife gets 60%, a 60/40 split, we have to do what's called a Qualified Domestic Relations Order, send it to the Plan Administrator, have it approved

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by them, and very often we go back and forth, back and forth, because they have very specific requirements that they have to meet their plan and that has to go into the QDRO. It is weird that even family lawyers have to deal with the ERISA benefits and the administrators. It is all over the legal system today and getting it approved. It just took me since the end of December until now to get one plan approved by an administrator down in Florida. So, it can take some time going back and forth and two visits to the courthouse to get the judge to sign off twice.

BILL WILSON: I think the important thing you need to understand as employers from that is the definition of a Qualified Domestic Relations Order is used for most cases fairly specifically and clearly set out in ERISA. But, it is the Plan Administrator's responsibility to make sure that the order you are looking at meets those qualifications. You cannot just rely on the fact that somebody went and got some Common Pleas Judge to sign an order and assume that it satisfies the requirements. Your obligation is independent and if the order doesn't comply, you have to ignore it and say, go back and get a new order. So, it is not that complicated, but you have to look at the requirements of the statute and make sure it complies.

QUESTION: I know someone who was employed by a small company and their rules were that you get health coverage after 90 days. This person went after 90 days and said, what about my health coverage? They were delaying. They didn't have the forms, they didn't have this, they didn't have that. He kept asking and then, some months later, was let go in a multiple layoff so it had been close to a year past the time they were supposed to have benefits. This person went to small claims court and the judge basically said, you as an employee did not prove your case.

BILL WILSON: The first issue I would say is the small claims judge was right because he doesn't have jurisdiction over that kind of ERISA case. That is exclusively within the jurisdiction of the Federal Courts. I may know that gentlemen or, alternatively, that story is just not all that uncommon. That is one issue, but there are a whole bunch of ERISA and common law contract implications in an employer promising something and then not delivering where the employee goes ahead and provides their services in reliance on that promise. That is what we call a contract if it is not pre-empted by ERISA.

QUESTION: Still, he didn't have jurisdiction and he still made a ruling?

BILL WILSON: Well, his ruling, I don't know what the basis of his ruling was, but if his ruling was, I'm not allowed to hear this kind of case so you've got to go someplace else and therefore your claim is dismissed, he'd have been right. Beyond that, I'd have to know more details about the judge's reasons.

QUESTION: He basically said the employee didn't make the case because they couldn't prove that they kept trying to get the health insurance.

BILL WILSON: That could do an employee in, in any forum, if they fail to prove their allegations.

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DONNA SHOPULSKI: I was going to say, in talking about the QDRO and the Domestic Relations Order issue, that the reason you have to make sure these orders follow the provisions of ERISA and set out everything ERISA requires is because of the fiduciary of the plan. We're back to that again. You're responsible for the management and administration of the plan. Under ERISA there are very specific rules on when you can take away somebody's retirement benefit. My benefit is my benefit under the contract under ERISA, so you can't just pay out my benefit to anybody. But, there is an exception for a divorce or a judgment from a domestic court and also child support orders are an exception to that, but to meet that exception you have to fulfill all these requirements. If otherwise you just pay out the benefit and it was not a qualified order under ERISA, you breach your fiduciary duty. You alienated my benefit from me and given it to somebody else. That's why that's a big deal. Its not just a rubberstamp order which most of the judges will do.

QUESTION: What constitutes an exact order? We get quite a few domestic child support cases where we have to include the child in our health care insurance with the employee.

LAURIE ABELE: That's not a QDRO. Under the child support laws there is a provision that the person responsible for paying support also must provide health insurance for the children. So, if you get an order from a Family Court Master or a judge from the Court of Common Pleas, you have to follow that order and take care of making sure that child is covered.

QUESTION: Does that mean the employer has to pay for the cost of that child's insurance?

LAURIE ABELE: No, that does not. It depends what your plan provides. If you have a blanket policy that you cover all dependents, then you would pay for that. If you have a plan where you only pay for your employees' benefits and the child would be extra, you can provide that the child can be put on the plan, but the employee would be responsible to pay that insurance payment.

BILL WILSON: But, orders that relate to wage attachments for child support and spousal support or health insurance, those aren't what we are referring to as Qualified Domestic Relations Orders. You can just rely on whatever the court order says on those. The ones you have to separately and independently scrutinize are the ones that have to do with dividing up pension plans, which means 401(k)s or any other kind of deferred retirement plan.

QUESTION: What we saw in the last client was they put in a plan where they increased the deductibles on their insurance policy and now a lot of the expenses come in and certain expenses are paid for by the employee. I had a concern about digitizing those records, digitizing all the payables and having them in a place where somebody could possibly read them. What recommendations should we give those clients?

BILL WILSON: That is not a misplaced concern at all and I don't think we can give you comprehensive feedback on how to make allowances for all of the concerns that the digital revolution is creating in how

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to comply with all these statutes because, you know, what are the obligations to protect privacy in light of the fact that we know there are hackers out there who are very sophisticated. That is evolving and will continue to do so. So, be careful.

QUESTION: It sounds to me like certain information isn't PHI next to something else. For instance someone's name and address on its own is not PHI, in that file, whether it be electronic or even a manila folder. If in that I put his medical information, now the combination of identifying the individual with something specific medical about that individual and that together makes it PHI. Is that correct?

DONNA SHOPULSKI: Yes.

BILL WILSON: And you've probably violated the ADA if it applies to you because it requires medical information to be kept in separate...

QUESTION: That's what I was getting at. Is really keeping it separate with a key to the link in between, solving the problem?

DONNA SHOPULSKI: Basically, yes. If it can't be identified if its just name and address, it's not protected. If health information without a name and address or anything else that could identify the person, like social security number. If you reasonably know we can connect with us, it is still protected. It doesn't need a name on it. But, if there is no way to identify the person, then it is still not protected because it is not identified.

QUESTION: For purposes of the group, could you give a couple examples of other than tracking trends, where would an employer, for what reasons would an employer keep health information that wasn't identifiable? Is it just for tracking trends? Otherwise I would think even when its separated, I'm trying to think of reasons, if it was a leave situation they would need to know who it belonged to, to know if it was approved or disapproved, etc. But, having trouble thinking of reasons why...

JIM BAILEY: Lynn, is that because his question was you have some that's not identifiable and then you mix it with the other? I don't know. Maybe he could elaborate on why that would happen. Lynn asked why would you have the name and address and the health information separated? Wouldn't they usually be on the same form? What was your situation if you feel comfortable talking about that.

QUESTION: If you are a business associate working with hospitals, you are going to come across information that is not going to come in the right form that you wanted it.

Lynn: Which is really a different question. Employment information and health information would be kept separate is where you were going. I was trying to imagine why that even if there is a number, whether it's a social security number or even just 1-2-3-4-5, but that would somehow connect to an

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employee's name, if it is health information and it fits other things like its under a plan of ERISA, then it would be protected, right?

DONNA SHOPULSKI: Yes. Because it is traceable to a particular person. The only purposes for which I know they are keeping information, unidentified information, is for trend tracking and maybe for pricing.

QUESTION: Can I jump in real quick? I also work for a technology company and do document management and know that the teachers' plan in a state here in the northeast, they had split the information off, employment information versus pension health, etc. One of the employee's information, just their basic employment information, got out and they lost some of their identity, they had a financial loss. They sued in court and the case went actually all the way to the Massachusetts State Supreme Court and they ruled that the group administering the information violated the privacy act as well as ERISA and this group got a major financial hit and they told them that they had to then change the system and protect all of the information not just information related to pension and privacy. So, what we had to do was go back and reengineer the software and set up profiles on who could view the data and then separate profiles on who was allowed to actually make changes or whatever to protect all of the data. The court said that the firewall that they had set up did not count as protection at all. And they hit them very hard - \$5.8 million.

BILL WILSON: Okay. We have a lot of material that we haven't touched on that will come out in the transcript. Some additional written materials as well as the actual transcription part of the transcript.

LANCE NELSON: I want to try keep everybody on time, but I'm sure the folks will stick around if you have additional questions. There is also quite a bit of information on some of these issues on our website - macelree.com. In addition, the transcript from last year's employment law seminar is also on there, as well as the other three seminars that we did with the Chamber. So, there is a good deal of information you can get for free perusing at your leisure. Also, our employment lawyers will sit down regularly with the HR people or other representatives of businesses that we represent and review procedures and practices and try to help people recognize where there may be issues.

Before we do the drawing, has everybody put their business card in here? I'll ask our special guest from Maryland to pick out a card. You can blame her if you don't win.

DONNA SHOPULSKI: Bill Ryan.

LANCE NELSON: Thank you everyone for coming.

WAGE PROTECTIONS FOR EMPLOYEES IN PENNSYLVANIA

One of the very earliest employment statutes – part of the New Deal – is the Fair Labor Standards Act, 29 U.S.C. §201 et. seq. It requires employers engaged in commerce, or those who

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employ persons who engage in commerce, to pay a certain minimum wage and, for employees whose workweek exceeds 40 hours, a premium for the extra hours of at least one and one half times the regular rate. There are a number of types of employees who are exempt from the requirement to pay the overtime premium, and some who are exempt from both requirements.

The FLSA allows states to require more of employers than the minimums required by its own terms. Some states, including Pennsylvania, have wage and hour protections for employees that add to the requirements of the FLSA. The Pennsylvania minimum wage act duplicates the FLSA's minimum wage and premium pay requirements, but has a slightly different list of exemptions.

The Pennsylvania Wage Payment and Collections Law (WPCL) also provides some additional remedies for employees whose employers fail to properly manage the payment of their wages.

Enterprise Engaged In Commerce

The FLSA's definition of an enterprise engaged in commerce is liberally interpreted to effectuate the policies of the act.. Where a business has employees who handle goods or materials that have been moved in commerce, that business is engaged in interstate commerce. Where the business is comprised exclusively of retail establishments, it is covered by the FLSA only if it has annual gross sales in excess of \$500,000, exclusive of excise taxes. 29 U.S.C. §203(s)(2).

Employer Status

"Employer" under the FLSA is a broader concept than that of the common law employer. It includes any person acting directly or indirectly in the interest of an employer in relation to the employee.

Most courts have held that this means that individuals who are sole owners and officers of a corporate employer, direct the employee in the performance of the job, and hire and fire, are employers under the FLSA, and can therefore be held liable for actions in which they were personally involved. The First Circuit tests individual liability with an "economic reality" test.

Work Time

The employer is responsible for payment for all time for which it suffers the employee to work. If the employer is aware that the employee is working, even if the employee is violating some corporate policy by being on the job, the employee is to be compensated for the work. It is the employer's obligation to keep track of the employee's work time, and to keep accurate records of that time. If the employer fails to keep accurate records, it suffers the consequences of any uncertainty as to the actual amount of time for which the employee is to be compensated.

Certain types of time during which the employee may not actually be performing work may nonetheless be work time for pay purposes. Lunches, which may normally be excluded if the employee is off duty, become work time if the employee is subject to frequent interruptions to respond to customer requests or return to work before the lunch is over. On call time may be work time if the employee's movements are significantly restricted. Drive time from work to home is not work time. Travel time

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during the work day while going from the employer's place of business to a customer's location, however, is work time. And, if the employee is required to report to some designated assembly point before going to a moving work site, as is common in the construction industry, the travel time from assembly to the work site is work.

Time for salaried non-exempt employees may be calculated according to three alternative methods that have been approved by DOL: the flat method, the fluctuating workweek or half-time method, and the variable workweek.

Calculation of Pay

When an employer violates the act, the calculation of liability is often complex, because the regular wage allows credit for all wages actually paid, and is a separate calculation for each work week.

Performance bonuses paid to nonexempt employees are normally included in the calculation of the regular wage, since they are usually a non-discretionary promise.

Compensatory Time

Section 207(o)(5) requires that employers reasonably accommodate employee requests for compensatory time. It does not foreclose a mandatory comp time policy.

Exemptions

In an FLSA case, it is the employer's burden to prove that an employee meets all the requirements for an exemption. Exemptions are strictly construed against the employer. Employees who are exempt from the FLSA's requirements are:

bona fide administrative, executive and professional employees who are paid a salary. This is the most commonly litigated exemption. The employee must spend no more than 20% of his or her time on non-exempt work. Executives, administrators, and professionals are characterized by jobs which require a large amount of discretion and little supervision. Managers and executives tend to supervise others and have decision making authority. Normally, if an employee is not paid on a salary basis, this exemption does not apply. Under the FLSA, a salary is a regular paycheck which does not vary depending on the time worked. In other words, the employee may get no premium for overtime, but is not subject to pay deductions for time off less than one day at a time either. If an employee is subject to having his pay docked for missing work during the day, he is non-exempt. An exemption is not lost just because of a theoretical possibility of docking pay for absences, where there is no evidence of a real policy, but a pattern and practice of disciplinary suspension eliminates the exemption. The fact that the employer actually pays for overtime does not necessarily mean that an exemption cannot be shown. Professional employees have normally been those with advanced degrees. Regulatory changes in March 2004 have allowed on-the-job experience to substitute for this requirement, if the other indicia of

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professional status are present. Some states, such as Illinois, are apparently taking steps to prevent these changes from impacting their resident employees. The FLSA allows states to require more of employers than its own minimum requirements.

There is a "window of correction" defense open to employers who inadvertently dock pay of salaried employees and correct the error promptly. This does not apply to cleanse improper policies.

Employees paid on a "fee" basis can be exempt, but not where there is a hybrid compensation arrangement partly dependent on hours worked. The PMWA has similar exemptions to this one.

employees of amusement or recreational establishments, organized camps, or religious or non profit educational conference centers, if they (a) do not operate more than 7 months per year, or (b) its receipts during its most lucrative 6 months don't exceed those of the other 6 months of the year by more than one third. This exemption does not apply to private enterprises which provide services in national parks or forests, except those directly related to skiing.

The PMWA also adopts an exemption similar to this.

employees who catch, cultivate or farm seafood or fish. The PMWA does not duplicate this exemption, so it is not effective for Pennsylvania employers.

agricultural employees if the employer uses less than 500 man days per year of such labor, or if the employee is a member of the employer's immediate family, or if the employee is paid on a piece basis for hand harvesting, commutes to work, and has been employed in agriculture less than 13 weeks the previous year, or is principally engaged in range production of livestock.

The PMWA has an exemption for farm laborers which is even broader than this FLSA exemption, but the FLSA must be complied with, so the narrower exemption is the rule in practice.

employees of small newspapers with circulation less than 4000, most of which is in the county in the local area. This exemption will not apply if the newspaper is one of a chain that is really one enterprise that is too large for the exemption in total. The PMWA has this exemption.

seamen on non-American ships. The PMWA also has this exemption.

casual, in home, domestic service employees who provide companionship for those who can't care for themselves. The PMWA has this exemption as well.

criminal investigators who receive availability pay. The PMWA does not have this exemption.

computer systems analysts, programmers, software engineers, or other similar workers who work at the design level and get at least \$27.63 per hour. This relatively new exemption has not yet been adopted in the PMWA.

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Employees who are exempt from the overtime pay requirements, but not those for the minimum wage, are:

motor carrier employees. This is a potentially very broad exemption for people whose employers are subject to ICC regulation. This exemption may apply to all employees of a motor carrier. Courts have held that it is not limited to those who cross interstate lines in their work. The PMWA has this exemption.

rail and air carrier employees. The PMWA does not have this exemption.

outside buyers of poultry and dairy products. The PMWA lacks this exemption.

seamen. The PMWA has this exemption.

announcers, news editors, or chief engineers for radio and TV stations in smaller markets. The PMWA has this exemption as well.

salesmen selling cars and boats, and mechanics working for car sales establishments. The PMWA has this exemption.

local delivery drivers and their helpers who are paid by the trip, under certain conditions. The PMWA does not have this exemption.

most agricultural workers. Farm laborers exempt under the PMWA.

country elevator workers. There is no PMWA exemption like this, but remember that farm laborers are exempt.

persons working in the maple sugar industry. The PMWA has this exemption.

persons working in transportation of fruits and vegetables from the farm.

taxi drivers. The PMWA has a similar exemption.

fire protection workers for public agencies EMTs are non-exempt. The PMWA does not have this exemption.

foster parents for nonprofit educational institutions for orphans. The PMWA does not have this exemption, but the absence of an employment relationship will usually prevent the application of the statute.

motion picture theatre employees. The PMWA has this exemption.

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forestry industry employees who work on trees. The PMWA lacks this exemption.

Remedies

An employer who violates the minimum wage or maximum hours provisions of the FLSA is, of course, liable for the amount of unpaid wages or unpaid overtime compensation. In addition, the employer is liable for an additional equal amount as liquidated damages. The employer has a defense, to the liquidated damages only, if it acted "in good faith." 29 U.S.C. §260. In order to establish the defense, the employer must have both (1) had an honest intent to ascertain and follow the requirements of the FLSA, and (2) taken reasonable steps to determine what those requirements were. The burden of proof is on the employer to establish this defense. A successful plaintiff is also entitled to recover reasonable attorneys fees from the employer. This remedy has nothing to do with good faith; if the employee prevails, he recovers a reasonable attorneys fee in addition to his wages.

The WPCL provides additional protections for employees, regardless of their wage or salary rate or the nature of their jobs, if they are not paid in a timely fashion. In addition to the amount of unpaid wages, violating employers are liable for reasonable attorneys fees and, in the case of deliberate violations, additional liquidated damages.

There are criminal penalties for violation of the FLSA, PMWA and WPCL.

Retaliation

The FLSA contains a section making it unlawful to retaliate against an employee for complaining about perceived wage and hour violations. Most courts have interpreted this section so as to cover complaints voiced only to the employer, rather than requiring a complaint to the DOL or in court. A case alleging a violation of the anti-retaliation provision of the FLSA will resemble a retaliation case filed under Title VII.

TIPS ON UNEMPLOYMENT COMPENSATION FOR EMPLOYERS

By Laurie B. Wyche-Abele, Esq.

Employers who don't pay their Unemployment Compensation ("UC") taxes or who fail to file State UC tax reports on time are subject to penalties under Pennsylvania Law. The possible penalties include a delinquency tax, an interest penalty, a penalty of 100 percent of the value of the report, risk of losing their Federal Unemployment Tax Act credit and a lien.

If an employer has a good reason that it is unable to pay its contributions or file the required tax reports on time, it should request an extension of time for the payment of contributions due and file an estimated report of wages paid. The request for an extension and estimated report must be made on or before the date the report is due to

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avoid any of the above penalties. Monthly interest will still be assessed against the employer until the expiration of the extension period.

To make processing a UC claim easier, employers should keep good employment records. A personnel file should include the employee's social security number; full name, wage rate, record of any bonus paid, total wages paid, business expenses paid by the employer; employee's schedule of hours worked, location of employment, daily attendance record, specific reasons for any absences; detailed description(s) of all disciplinary action(s), and documentation about the employee's reason(s) for separation from employment.

An unemployed person who worked either as a full-time or part-time worker in the past may qualify for UC benefits. In addition to being unemployed, the worker must: meet the financial eligibility thresholds; be ready, able and available for work; have a valid separation from work; not refuse to accept or consider work opportunities without good cause; not be unemployed due to stoppage of work associated with a labor dispute; not have exhausted his or her credited total benefit amount; and not be collecting UC benefits from another state.

Most workers in Pennsylvania are "at will." This means that an employer can terminate the employee for any reason or no reason at all. Employees who are discharged for incompetence, error or similar reasons may still be eligible for UC benefits. It is important for employers to keep up to date with UC legislation and court decisions in order to properly evaluate whether it should challenge an employee's claim for UC benefits.

Certain employees discharged for willful misconduct are not eligible for UC benefits. When an employee is terminated for willful misconduct, the employer has the burden to prove that the employee's conduct was such that it meets the definition of willful misconduct in Pennsylvania.

Willful misconduct is defined by the Pennsylvania Supreme Court as:

- (a) wanton or willful disregard for an employer's interests;
- (b) deliberate violation of an employer's rules;
- (c) disregard for standards of behavior which an employer can rightfully expect of an employee; or
- (d) negligence indicating an intentional disregard of the employer's interest or an employee's duties or obligations.

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In addition, claimants who voluntarily quit their job without justification are not eligible for UC benefits. In a voluntary quit case, the claimant has the burden of proving that the reason for leaving his or her job was so real and necessitous as to leave no other alternative to the claimant but to quit. For instance, a claimant may be eligible for benefits if he or she had to quit a job due to a medical condition.

Procedurally, employers should designate one person to process UC claims. That person should investigate and process claims in a timely manner. If there are valid reasons for contesting a claim, such as a voluntary quit or willful misconduct, this person should complete the appropriate forms and clearly assert the reason that the employer is challenging a claimant's entitlement to UC benefits. In the case of a voluntary quit, a photocopy of the employee's resignation letter should be forwarded to unemployment as well as any additional supporting information. In the case of willful misconduct, the specific rule that the employee violated should be set forth on the unemployment forms. In addition, if the rule is contained in a writing that was provided to the employee, i.e. a policy manual, a copy of the rule should be forwarded to unemployment along with any other documents supporting the employee's violation of the rule.

Finally, employers need to be aware that the appeals process for UC claims involves strict time periods. Most appeals are due within fifteen (15) days from the date that a decision is mailed. Appeals from the UC Service Center to a Referee and from a Referee's decision to the Unemployment Compensation Board of Review are to be filed within this time frame. Appeals from a decision from the Unemployment Compensation Board of Review must be filed within thirty (30) days from the mailing date of the Board's decision with the Commonwealth Court of Pennsylvania. If an appeal is filed late, it will almost certainly be dismissed. Late appeals are allowed in only the rarest of cases. For instance, if a party can prove that it was misled by someone at unemployment, the appeal may be permitted. However, it may be very difficult to prove that a particular service worker at unemployment provided misleading information that led to the filing of a late appeal. It is better to know your filing deadlines and file within the time allowed than to rely on anything that a service worker from unemployment tells you over the telephone.