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JUNE 2010

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**ANNOUNCEMENTS**

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**JUNE 26TH 2010**

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**WAGE AND HOUR LAWS IN A BLACKBERRY WORLD**

By some estimates, 70% of employers are out of compliance with state or federal wage and hours laws. This figure is not surprising when one considers the complexity of the laws and the potential for error in classification of employees or in record keeping. At the same time, the federal and state governments are looking for ways to boost their coffers during this budget crisis and have stepped up enforcement of such claims, and employees' attorneys looking for work have begun targeting wage and hour compliance as an alternative to discrimination law suits. In light of these issues, employers are advised to keep abreast of new laws and to audit their internal practices for compliance.

**New Record Keeping Requirement**

As of October 26, 2009, New York Labor Law 195(1) requires New York employers to provide written notice to all newly-hired employees of their rate of pay and regular pay day. For non-exempt employees (those entitled to overtime), the law requires that they be provided with their regular hourly and overtime rates of pay. For exempt employees, the employer must provide the classification under which the employee is exempt. The employee must acknowledge receiving the document in writing. The Department of

Labor (DOL) has a form available on its website for employers to use. Employers who do not use the DOL form are at risk of having their paperwork deemed insufficient.

**Increase in Wage and Hour Overtime Litigation Due to Technology**

Employers have always faced issues when deciding when to compensate employees for time spent on-call while away from work. Recent technology, such as cell phones and Blackberries, has complicated the issues surrounding such on-call time. Class actions against AT&T, T-Mobile, and CB Richard Ellis, Inc., among others, have highlighted the dangers of non-exempt employees' after-hours use of company-issued technological devices. T-Mobile recently settled a multi-million dollar class action relating to its technical services employees. Both AT&T and CB Richard Ellis continue to litigate claims that they failed to pay employees for off-duty Blackberry and cell phone use in their support and maintenance departments.

In general, if a non-exempt employee is required to respond to e-mails, text messages or phone calls outside of work, the employee should be paid for this time. Employers should train managers and supervisors not to require after hours use of

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**ANNOUNCEMENTS**

**WE ARE PLEASED TO ANNOUNCE THAT**

- JOSEPH N. PAYKIN, ESQ.**
- CHARLES D. KRIEG, ESQ.**
- STUART SUGARMAN, ESQ.**

have joined HH&K and will be based in our New York City office located at 185 Madison Avenue New York, New York

## WAGE AND HOUR LAWS IN A BLACKBERRY WORLD

(Continued from page 1)

such devices unless necessary, and employees should be expected to record any time they spend using such devices outside of work. To ensure compliance, employers should periodically audit employee time entries to make sure that such after hours work is being recorded.

Employers who do not pay employees for such time may find themselves involved in costly litigation. Claims brought under the FLSA entitle the employee to not only actual damages, but to penalties and attorneys' fees as well.

Of course, these are only two of

the wage and hours issues confronting employers in these difficult times. Employers with questions are advised to consult with their legal counsel to ensure compliance and avoid litigation.

*Article written by Dawn J. Lanouette Esq. For more information, contact Ms. Lanouette at (607) 231-6917 or via email at dlanouette@bbk.com.*

## ELDER LAW UPDATE

The rules and regulations that impact both the physical and financial affairs of the elderly change as often as Broome County weather. Often, well intentioned people provide misinformation that can dramatically impact the health and welfare of the elderly. Already, 2010 has produced legislative changes that effect us all and, in particular, the elderly.

**Power of Attorney:** In an earlier edition of the Newsletter, we presented a discussion of the new New York power of attorney. As of May 1, 2010, the expected revisions to this new law have not been made. We continue to operate under the September 1, 2009 law and all powers of attorney executed after September 1, 2009 must meet the requirements of this new statute. Powers of attorney signed before September 1, 2009 remain effective and do not need to be changed.

**Health Care Decision Making:** Patients in New York make their own health care decisions as long as they are competent to do so. If an individual is medically determined to be incompetent and not able to understand a medical and/or health choice, then an agent under a Health Care Proxy can make that decision for the patient. What happens when a patient is not able



Photo from Juniper Images Collection

to understand the medical choice presented by the health care provider and the patient does not have a Health Care Proxy in place? This rather dire situation has been ameliorated by the passage of the Family Health Care Decisions Act. Under the Act, described in detail on page 7 of this newsletter, certain

individuals will now be able to make certain medical decisions for patients deemed unable to make a health care choice.

**Medicaid Application Process:** On April 1, 2010, a new Medicaid (and Family Health Care Plus) application was promulgated. If you are applying for Medicaid assistance to pay for long-term nursing home care, this new Application and Access New York Supplement A must be completed. The basic information requested by the Application has not changed substantially.

The Department of Social Services ("DSS") will still require copies of all bank and investment account statements, deeds, and identifying information (Social Security cards, birth certificates, etc.). If a long-term care medical admission is a possibility for you or a loved one, you should be prepared to provide information to DSS for a period of 60 months prior to the submission of the Application. The other change in the Application Process is that, as of April 1, 2010, a personal interview with a representative of DSS is not required. The Application and supporting documents can be dropped off or mailed.

The Deficit Reduction Act of 2006 is the current Medicaid statute that effects long-term care Medicaid. This law changed the "look-back period" for some transfers from 36 to 60 months. Other substantial changes make the transfer of assets to children or others more difficult if Medicaid benefits are requested. Exemptions still exist and some planning techniques remain viable.

If you or a loved one is facing a medical crisis that will involve a potential admission to a nursing home, please check with your legal advisor about your rights, responsibilities and the availability and utility of any planning techniques that you may wish to pursue.

**Final Thoughts:** Everyone should have in place a power of attorney, health care proxy and asset distribution paradigm (Will, Trust, etc.). These documents will allow you to control your own affairs and allow you to dispose of your assets in the manner you choose with maximum efficiency and reduced expense. If you are concerned about long-term care issues, recognize that the Deficit Reduction Act of 2006 has reduced your ability to give gifts and still qualify for Medicaid. The law did not, however, eliminate all planning options. Make sure that your records are maintained for Medicaid purposes for at least 60 months.

In a medical crisis without the benefit of a Health Care Proxy, keep in mind the new Family Health Care Decisions Law.

The laws that impact the elderly change frequently. Make sure that any decisions that you make are based upon the current state of the law and its implementation. As further changes occur (and they will), we will endeavor to bring them to your attention.

*Article written by Martin J. Kane Esq. For more information, contact Mr. Kane at (607) 231-6767 or via email at mkane@bbk.com.*

The Marcellus Shale formation, part of which runs under the Southern Tier of New York, is one of the largest natural gas fields in the world. Some geologists believe that this formation holds as much as twenty times more natural gas than is consumed annually in the United States. Although the practice of vertical drilling for natural gas is nothing new in New York, the relatively new processes known as horizontal drilling and hydraulic fracturing have not been used in New York and are necessary to facilitate the economic production of the natural gas contained in the Marcellus Shale.

Currently, horizontal drilling and hydraulic fracturing are not permitted in New York due to a July 2008 moratorium imposed by Governor Patterson, ostensibly to allow the New York Department of Environmental Conservation (DEC) to review and analyze their impact. The DEC is in the process of updating the Generic Environmental Impact Statement (GEIS), which is a written analysis of the potential impacts drilling may have on the environment. The revised GEIS will analyze the differences between the horizontal drilling process and the established vertical drilling process, and will provide regulations to monitor the environmental impacts of the drilling process. Many local landowners have joined coalitions seeking to enter into lease agreements with oil and gas companies for the mineral rights on their land, with the hope that the moratorium will soon be lifted and horizontal drilling will proceed, allowing the landowners to participate in the substantial profits that are expected to result.

Although some people oppose large-scale gas drilling, because of fears of adverse environmental impacts, all property owners should be aware of the law of compulsory integration. Compulsory integration is intended to ensure some compensation to landowners for their mineral rights if they do not sign a lease with a company that drills a well in the vicinity of the landowner's property.

In order for a company to obtain a drilling permit from the DEC, a "spacing unit" must be identified. A spacing unit consists of a certain number of acres of land surrounding the proposed drilling site. An application for a permit requires that at least 60 percent of the land within the proposed spacing unit be "controlled" by the company proposing to drill (meaning that the company owns or has leased the mineral rights to the land). A property

owner who does not enter into an agreement with the company may therefore find his property located within a proposed spacing unit. Such a property owner is referred to as an "uncontrolled owner."

Compulsory integration is the procedure used to determine what rights an uncontrolled owner within a spacing unit will have if and when drilling occurs. So long as all of the DEC's requirements for a permit are met, the company will be permitted to drill. Uncontrolled owners will not be able to prevent the drilling, but they will be compensated based on how they elect to be integrated. The DEC will not grant any surface rights through compulsory integration, but the company will be permitted to remove gas from beneath the surface of the uncontrolled owner's property.

Under Environmental Conservation Law Section 23-0901(3), uncontrolled owners are provided with the opportunity to elect integration of their interests in one of three ways: as a royalty owner, as a participating owner, or as a non-participating owner. The choice made between these options determines how the owner will be compensated from the sale proceeds of the gas that the company is able to produce from the well. What follows is a simplified description of the differences between these options.

A royalty owner will receive a royalty (a proportionate share of the profits from any oil or gas production) equal to the lowest royalty in an existing lease in the spacing unit, but no less than 12.5%. The royalty owner has no obligation for any charges, taxes or fees associated with the operation of the well, and no liability for any personal injury or property damage relating to the drilling and operation of the well. Any uncontrolled owner who fails to elect a different integration option will be made a royalty owner by default. This option involves the least potential risk, and possibly the smallest reward, of the three integration choices.

A participating owner pays its proportionate share of all costs (based on the size of the owner's property)

associated with participation in the drilling and operation of the well—literally becoming a "partner" in the mining operation with the company. This requires a significant investment of money at the outset but allows the owner to receive a 100% royalty on the profits based on the owner's share of the well as soon as production begins. A participating owner will also be proportionately liable for any claims associated with the well.

A non-participating owner does not have to pay any up-front money, but will instead "reimburse" the well operator out of production proceeds for the owner's proportionate share of the actual well costs. Under this election, the owner will eventually be entitled to a 100% share of the production proceeds attributable to its interest in the spacing unit, but only after the well operator has recouped the owner's share of the actual costs plus a 200% "risk penalty." A non-participating owner also has economic and liability exposure associated with the well.

The well operator is required to provide all uncontrolled owners notice of intent to integrate with an election form describing these choices at least 30 days prior to an integration hearing, which is scheduled by the DEC and takes place in Albany. The uncontrolled owner must make an election within 21 days of receiving the notice. Which of these three elections is the best choice for integration of an uncontrolled property owner's interests is not a simple question to answer, and certainly varies from owner to owner. There are numerous considerations involved in making the election. Promptly upon receipt of an integration notice and election form, consultation with an attorney specializing in oil and gas law is highly recommended. Failure to timely respond to the notice will result in a waiver of the right to appeal the integration or to become a participating owner.

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## HEALTH CARE LEGISLATION AND THE SMALL BUSINESS OWNER

On March 23, 2010, President Obama signed the Patient Protection and Affordable Care Act (PPACA) into law. The PPACA will ambitiously and extensively overhaul health care over the next four years. The lengthy and complex law has left many small business owners to wonder how the PPACA will impact the way they run their businesses.

The PPACA is designed to ensure that every American has access to affordable health care. Since the middle of last century, for many Americans, health insurance has been paid, at least in part, by employers. If you are a small business owner who chooses to provide health insurance for your employees, the PPACA encourages you to continue doing so.

In recent years, because of dramatic increases in health insurance premiums, many small business owners have been forced to reduce or eliminate health insurance benefits for their employees. In order to reduce the cost of those premiums, the PPACA has mandated the creation of State-run health insurance exchanges in which small business owners with up to 100 employees can participate. The exchanges must be established before 2014.

A health insurance exchange is an entity that contracts with private insurers to provide a target population, like employees of small businesses, with several choices for health insurance coverage. A health insurance exchange is not an insurance company, but rather is supposed to connect people with insurance companies in an efficient way. That increase in efficiency, coupled with the larger risk pools created by broad-based participation, is what lawmakers hope will lower the cost of health insurance premiums.

The PPACA also creates tax credits for small business owners who choose to provide their employees with health insurance benefits. To qualify, the employer must pay at least 50% of each employee's health insurance premium. The amount of the

credit for each eligible employer will increase every year from up to 35% of the health insurance premium paid for by the employer in 2010 to up to 50% of the health insurance premium paid for by the employer in 2014. The percentage of the tax credit will be based on the number of people employed and the average of their salaries. For example, if your business has ten employees whose average annual compensation is \$25,000, your business will qualify for the largest available tax credit. If insuring those employees costs your business \$60,000 in 2010, your business will receive a 35% tax credit, or \$21,000. Under the same scenario in 2014, your business will receive a 50% tax credit, or \$30,000.

The PPACA creates State-run health insurance exchanges for both small businesses and individuals who are not working or do not have health insurance offered by their employer. If you own a small business that employs fewer than fifty people, you will not have to pay a penalty if you choose not to supply your employees with health care. Your employees will instead participate in a State-run individual health insurance exchange.

If your small business has more than 50 employees and you choose not to provide them with health insurance, your business will pay a penalty to the government of \$750 per year, per employee. Such penalty may be increased at the option of the government.

As a small business owner, you should contact your tax advisor and legal counsel to determine how PPACA will affect your business. As with all such issues, preparation and planning are preferable to avoidance and regret.

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## REGULATION Z

The new Regulation Z Truth in Lending Act rules take effect July 1, 2010. Banks and credit unions normally offer both closed and open-ended loans, as well as "hybrid" loans that have both open-ended and closed-ended features. Under current rules, lending institutions have been able to provide open-end credit term disclosures to combined closed and open-ended loans. The new rules require open-end disclosures for open-end loans and closed-end disclosures for closed-end loans.

Examples of open-ended loans are revolving lines of credit and credit cards, which allow a client to take continuous advances without requalifying each time, up to the amount of credit allowed, and pay them off. This same client can take out a line of credit for a vehicle loan, thus creating a closed-end sub-account. Previously, this client might receive only open-end disclosures in regard to his loan, and the lending institution would be Regulation Z compliant. Now, closed-end disclosures will be required in conjunction with the closed-end vehicle loan, in addition to the initial open-end disclosures the client would have received with regard to the revolving line of credit.



Image from Port Eighty Eight

Currently, lending institutions can offer an open-end credit plan with closed-end features and pull a credit report before the closed-end credit advance, without offering closed-end disclosures. Under the new regulations, this is no longer possible. Lending institutions will not be able to pull a credit report, which would be considering "underwriting." Verification is acceptable, but verification is merely confirmation of credit information initially provided by the client.

These regulations are intended to provide clients with more comprehensive disclosures. Even if a client is receiving a hybrid loan, he or she should receive specific disclosures for each type of credit plan. Initially, lending institutions may have difficulty determining if a credit plan is open-end, closed-end, or both. With these new requirements for disclosures, the distinction is more important than ever, and institutions should consult their attorneys in developing procedures to comply with Regulation Z.

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## MAINTAINING U.S. SECURITY IN A GLOBAL MARKET

Pulitzer Prize winning author and commentator Tom Friedman's award winning book "The World Is Flat," written in 2005, chronicles the reality of globalization as driven by many influences, including the Internet and other swift advances in technology and communications. Small and medium sized businesses throughout the world can now participate in the global economy as major corporations conduct on-line solicitations and compete for willing suppliers around the world. A related development is the dramatic increase in cross-border, international acquisitions of businesses. Americans tend to think that our corporations are the primary purchasers of international businesses. However, since the year 2000, an increasing number of U.S. businesses have been acquired by foreign purchasers. The value of these investments has fluctuated from year to year, based on the relative strength or weakness of the U.S. dollar compared to other currencies. In 2000, over \$320 billion worth of U.S. businesses were acquired by foreign investors. The most prolific purchasers of U.S. businesses have been England, Canada, France, Germany, Japan and China.

This business phenomenon gives rise to a question: could U.S. security and our national defense be compromised by the continuation of this aspect of globalization?

Congress has established two distinct but related laws, and attendant regulations, to reduce the security risks of globalization on U.S. business and our national security. First, the Exon-Florio Act ("Act"), enacted in 1988, provides a mandatory procedure to be followed by any foreign purchaser of any U.S. business involved with our national security. The purpose of this legislation is to prevent U.S. defense technology and intellectual property from being transferred, directly or indirectly, to potential enemies or terrorists. Second, the 1976 Arms Export Control Act gives the President the authority to control the export of defense related articles and services from businesses in the U.S. to customers in other countries. These export control laws and regulations apply to all U.S. businesses whether they are owned by U.S. or foreign interests.

Since many business people may be unfamiliar with the Exon-Florio provisions, a brief summary follows. The Act gives the President the authority to review and suspend or prohibit (and even unwind) the purchase of a U.S. business by a foreign interest if such transaction threatens to impair the national

security of the U.S. In 2007, the Act was amended to make the review of proposed acquisitions having national security implications more rigorous. This review process is voluntary and is initiated by the parties involved in the purchase and sale of a business having possible national security implications. This is a determination made by the parties to the transaction based on the Act's guidelines, which list those factors which pertain to "national security". Not surprisingly, these factors include: whether U.S. critical technologies are involved; whether a foreign government's controlled business is involved (and which country); whether the proposed transaction could assist in the sale of military equipment or technology to a country which poses a potential regional threat to U.S. interests; and whether the transaction involves critical infrastructure of the U.S. It is important to note that there is no minimum dollar threshold or test for transactions subject to the Act, so even small transactions are subject to this review process if the subject matter relates to "national security". There is a very detailed schedule of information which the parties to a proposed transaction must submit to the Committee on Foreign Investment in the U.S. (CFIUS), which is comprised of representatives of the U.S. State, Defense, Treasury, Commerce, Homeland Security and Energy Departments. CFIUS appoints one agency as Lead Agency for each filing. The Secretary of Labor and Director of National Intelligence also serve on CFIUS, which will review each filing for thirty (30) days and then determine if it should initiate a forty-five (45) day investigation, followed by a report to the President, who makes the final decision (within 15 days) on whether to prohibit a proposed transaction. Most transactions are approved after the initial thirty (30) day review period, which focuses on the identity of the foreign purchaser and the mutual security sensitivity of the products and technology proposed to be acquired in the transaction.



Illustrator: DieterSpannknebel

The Notification Document is prepared jointly by the parties. It is a time consuming project and must describe the proposed transaction and full details about the background of the foreign purchaser.

Although the parties to a proposed transaction must voluntarily decide whether to submit an Exon-Florio Notification, the failure to do so could result in CFIUS initiating a review of a transaction on its own initiative, usually based on an adverse reaction to the transaction from other business or governmental interests. Consequently, it is prudent for parties to a transaction having even indirect national security implications to file a notification voluntarily rather than risk independent CFIUS review of a transaction.

By the implementation of laws which first monitor and restrict the purchase of U.S. national defense related businesses by foreign investors, and also enforcing strict export laws controlling the foreign sale of sensitive products and services, the U.S. Government is seeking to protect US security in an increasingly fluid global marketplace. Any U.S. business involved with the sale of products or services to an agency of the U.S. government must consider this issue carefully at a very early stage of any plan to sell their business (even a small business) to a foreign purchaser.

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 AVOIDING THE VIRTUAL “STICK ‘EM UP”
 

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According to the history section on the FBI’s website, “being the victim of gentleman bank robber Willie Sutton was like being at the movies, except the usher had a gun. When asked why he robbed banks, Sutton simply replied, ‘Because that’s where the money is.’”

Today, “the money” is in the computer that your business uses for on-line banking.

The FBI reports that, from 2008 to 2009, the amount lost to cybercrimes more than doubled, with an impact on the U.S. economy of an estimated \$117 billion – and those are just the reported losses. Unfortunately, cyber criminals are increasingly turning their sights on small businesses and local governments. These are juicy targets from a gentleman robber’s point of view since they generally have more money than consumers, but less security than large businesses and agencies.

A recent wave of cyber thefts, including some in the central New York area, points out the dangers faced by small businesses, particularly if you use online banking to initiate payroll and other funds transfers.

Commonly, these thefts require the unwitting cooperation of the business’s employees. First, the attacker surreptitiously installs “malware” software on a target’s computers, often by luring a computer user to click on a spam e-mail or visit a website disguised as a bank or legitimate business. This software can capture information and send it to another computer, allowing that computer to adopt the disguise of the business’s computer. Then, the attacker tricks a human being into revealing login user names and passwords. Finally, with all this information, the attacker sends a direction to the target’s bank to transfer funds to a conspirator.

To the security system of the victim’s bank, such a request for a funds transfer can look identical to a properly authenticated request made by the entity itself. The funds transfer will go through as directed, to a foreign bank account or the U.S. bank account of a conspirator, who immediately wires the money abroad. Once abroad, the funds are withdrawn and are virtually impossible to recover.

Victims may not be able to recover from their own banks either. Under standard banking agreements and the Uniform Commercial Code, banks and their customers agree that funds transfer requests sent electronically can be accepted by the bank if a security procedure is followed. If the bank follows the security procedure and has no knowledge of a problem, the loss falls on the customer.

The customer still may be able to collect from the bank if it shows that that the loss was not connected with a current or former employee or agent and that access to the security

information was obtained from a source other than the customer’s system. However, if the customer’s computer system was compromised—and not the bank’s—then the customer is likely out of luck.

As with every other criminal threat, there are a number of defensive measures that small businesses and local governments can take – your bank’s website and [http://www.fbi.gov/cyberinvest/protect\\_online.htm](http://www.fbi.gov/cyberinvest/protect_online.htm) are two sources of advice. Here are a few more suggestions:

**Isolated Computer** – Cyber attackers often get a toehold in your computer system when an employee opens an e-mail sent by the attackers or clicks on a link, which may appear to be a legitimate website. If the computer you use for on-line banking transactions is a stand-alone computer never used for any other purpose, the threat is minimized. It also helps to turn it off at night so that spyware or a botnet cannot reach out to other unwitting users.

**Updates** – It goes without saying that businesses should have software security from a reputable vendor. It is also important to keep it up-to-date. Even though new viruses are constantly being created, a good security system that is updated on a regular basis is the first line of defense. Another easy step: Be sure that employees change passwords every 45 days, and don’t use birthdays, addresses or other information that can be found on Facebook or similar sites.

**Be Suspicious** – E-mails or text messages purporting to be from your bank or the government and asking you to give passwords or other information are almost always false. Never answer by e-mail. If you think the request is legitimate, call your contact at the bank.

**Consider Using “Positive Pay”** – Many banks offer their customers a service called “positive pay.” If your business writes a lot of checks, the bank can send you a file of check numbers when the checks are presented for payment and ask you for specific authorization to pay the check. If an attacker tricks your system into issuing a fraudulent check, this is a way to stop the bank from paying it. The same service however, cannot be offered for wire transfers – these occur immediately. That is why it is important to have good security in the first place.

**Monitor** – The sooner your bank learns of a problem, the easier it is to try to recover misdirected funds and, at a minimum, to try to prevent any further losses. Reviewing records of funds transfers on a daily basis can help.

*Article written by Amy Shapiro, Esq. (Thanks to Jim Terry at NBT Bank for suggestions). For more information, Ms. Shapiro can be reached at 607-231-6741 or via e-mail at [ashapiro@bbk.com](mailto:ashapiro@bbk.com)*

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 RED FLAG RULES UPDATES
 

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The Federal Trade Commission (“FTC”) has voted to delay enforcement of its “Red Flags Rule,” which was first reported on in our December 2009 Newsletter. The Red Flags Rule requires that banks and businesses that fall within the definition of the word “creditor” must develop, implement and comply with policies to protect their consumers from identity theft. After several delays, the FTC had set its most recent enforcement deadline for June 1, 2010. However, because Congress is now

considering legislation that would exempt physicians, attorneys, and accounting offices with fewer than 20 employees from having to comply with the regulation, enforcement will be delayed until December 31, 2010.

*For additional information or questions regarding the Red Flags Rule, contact Jacqueline A. Bain, Esq., at (607) 231-6999 or via e-mail at [jbain@bbk.com](mailto:jbain@bbk.com).*

## FAMILY HEALTHCARE DECISIONS ACT

On March 16, 2010, Governor Paterson signed the Family Healthcare Decisions Act (the "Act") into law. The Act allows a surrogate to make health care decisions, including decisions to withdraw or withhold life-sustaining treatment, when a patient loses decision-making capacity and does not have a health care agent. The Act applies to general hospitals and residential health care facilities, such as nursing homes. The Act does not apply to mental hygiene facilities, psychiatric units of general hospitals or outpatient settings such as clinics or doctors' offices.

As defined in the Act, "decision-making capacity" means the patient's ability to understand appreciate the nature and consequences of the proposed healthcare, including the benefits, risks and alternatives, and to reach an informed decision. The patient's attending physician must make an initial determination that, to a reasonable degree of medical certainty, an adult patient lacks decision-making capacity.

The Act establishes the following hierarchy for selecting a surrogate:

1. a guardian authorized to decide about health care pursuant to Article 81 of the Mental Hygiene law;
2. a spouse, if not legally separated from the patient, or a domestic partner;
3. a son or daughter 18 years of age or older;
4. a parent;
5. a brother or sister 18 years of age or older; or
6. a close friend.

Once a determination is made that an adult patient lacks decision-making capacity, a person from the class highest in priority who is reasonably available, willing and competent to act, is deemed the surrogate. However, such person may designate any other person on the list to be the surrogate, provided that no one in a class higher in priority than the person designated objects.

The surrogate has all the power the patient would have in making his or her own medical decisions, including decisions about withholding or withdrawing life-sustaining treatment. The surrogate must make decisions in accordance with the patient's wishes, taking into account the patient's moral and religious beliefs. If the patient's wishes are not reasonably known and cannot be ascertained, the Act directs that the surrogate make decisions that are in the patient's best interests.

If the patient objects to the determination of incapacity or to the choice of surrogate, or to a healthcare decision made by a surrogate, the patient's oral objection controls unless a court determines that the patient lacks decision-making capacity or another legal basis exists for overriding the patient's decision. Additionally, if the patient has already made a decision about the healthcare either orally or in writing, the attending physician does not need to seek the consent of a surrogate.

Pursuant to the Act, a surrogate may withhold or

withdraw life-sustaining treatment for a patient if the patient will die within six months or is permanently unconscious, as determined by two independent physicians, and treatment would be an extraordinary burden to the patient.

If the patient has an irreversible condition, as determined by two independent physicians, and treatment would involve such pain, suffering or other burden that it would be inhumane or extraordinarily burdensome to provide treatment under the circumstances, a surrogate may also withhold or withdraw life-sustaining treatment. Providing nutrition and hydration orally to the patient, without reliance on medical treatment, is not considered healthcare and is not subject to the Act.

Under the Act, individuals with mental retardation or developmental disabilities fall within the class of individuals for whom healthcare surrogates may be appointed, unless the individual resides in a mental hygiene facility or there is a guardian appointed by the court pursuant to Article 17-A of the Surrogate's Court Procedure Act.

The passage of the Act does not diminish the importance of preparing a health care proxy, which allows an agent to make healthcare decisions on behalf of a patient if he or she later loses decision-making capacity. The proxy form can be tailored to give the agent as much or as little authority as the patient desires and the agent must make decisions in accordance with the patient's expressed wishes or best interests. When a patient loses decision-making capacity and a healthcare agent has not been appointed, the Act reduces the uncertainty that caregivers face and assures that the best interests of the patients are protected.

General hospitals and residential care facilities are required to adopt policies and procedures to implement the requirements of the Act. These policies and procedures were expected to be in place as of June 1, 2010. In addition, there are new patient rights templates that must be distributed to all patients. Hospitals and residential care facilities should review their policies and procedures and revise them as necessary to ensure compliance with the Act.

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