

HEALTH CARE REGULATIONS DEFINING GRANDFATHERED PLANS CREATE URGENT NEED FOR EMPLOYERS PLANNING ON HEALTHCARE CHANGES

Under the Patient Protection and Affordable Care Act (PPACA), health plans that were in existence on March 23, 2010 (the day PPACA was signed) are grandfathered under the law and exempt from many of PPACA's requirements. However, in order to keep grandfathered health plan (GFHP) status, a plan may not be modified in any significant way. Thus, employers who are dealing with health plan renewals need to decide whether they want to maintain GFHP status.



Catherine Shuck....

"The critical point is that all employers considering healthcare changes should study, and seek counsel as to, the possible effects of the changes on GFHP status."

The interim final regulations published in June identify changes that will cause a plan to lose GFHP status. A group health plan or health insurance coverage no longer will be considered a GFHP if the plans sponsor or an issuer:

- Eliminates all or substantially all benefits to diagnose or treat a particular condition;
- Increases a percentage cost-sharing requirement (such as co-insurance) above the March 23, 2010 level;
- Increases fixed-amount cost-sharing requirements other than co-payments, such as a \$500 deductible or a \$2,500 out-of-pocket limit, by a total percentage measured from March 23, 2010 that is more than the sum of medical inflation plus 15 percentage points;
- Increases co-payments by an amount that exceeds the greater of: a total percentage measured from March 23, 2010 that is more than the sum of medical inflation plus 15 percentage points, or \$5.00 increased by medical inflation measured from March 23, 2010; or
- For a group health plan or group health insurance coverage, an employer or employee organization decreases its premium contribution rate by more than 5 percentage points below the contribution rate on March 23, 2010.
- Changes issuers (with some exceptions for insured collectively bargained plans)
- Adds or decreases annual limits

Note that the 15% allowance is not an annual increase; it is the total increase measured from March 23, 2010. In other words, if a plan raises co-payments 15% plus an amount for medical inflation this year, the plan will only remain grandfathered next year if the increase is due to medical inflation alone.

A plan may make these changes without losing GFHP status:

- Add or delete employees and their families
- Change third-party administrators, provider networks, or prescription drug formularies
- Change plan to comply with federal or state law
- Change plan to voluntarily comply with provisions of PPACA

Some are saying that losing grandfathered health plan status is not a big deal because the benefit changes required by the new laws will not increase costs significantly. Regardless of whether the preceding rationale has merit, it is possible that losing GFHP status will cost an employer with a self-insured plan, and its employees, additional money because the new laws require individuals to maintain minimum essential coverage for taxable years ending after

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December 31, 2013. Minimum essential coverage includes health coverage provided through GFHPs, qualified health plans obtained through the exchanges, health insurance policies, and governmental plans. It appears that minimum essential coverage will not be available from self-insured group health plans, other than GFHPs, unless regulations correct this glitch.

For individuals, the failure to maintain minimum essential coverage could result in a penalty of the greater of:

- \$95 (per adult, up to \$285 for family) or 1.0% of income in 2014,
- \$325 (per adult, up to \$975 for family) or 2.0% of income in 2015, and
- \$695 (per adult, up to \$2,085 for family) or 2.5% of income in 2016.

For each child under age 18, one-half of the applicable dollar amount is used in determining the penalty. After 2016, dollar amounts will increase by the annual cost of living adjustment.

An employer with an average of at least 50 full-time employees during the preceding calendar year, who does not offer minimum essential coverage and who has at least one full-time employee receiving the premium assistance tax credit or cost sharing reduction, must pay \$2,000 per full-time employee, excluding the first 30 employees. The calculation of full-time workers is made on a monthly basis.

In other words, one effect of losing GFHP status could be that the employer and its employees will have to pay taxes if the employer offers a self-insured health plan, even if the plan provides better benefits than the exchange offers (at least absent further regulatory clarification from the government). Thus, a large employer will be encouraged to terminate its self-insured plan if it has to pay the tax because it will not pay the tax and provide coverage under the self-insured plan. If the plan is terminated or continues without GFHP status, the employees will pay the individual tax or find coverage in the exchange.

The critical point is that all employers considering healthcare changes should study, and seek counsel as to, the possible effects of the changes on GFHP status.

PREVENTIVE SERVICES AND THE NEW HEALTH CARE LAWS

One reason to keep grandfathered health plan (GFHP) status is to avoid the Patient Protection and Affordable Care Acts (PPACA) requirement of providing first-dollar coverage for preventive health care. For plan years beginning on or after September 23, 2010, employer health plans that are not GFHPs must provide coverage for preventive services without charging a covered employee or covered dependent a co-pay, co-insurance or deductible if the services are delivered by a network provider. Recently issued regulations explain what services non-grandfathered health plans must provide.

Generally, preventive care includes any service with an A or B rating from the United States Preventive Services Task Force. (For information on the USPSTF, including a list of its preventive service recommendations, go to [http://www.uspreventiveservicestaskforce.org/.](http://www.uspreventiveservicestaskforce.org/))

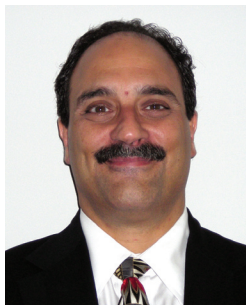
These include things such as:

- Blood pressure, diabetes, and cholesterol tests
- Many cancer screenings
- Counseling from your health care provider on such topics as quitting smoking, losing weight, eating better, treating depression, and reducing alcohol use
- Routine vaccines for diseases such as measles, polio, or meningitis
- Flu and pneumonia shots
- Counseling, screening and vaccines for healthy pregnancies
- Regular well-baby and well-child visits, from birth to age 21

Employers whose plans do not have GFHP status obviously will bear the full costs for these preventive services. So be prepared for the possibility of significant cost increases if your health plan loses GFHP status.

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for the latest legal updates, seminars, alerts and firm biographical information!**

SUPREME COURT ISSUES NEW EMPLOYMENT PRIVACY RULING



Gerard Jabaley..

"The employer had issued a policy that applied to all employees, including a reservation of the right to monitor and log all computer network activities including e-mail and internet use, with or without notice, and stating that users should have no expectation of privacy or confidentiality when using these sources."

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in the messages that was protected by the ban on unreasonable searches and seizures found in the Fourth Amendment to the United States Constitution and that the employers action violated their rights under the Stored Communication Act (SCA).

In reviewing the issue, the U.S. Supreme Court noted that it had not reviewed the scope of an employees Fourth Amendment privacy rights in over 20 years. In its earlier 1987 opinion in *OConnor v. Ortega*, the Court had addressed the privacy rights of government employment in two steps. First, because some government offices may be so open to fellow federal employees or the public that no expectation of privacy is reasonable, the court must consider the operational realities of the workplace in order to determine whether an employees Fourth Amendment rights are implicated. Using this analysis, the question whether an employee has a reasonable expectation of privacy must be addressed case-by-case. Where it is determined that an employee has a legitimate privacy expectation, an employers intrusion on that expectation for a non-investigatory, work-related

In *City of Ontario v. Quon*, 30 IER Cases 1345 (U.S. June 17, 2010), the U.S. Supreme Court addressed the issue of whether a government employer could read text messages sent and received on a pager the employer owned and issued to an employee. The employer had issued a policy that applied to all employees, including a reservation of the right to monitor and log all computer network activities including e-mail and internet use, with or without notice, and stating that users should have no expectation of privacy or confidentiality when using these sources. While the computer policy did not apply on its face to text messaging, the City had explained to employees and issued a memo that it would treat text messages the same way as it treated e-mails.

However, an employer official also stated that it was not his intent to audit an employees text messages to see if the employers policy on overage non-work related transmissions were violated, suggesting that employees could reimburse the employer for the overage fee rather than have the employer audit the messages. Later, however, the employer decided to determine whether the existing character limit on text messaging was too low, and so it ordered transcripts of the text messages for certain employees who had exceeded the character allowance. In reviewing such text messages, the employer determined that a high percentage of the plaintiffs text messages were not work related, and some were sexually explicit. The plaintiffs were then disciplined for violating the rule about pursuing excessive personal matters while on duty. The plaintiffs sued, contending that they had a privacy interest

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KNOW YOUR ATTORNEY MICHAEL W. JONES

MICHAEL W. JONES is Of Counsel in the Nashville, TN office of Wimberly Lawson Wright Daves & Jones, PLLC. His law practice includes an emphasis in workers' compensation, and general civil litigation, as well as insurance law. He received his Bachelor of Arts degree from Rockhurst



College and his law degree from the University of Kansas. Michael is a Rule 31 Listed General Civil Mediator, Tennessee Supreme Court.

He is admitted to practice before the United States Supreme Court, United States District Courts for the Middle and Western Districts of Tennessee, United States District Court for Kansas, as well as in Tennessee, Florida, and Kansas. He is a member of the Nashville and Tennessee Bar Associations and the Mid-South Workers' Compensation Association.

THE 2010 LABOR EMPLOYMENT UPDATE CONFERENCE



**November 18 & 19, 2010
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MILITARY LEAVE IT MAY BE LONGER THAN YOU THINK



Catherine Shuck.....

“What many employers may not know is that there are several exceptions to USERRA’s five-year limit on time away from work for military service.”

Most employers are aware of the obligation to re-employ individuals returning from military service pursuant to the federal Uniformed Services Employment and Reemployment Rights Act (USERRA). What many employers may not know is that there are several exceptions to USERRA’s five-year limit on time away from work for military service. For example, when an employee is deployed pursuant to 10 U.S.C. § 12302, which authorizes involuntary active duty of up to 24 months during a national emergency, the time the employee is away from work does not count towards his five-year limit under USERRA. The time away, however, is completely protected by USERRA.

In the same vein, many employers are aware that USERRA does not cover time served in the National Guard pursuant to state (rather than federal) authority. What employers may not know is that in many states, including Tennessee, public employees (including local, as well as state government employees) are entitled to an unlimited leave of absence during their National Guard service, without loss of rights or benefits.

If you have employees on military leave, be sure to examine whether state law, or whether any of USERRA’s exceptions, apply to your situation.

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the privacy of text messaging. It would also be necessary to consider whether a review of messages sent on police pagers, particularly sent while officers are on duty, might be justified for other reasons. These matters would all bear on the legitimacy of an employees privacy expectation.

The Court decided that it must proceed with care when considering the whole concept of privacy expectations and communications made on electronic equipment owned by a government employer, particularly because of emerging technology before its role in society has become clear. The Court decided instead to dispose of the case on narrower grounds, by assuming for the purposes of deciding the case that the employee had a reasonable expectation of privacy in the text messages sent on the pager provided to him by the City, that the employers review of the transcript was a search within the meaning of the Fourth Amendment, and that the principles applicable to a government employers search of an employees physical office (the fact pattern in the Ortega case) apply with at least the same force to an employers intrusion on an employees privacy in the electronic arena.

After assuming, without deciding, these propositions for the purpose of deciding the case, the Court decided to dispose of the case based on the issue of whether the search was reasonable. The Court concluded that since the search was motivated by a legitimate work-related purpose, and because it was not excessive in scope, the search was reasonable and therefore did not violate the Fourth Amendment.

Editors Note: While the Supreme Courts current ruling deals with public employment, and the Fourth Amendment does not directly apply to private employment, the principles in the public employment cases nevertheless often have application to the private sector. Some of the principles include various computer privacy statutes, such as the Stored Communications Act, 28 U.S.C. Section 2701, which was also at issue in Quon, and also various state privacy principles, that are applicable to private employers, and courts often look to Supreme Court privacy cases in the public sector for guidance. It is also useful to look at the fact pattern in the current case which involves many issues that could arise under a private employers computer policies. Certainly the case suggests many issues that an employer should address and resolve in its own policies involving privacy issues on computers and otherwise.



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We invite you to attend our 31st Annual Labor and Employment Law Update

TARGET OUT OF RANGE



THE WIMBERLY LAWSON LABOR & EMPLOYMENT LAW UPDATE

Knoxville Marriott Downtown
500 Hill Avenue, Knoxville, Tennessee
November 18 & 19, 2010



KEYNOTE SPEAKER

Michael T. Strickland

*Founder and CEO of Bandit Lites
and Chairman, Knoxville Chamber
of Commerce Board of Directors*

SPECIAL GUESTS EEOC OFFICIALS

Opportunities to participate in
panel discussions entitled
*"What You Always Wanted To Know,
But Were Afraid To Ask"*
with guest speakers
Sarah L. Smith, Director, and
Sylvia Hall, Enforcement Supervisory
Federal Investigator with the Nashville,
Tennessee office of the EEOC.

A FEW COMMENTS FROM LAST YEAR

☐☐ Fun, outstanding speakers
and presentations...
lively, entertaining. ☐☐

☐☐ Very informative -
organized and professional. ☐☐

☐☐ It was very positive -
I left feeling
VERY motivated! ☐☐

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The use of this seal is not an endorsement by the HR Certification Institute of the quality of the program. It means that this program has met the HR Certification Institute's criteria to be pre-approved for recertification credit.



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TARGET OUT OF RANGE



Dear Clients and Friends:

Our Annual Conference is truly the high point of the year for us -- a time to gather with friends and discuss important, contemporary employment issues. **PLEASE PLAN NOW TO JOIN US.**

Our day and a half program covers important legal decisions and societal trends affecting employment. Topics are carefully selected to address the concerns of all employers and to give you an opportunity to select from a wide array of topics dealt with in detail. Some of the twenty-five or more topics are:

- Impact of Healthcare Reform on Employers
- FMLA Intermittent Leave Regs and How They Affect You
- Social Media in the Workplace
- COBRA Expansion
- 21st Century Contracts and Agreements
- Avoiding Issues Later with Effective Hiring Now
- When is Mediation Best?
- Avoid Top Wage-Hour Violations
- Sweatpants, Tattoos and Body Piercings – Issues and What You Need to Know
- Violence in the Workplace
- Latest Developments in Workers Compensation
- Understanding the EEOC – EEOC Officials Will Comprise Panel

Join us in Knoxville on November 18 and 19! We promise you an informative, but light-hearted, thorough and practical journey through today's workplace issues.

Hope to see you there!

Respectfully,

Ronald G. Daves
Managing Member

AGENDA

Thursday, November 18, 2010 (9:00 a.m. - 5:15 p.m.)

8:00 a.m. – 9:00 a.m. Registration and Continental Breakfast

9:15 a.m. - 10:45 a.m. - General Session

The Year in Review - Privacy Rules, Selection Testing and More
DOL's Ramped-Up Enforcement
Jury Waivers/Mandatory Arbitration
Employment Non-Discrimination Act (ENDA)
Crisis Management, Response Plans and Strategies

11:00 a.m. - 12:00 p.m. - Breakout Sessions

Employee and Employer Rights and Obligations Under the FMLA
HR Jeopardy - the Game (Interplay between ADA/FMLA/WC)
What OSHA's New Enforcement and Penalty Plan Means to You
Latest Developments on TN Workers Compensation Law
Non-Compete, Confidentiality & Separation Agreements for the 21st Century
Strategies to Meet the New Wave of Immigration Enforcement

12:00 p.m. - 1:15 pm - Lunch (*Courtesy of Wimberly Lawson*)

1:30 p.m. - 2:30 p.m. - General Session

Keynote Speaker - Michael T. Strickland,
Founder and CEO of Bandit Lites and Chairman,
Knoxville Chamber of Commerce Board of Directors

2:45 p.m. - 3:45 p.m. - Breakout Sessions

Defending Wage-Hour Class and Collection Actions/Q&A
The Obama Administration NLRB - What's Next?
EEOC Panel - What You Always Wanted to Know, But Were Afraid to Ask
Workplace Violence - What Should You Do Now?
ADAAA and Reasonable Accommodations Without a Hassle
Healthcare Reform-Effects and Strategies for Employers
Don't Be a Dope - Ensure Protection Under the Tennessee Drug Free Workplace Act

4:00 p.m. - 5:15 p.m. - General Session

Have You Met GINA? Genetic Information Non-Discrimination Act
E-Verify and Immigration Update
WARN Act Issues
Recreational Activities and Workers Compensation
Things That Go Bump In The Dark And Other Things That Keep Corporate Counsel Awake At Night

5:15 pm – 7:00 pm Reception (please join us for scrumptious hors d'oeuvres)

Friday, November 19, 2010 (8:30 a.m. - 12:30 p.m.)

8:00 a.m. – 8:30 a.m. - Continental Breakfast

8:45 a.m. - 9:45 a.m. - General Session

No Safe Sex in the Workplace
Proliferation of Retaliation Claims
Nuts & Bolts of Class Action Claims
Update on Ledbetter Fair Pay Act Cases/Decisions

10:00 a.m. - 11:00 a.m. - Breakout Sessions

Open Forum and Q&A Regarding Compliance with ObamaCare
Most Common Mistakes In Tennessee Workers Comp Settlements
Avoiding and Remediating Wage-Hour Deficiencies
Defining New Reasonable Facts Other than Age in Discrimination Cases
EEOC Panel - What You Always Wanted to Know, But Were Afraid to Ask
Employee Handbooks - Critical Issues
Social Media in the Workplace - Problems and Cures

11:00 a.m. - 12:30 p.m. General Session

Internal Investigations - Risks and Rewards
Strategies for Mediating/Settling Employment Claims
Diversity - Why Can't We All Just Get Along?
Tattoos and Dress Codes - problems and Cures

12:30 p.m. Conclusion



The use of this seal is not an endorsement by the HR Certification Institute of the quality of the program. It means that this program has met the HR Certification Institute's criteria to be pre-approved for recertification credit.

This program has been approved for 9.25 recertification credit hours toward PHR, SPHR and GPHA recertification through the Human Resource Certification Institute (HRCI). For more information about certification or recertification, please visit the HRCI home page at www.hrci.org.

This program has been accredited by Tennessee CLE for 9.25 general credit hours.



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Thirty-First Annual Labor & Employment Law Update Conference

**Knoxville Marriott - Knoxville, Tennessee
November 18-19, 2010**

COST:

Early Bird (registration AND payment received by October 15)

\$299 per person

\$289 for each additional person from same company

\$239 for eight or more from same company

Registration and payment received AFTER October 15

\$339 per person

\$329 for each additional person from same company

\$299 for eight or more from same company

REGISTRATION INCLUDES:

Seminar (1 1/2 days), materials, two continental breakfasts, lunch and evening reception on Thursday, November 18, 2010

CANCELLATION CHARGE:

50% cancellation fee will be incurred for cancellations after October 29. Cancellations made after November 10, 2010 will forfeit registration fee (registrants will receive the conference materials post-seminar)

HOTEL ACCOMMODATIONS Knoxville Marriott • 500 Hill Avenue

SPECIAL RATES AVAILABLE

Be sure to state you are attending the Wimberly Lawson conference in order to receive the room rate of \$102.00/standard.

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RESERVE ONLINE at www.marriott.com/TYSMC
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FIVE WAYS TO REGISTER

1. Mail to: Bernice Houle
Wimberly Lawson Wright
Daves & Jones, PLLC
P.O. Box 2231
Knoxville, TN 37901
2. Fax to: 865-546-1001
3. Email to: [bhoul@wimberlylawson.com](mailto:bhoule@wimberlylawson.com)
4. Via website: www.wimberlylawson.com
5. Phone: 865-546-1000



KEYNOTE SPEAKER

Michael T. Strickland

Founder and CEO, Bandit Lites
Chairman, Knoxville Chamber of
Commerce Board of Directors

Michael T. Strickland, founder and CEO of Bandit Lites, grew up in Kingsport, Tennessee. Along the way Michael played football and basketball, was an Eagle Scout, was twice president of his Junior Achievement companies and was an avid church member. Michael attended city schools in Kingsport and graduated from Dobyns Bennett High School in 1973. In 1968 at age 12 while in junior high school Michael started what would become his life long passion and his company, Bandit Lites. Michael moved the firm to Knoxville when he began to attend college at the University of Tennessee. He obtained a Bachelor of Science in Business from the University of Tennessee and then attended the University of Tennessee Law School. The company continued throughout college and has existed ever since under Michael's guidance and ownership. In 1999 CNN USA Today named Michael as Entrepreneur of the Year. Michael currently serves as Chairman, Knoxville Chamber of Commerce Board of Directors.

A large part of Michael's time is now spent philanthropically as Michael and Bandit Lites attempt to give back to a world that has so blessed the staff at Bandit Lites. Michael spends as much time as possible helping others through a number of different charities, agencies and foundations, including Boy Scouts of America, American Heart Association, Make a Wish Foundation and others to which he belongs.

Michael is married to Nicole and has two children, Chase and Cole. Michael and his family live in Knoxville and are very involved with the University of Tennessee as well as many little league sporting events and activities.

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Special Needs? If you should have any special needs, such as wheel chair access or special dietary requirements, please contact Bernice Houle at 865-546-1000 no later than 10 days before the event.