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Human Resources Newsletter

# HR Focus



## Time to "friend" your social networking policy

by Steven A. Palazzolo: [spalazzolo@wnj.com](mailto:spalazzolo@wnj.com)

**Now why on earth would I be writing about social networking in the Newsletter instead of on my blog?** You all know I have a blog right? You know you can find it at <http://negotiumlex.wnj.com/> right? (How's that for a shameless plug?) So why? Why not blog

or tweet or post an update on Facebook about this topic? After all, that seems more appropriate, doesn't it? Of course it does. But here's the deal. The people who read blogs or post on Facebook or "tweet" probably are already up to speed on this social networking stuff. It is the rest of us, the old codgers that don't tweet regularly who we want to talk to today. You know who I am talking about. There is a bunch of you out there (me included, by the way) who hear "tweet" and think of a little yellow cartoon bird and a cat named Sylvester. And even more of you who are asking, "When did "friend" become a verb?" I'll tell you what my kids tell me: "Dad, get with the times".

Why you ask, why do I have to get with the times? Good question. You see, if I don't get with the times at home my kids think I'm "lame." Let's face it, nothing I can do to fix that so why bother. But if you don't "get with the times" at work, it could cost you. And maybe cost you big.

First of all, use of sites like Facebook, Myspace, Twitter and others can seriously affect productivity at work. According to one survey simply surfing the Web by employees costs U.S. companies about \$63 billion each year and use of social networking sites at work costs U.K. companies about \$2.5 billion each year. That's right, that's BILLION with a big capital B. See <http://mashable.com/2009/10/26/social-media->

*continued on page 6*



# Welcome Relief! IRS Issues Section 409A Correction Program

by Justin W. Stemple: [jstemple@wnj.com](mailto:jstemple@wnj.com)

For several years now companies and their advisors have been frustrated by the lack of guidance under Section 409A of the Internal Revenue Code for certain common plan provisions and the inability to correct a document that is found to have provisions that violate Section 409A. The IRS has recently issued Notice 2010-6, which provides helpful and practical guidance on how Section 409A applies to certain common plan provisions and for the first time provides a procedure to correct plan document errors.

## APPLICATION OF SECTION 409A TO COMMON PLAN PROVISIONS

The Notice provides guidance on how Section 409A applies to two common plan provisions. It was previously unclear whether these provisions violated Section 409A.

- If a plan provides for payment “as soon as administratively practicable” or under some other ambiguous timing rule after a permissible payment event, then the payment timing will not violate Section 409A if payment is made by the later of the end of the service providers tax year or the 15th day of the third month after the payment event occurs.

- If a plan provides for payment upon an event that could be interpreted as a permissible payment event under Section 409A but could also be interpreted to not comply with Section 409A, such as a termination of employment (a “separation from service” under Section 409A) or an acquisition (a “change in control” under Section 409A), then the provision may or may not violate Section 409A depending on how the provision has been interpreted historically. Such a provision may be corrected by adding a Section 409A definition or a clause that the plan will be interpreted in accordance with Section 409A.

## CORRECTION OF PLAN DOCUMENT FAILURES

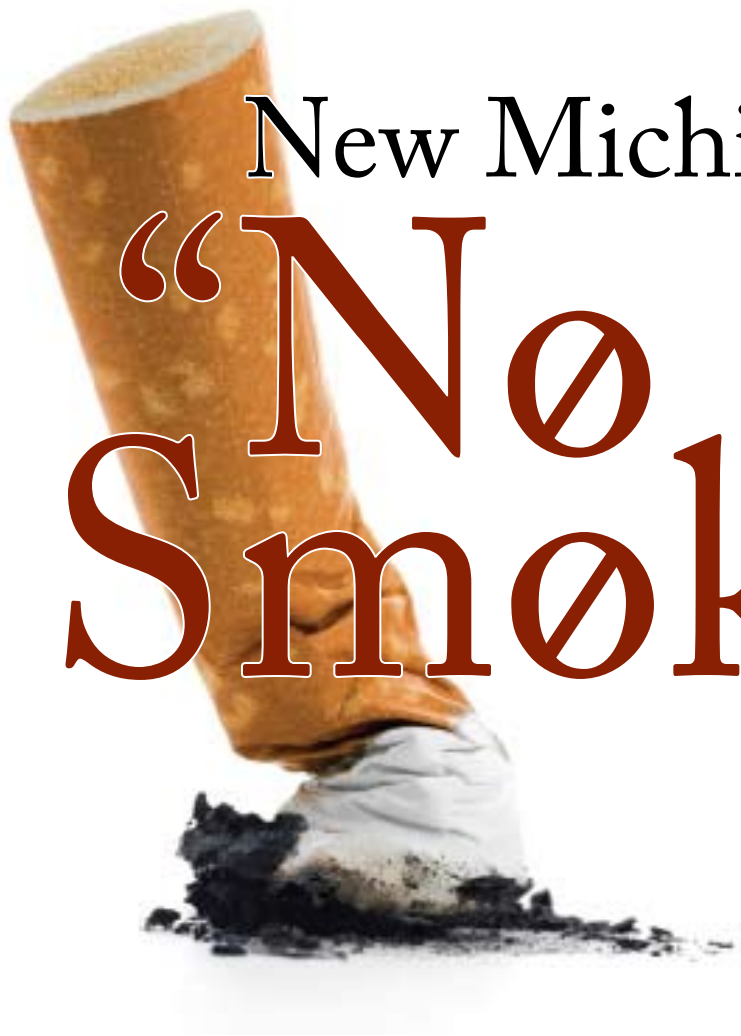
The Notice includes procedures to correct plan document provisions that violate Section 409A. Under the Notice the service recipient self-corrects the document failures. The procedure does not require submission of the proposed correction to the IRS. The Notice may require a portion of the deferred amount be taxable under Section 409A as the cost of correcting the plan document. The general rule for many of the corrections in the Notice is that, if the improper provision would have triggered a payment within one year after the correction, a portion of the deferred amount (typically 25% or 50% depending on the correction) must be included in taxable income and subjected to the Section 409A 20% additional tax, even though the deferred amount is not paid under the corrected provision. If no payments would have been made until more than a year after the correction is made, no taxes are owed until actual payment. The intent of this approach is to encourage employers to self-audit and self-correct their own arrangements before any problems arise. The Notice provides corrections for the following plan document failures:

- An improper definition of separation from service, change in control or disability.
- A payment provision that allows for payment during a window more than 90 days after the payment event.
- A payment provision that times the payment based on the time the employee takes some employment-related action, such as signing a release or non-compete.



Notice 2010-6 provides helpful and practical guidance on how Section 409A applies to certain common plan provisions.

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# New Michigan “No Smoking” Law



by Robert J. Chovanec: [rchovanec@wnj.com](mailto:rchovanec@wnj.com)

Effective May 1, 2010, Michigan PA 188 of 2009 will prohibit smoking in any “place of employment” in Michigan, with narrow exceptions for Detroit casinos and for certain “cigar bars,” “tobacco specialty retail stores” and home offices.

“Place of employment” is defined as: “. . . an enclosed indoor area that contains 1 or more work areas for 1 or more persons employed by a public or private employer.” “Place of employment” does not include a motor vehicle or outdoor areas.

“Smoking” is defined as: “. . . the burning of a lighted cigar, cigarette, pipe, or any other matter or substance that contains a tobacco product.”

The new law requires employers to take the following actions:

- Clearly and conspicuously post “no smoking” signs or the international “no smoking” symbol at the entrances to and in every building or other area where smoking is prohibited.
- Remove all ashtrays and other smoking paraphernalia from anywhere smoking is prohibited.

- Inform individuals smoking in violation of this Act that they are in violation of state law and subject to penalties.
- Ask an individual smoking in violation of this Act to refrain from smoking and, if the individual continues to smoke in violation of the Act, ask him or her to leave the place of employment.

A person who violates the new law is subject to a civil fine of up to \$100 for a first violation and up to \$500 for a second or subsequent violation. A person alleging violation of the new law may bring an action for injunctive relief within 60 days after being on premises where smoking is prohibited by the new law.

The new law prohibits an employer from taking any retaliatory or adverse personnel action against an employee on the basis of the individual’s exercise of or attempt to exercise his or her rights regarding a place of employment (presumably, the right to insist that smoking not occur in the place of employment).

# Medicare

## Mandatory Reporting Requirements Update



by Norbert F. Kugele and Scott M. Hancock: [nkugele@wnj.com](mailto:nkugele@wnj.com) / [shancock@wnj.com](mailto:shancock@wnj.com)

You are probably beginning to notice some of the administrative difficulties in complying with the still relatively new Medicare mandatory reporting requirements. As you work through your specific reporting issues with your Responsible Reporting Entity (RRE)—which is typically your third-party administrator—it is probably a good time to remind you of the importance of group health plan participants providing their Medicare Health Insurance Claim Number (HICN) or Social Security Number (SSN) information to the RRE and to suggest that you keep on eye on the upcoming implementation of reporting for freestanding Health Reimbursement Arrangements (HRAs).



First, a recurring problem for RREs is obtaining HICN or SSN information of participants and their dependents.

Because of heightened awareness of the risks of identity theft, individuals may be reluctant to provide HICN or SSN information. In response to this problem, CMS has issued guidance advising participants and dependents to cooperate with RRE requests for HICN or SSN information. CMS issued a revised model collection form in August 2009 that RREs may use to assist them in obtaining individuals' HICN or SSN information. The model collection form is available for download at the following CMS Web site link: [http://www.cms.hhs.gov/MandatoryInsRep/04\\_Whats\\_New.asp#TopOfPage](http://www.cms.hhs.gov/MandatoryInsRep/04_Whats_New.asp#TopOfPage). When an individual refuses to provide HICN or SSN information, use of the model collection form provides the RRE with a safe harbor for purposes of Medicare mandatory reporting if the RRE:

- Does not know the individual is a Medicare beneficiary;
- Obtains a signed copy of the model collection form, even if the individual is later determined to be a Medicare beneficiary;
- Has the model collection form re-signed and dated every 12 months by the individual; and
- Retains the documentation.

Individuals who are reluctant to provide HICN or SSN information, however, may also ignore the model collection form. While CMS does not require that a health plan terminate an individual's coverage if the individual refuses to provide HICN or SSN information, CMS officials have suggested that the RRE should document its efforts to obtain a signed model collection form (for example, follow-up telephone calls made to request that the individual return the form).

You should also keep in mind that HICN or SSN information for dependents with coverage prior to January 1, 2009, does not need to be reported until the first quarter of 2011. Given the difficulty that RREs sometimes face in trying to obtain HICN or SSN information, you may want to reemphasize to your employees that participate in your group health plan that providing such information is important for Medicare mandatory reporting purposes.

Second, although Health Flexible Spending Arrangements and in most cases Health Savings Accounts are not subject to the Medicare mandatory reporting requirements, freestanding HRAs are subject to such reporting requirements, regardless of whether the HRA has an end-of-year carryover or a rollover feature.

In many cases, HRAs are bundled with a more comprehensive group health plan, in which case only employees electing participation in the group health plan also participate in the HRA. There is no separate reporting requirement for these HRAs, as information about participants in the HRA is reported along with information about the group health plan.



## Things Clients Are Asking Us About Retirement Plans

by Anthony J. Kolenic: akolenic@wnj.com

Ever wonder what other clients are asking us about? Here's a sampling.

- **Withdrawal Liability and “Plant Closing” Liability:** The economic downturn is prompting some clients to consider closing plants and to examine their collective bargaining obligation to contribute to multiemployer (union) pension plans. Either step can have significant consequences. Bargaining out of a multiemployer pension plan can trigger “withdrawal liability” that can be very significant ... we’ve seen cases where the liability is many times the sum of all of the hourly contributions ever made to the plan. Similarly, a plant closing where individuals employed at the plant participated in an employer-sponsored defined benefit plan may trigger an obligation to fund a five-year escrow of any shortfall in the plan’s funding. There are ways to deal with both withdrawal liability and plant closing liability, but they require advance planning.
- **The Definition of “Compensation”:** For several reasons, the definition of compensation used in retirement plans is getting much more attention recently. We have seen a lot of disparity between how a plan defines compensation and how that definition is applied in practice. In some cases, the differences relate to technical kinds of compensation, such as moving expenses and excess life insurance coverage. In other cases, the variations are the result of payroll practices that do not follow the plan language. It is important to find and address these discrepancies because they affect contributions and plan testing.
- **Auto Enrollment ... in Practice:** As more and more clients move to auto enrollment, we are helping to establish procedures to implement it successfully and to deliver the appropriate notices to participants. We are also seeing instances in which participants were not enrolled accurately. There is a mechanism through the IRS’s voluntary compliance program to deal with mistakes in that regard, but it requires prompt attention.
- **Fiduciary Process:** We could write a book about this one. We are seeing more concern with the potential liabilities of the investment committee and members of the Board of Directors, with the best ways to delegate fiduciary authority and the appropriate contract language with fiduciary advisers in that regard, and with compliance with Section 404(c) of ERISA in order to minimize the plan sponsor’s fiduciary exposure for participant investment decision-making. We are also seeing more attention paid to the selection and monitoring of investment alternatives for participants, particularly because of the issues arising lately with target date funds. Some target date funds have turned out to be not exactly as advertised, with problems coming to light as a result of the market downturn a year ago.
- **Participant Notices Generally:** We have a raft of new participant notices that are necessary now that did not exist two or three years ago, including both defined contribution and defined benefit statements for participants, the “QDIA” (or qualified default investment alternative) notice, automatic enrollment and safe harbor notices. In many cases, the notices must be provided annually – usually prior to the beginning of the plan year - and should be part of your regular schedule of administrative activities for the plan.
- **Updates of Distribution Forms:** The distribution forms for both defined contribution and defined benefit plans should be reviewed to make sure they contain appropriate updated language, such as the newly required discussion of the impact of deferring the commencement of payment. Also, the IRS just issued a new form of tax notice which should now be used for distributions.



## SOCIAL NETWORKING *continued*

productivity-cost/. And don't think the U.S. and U.K. are alone. *The Time of India* calls social networking sites a plague on "India Inc." see <http://timesofindia.indiatimes.com/city/mumbai/Social-networking-plagues-India-Inc/articleshow/5429382.cms>; and even *New Vision*, which bills itself as "Uganda's Leading Website" says: ". . . the 'majority' of corporations 'effectively lose close to 12.5% of total productivity each day since their employees keep accessing social sites.'" <http://www.newvision.co.ug/D/8/220/705325>

As if that wasn't enough, hackers are now using social media sites as an entry into your company's confidential information. [http://www.expertclick.com/NewsReleaseWire/How\\_to\\_Hack\\_a\\_Corporate\\_Networkwith\\_Facebook,201030121.aspx](http://www.expertclick.com/NewsReleaseWire/How_to_Hack_a_Corporate_Networkwith_Facebook,201030121.aspx)

So what should you do? Have your IT department deny access to these sites to employees while at work? Maybe. That is your call and it will surely cause you some employee relations issues if you do. One thing I am sure of though is you need a social networking policy. A couple of things to keep in mind as you are doing one. You want to make sure employees know they have to protect confidential information. If employees are going to post to social networking sites from work or by identifying you (their employer) they should include a disclaimer. All posts, whether from work or home, should be respectful of coworkers



Simply "surfing the Web" by employees costs U.S. companies about \$63 billion each year.

and not violate your EEO or harassment policy; and finally, time on social network sites should not interfere with productivity at work. You might also want to have some rules regarding blogging, especially if employees have blogs as part of their jobs. If you want to know more about social networking policies call any member of the WNJ Labor Practice Group. By the way, did I mention I have a blog?

## MEDICARE *continued*

However, if your plan offers a freestanding HRA benefit that is not tied to a particular health plan, the freestanding HRA must separately comply with the Medicare mandatory reporting requirements. Freestanding HRAs must start registration by May 1, 2010, in order to complete registration by June 30, 2010. However, if an RRE will have nothing to report because coverage does not overlap with Medicare, it is not required to register—which may occur if you have a freestanding, limited purpose HRA that, for example, only reimburses for dental and vision expenses but not for other medical expenses.

CMS guidance states that RREs that report freestanding HRA coverage with "effective dates" of October 1, 2010, must begin complying with the Medicare mandatory reporting requirements in the fourth quarter of 2010, and RREs that report freestanding HRA coverage with effective dates of January 1, 2011, must begin such compliance in the first quarter of 2011. At this point, it is unclear what

CMS means by "effective date" and more guidance is necessary. CMS, however, has provided the following guidance:

- RREs are not required to report HRA coverage with effective dates prior to October 1, 2010;
- RREs only need to report termination dates when a participant loses or cancels coverage;
- RREs only need to report HRA coverage that is not linked to other group health plan coverage; and
- RREs only need to report HRA coverage for annual benefit values that are \$1000 or more.

If you provide your employees with freestanding HRA coverage, you may want to verify that your third-party administrator is aware of these Medicare mandatory reporting requirements and intends to begin registration on May 1, 2010.

For clarification or additional information on the Medicare mandatory reporting requirements, feel free to contact a member of the WNJ Employee Benefits Practice Group. Information related to Medicare mandatory reporting requirements is also available at <http://www.cms.hhs.gov/MandatoryInsRep/>.

## 2009: YEAR OF THE EEOC?

Discrimination Charges Reach Record Highs and Payouts Total Over \$376 Million



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At the end of 2009, while most government agencies looked back at a year of decreased resources, stretched budgets and limited success, the U.S. Equal Employment Opportunity Commission (“the EEOC”) celebrated one of its best years ever. Of course, “best” is in the eye of the beholder. 2009 was not a great year at the EEOC for employers.

93,277 workplace discrimination charges were filed with the EEOC during 2009, the second highest level ever, and monetary relief for victims totaled more than \$376 million. The 2009 data shows that discrimination charges based on **disability, religion, national origin** and **age** hit record highs. Continuing a decade-long trend, the most frequently filed charges alleged discrimination based on **race** (36%), **retaliation** (36%), and **sex-based** discrimination (30%).



Though it is unclear whether this data reflects an increasingly successful federal agency or an increasingly hostile employment environment, the numbers come alive in a number of recent discrimination suit settlements.

For example, in December of 2009, Outback Steakhouse, Ralph Schomp Automotive and Riverstone Residential all experienced the sting of major discrimination claim settlements.

*“Cute girls should work in the front.” “Women managers let down and lose focus when they have children.”* These statements, among others, resulted in Outback Steakhouse paying a \$19 million settlement to victims of sex discrimination. In addition to the monetary damages, Outback agreed to a multi-faceted compliance program, including establishment of an online application system, creation of a new human resources position, employment of an outside consultant, and systematic reporting to the EEOC.

Facing charges of sex and age discrimination, the Colorado car dealership of Ralph Schomp Automotive settled with the EEOC for \$1.5 million and a similar compliance program, agreeing to post its anti-discrimination policy, provide anti-discrimination training, and systematically report to the EEOC. According to the lawsuit, five female employees were victims of offensive verbal comments and physical touching, demotion, refusal to transfer, salary reduction and failure to promote. In addition, the EEOC alleged that five older male employees were subjected to age-related comments prior to being terminated and replaced with younger, less experienced workers.

Finally, without even bothering to hire an attorney or to answer the complaint, Riverstone Residential, SW, LLC, an Arizona property management firm, settled a disability discrimination suit with the EEOC for \$30,000. The firm had been charged with unlawfully denying an employee disability accommodation, when the employee requested time off for treatment of his bipolar disorder, and unlawfully terminating the employee, when the employee informed the firm that he had been involuntarily hospitalized.

“Continuing a decade-long trend, the most frequently filed charges alleged discrimination based on race (36%), retaliation (36%), and sex-based discrimination (30%).”

Again, it is unclear why discrimination charges are at a near-historic level. It could be due to multiple factors, including greater accessibility of the EEOC to the public, economic conditions, increased diversity and demographic shifts in the labor force, employees’ greater awareness of the legal rights, and changes made to simplify the agency’s intake process. Whatever it is, employers need to be aware that we are facing another year of increasing discrimination claims. With that knowledge comes the ability to prepare an ongoing defense through successful training of managers, implementation of effective policies, and conscious awareness of the workplace environment.



APPLY NOW FOR  
H-1B VISAS

OCTOBER 2010



by Kathleen M. Hanenburg: [khanenburg@wnj.com](mailto:khanenburg@wnj.com)

**Do you anticipate hiring anyone this year who may need an H-1B visa?** If so, keep in mind that deadlines are approaching. The filing date is April 1 for new H-1B visas that will take effect on October 1, 2010. Once all of the new visas have been issued, no additional new H-1B's will be available until October 2011.

**H-1B LOTTERY**

In 2008, more than 160,000 petitions were filed at the start of the application period. Because of the high demand, officials held a lottery to allocate the 85,000 available visas. (Of the 85,000 total new H-1B's that will be available, 20,000 will be set aside exclusively for applicants who have earned a master's degree from a U.S. university.) Employers whose petitions were not selected in the lottery were unable to hire the professionals they needed at that time.

Last year, visas were available until December, but an improving economy might result in higher demand this year, which is why we are encouraging you to file early.

Remember, however, that a number of employers are not subject to the H-1B quotas and may file for H-1Bs at any time. These exempt employers include nonprofit research organizations, institutions of higher education and nonprofit organizations that are affiliated with institutions of higher education.

**NEW DEPARTMENT OF LABOR PROCEDURES**

The Department of Labor has adopted new procedures that can take a month or more to complete before an H-1B application can be filed. Under the new

procedures, employers who have not previously filed H-1B petitions must be approved by the DOL as bona fide business entities. It can take several weeks for the DOL to issue this approval, particularly for small businesses or businesses that have only been in operation a short time.

In addition, the DOL can take up to a week or more to approve labor condition applications even for employers who have previously filed H-1B petitions. In light of these new procedures, we strongly suggest application papers be completed no later than March 1 to insure an April 1 filing date.

**CONTACT INFORMATION**

Please contact us now if you have employees who are recent graduates currently authorized to work pursuant to optional practical training, or if you plan to hire someone who will need an H-1B visa and doesn't already have one through a current employer.

If you have questions about immigration, contact Kathy Hanenburg, chair of Warner's Immigration Practice Group, at 616.752.2151 or [khanenburg@wnj.com](mailto:khanenburg@wnj.com) or Angela Jenkins at 616.752.2480 or [ajenkins@wnj.com](mailto:ajenkins@wnj.com).

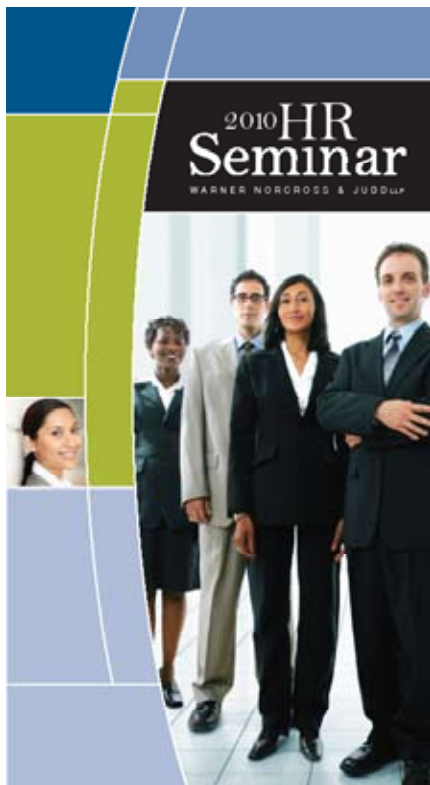
# 2010 HR Seminar

WARNER NORCROSS & JUDD LLP

REGISTRATION IS NOW OPEN

March 23, 2010  
8:30 am - 4:00 pm  
DeVos Place

Visit [wnj.com/events](http://wnj.com/events) for a schedule and descriptions of the 25 employee benefits and labor & employment breakout sessions being offered this year.



## I Was Wondering...

**Q:** What documentation do I need to verify that an employee has experienced an event that qualifies as a safe harbor hardship under our 401(k) plan?

**A:** A hardship distribution may only be made if the employee has supporting documentation that reasonably demonstrates the occurrence of the hardship event. The IRS does not have specific rules for what documentation must be provided, but for the safe harbor hardship events there is commonly used appropriate supporting documentation that you should be comfortable relying on. Having the employee check a box certifying that a hardship event has occurred is not sufficient: you must have supporting documentation.

- **Medical expenses** - a health care provider bill, along with a denial of payment from the insurance company, or a signed letter from the health care provider verifying the need and cost of treatment for expenses not yet incurred.
- **Purchase of principal residence** - a signed purchase agreement.
- **Twelve months' future tuition and related costs** - a bill from the educational institution or a letter enrolling the student and estimated costs or tuition, room, board and related expenses.
- **Payments to prevent eviction or foreclosure on principal residence** - a formal legal document giving notice that if the overdue rent or mortgage payment is not received by a certain date that formal eviction or foreclosure proceedings will begin.
- **Burial or funeral expenses** - a death certificate and funeral home bill.
- **Repair of casualty losses to a principal residence** - evidence of a casualty loss, a repair bill and proof the expenses were not covered by insurance.



## New FTC Guidelines May Hold Companies Liable for Unsolicited Employee Endorsements

by Janet L. Ramsey: [jramsey@wnj.com](mailto:jramsey@wnj.com)

You work for Company ABC and one of your best employees, Jane, maintains a blog which covers a wide variety of topics, from Jane’s recipe for her grandmother’s brownies to pictures of her dog, Tucker. Included within Jane’s blog posting is the following statement: “I’ve suffered from eczema for years, but have finally found a cure – the new lotion from ABC! I couldn’t believe how fast my eczema disappeared after using ABC’s lotion! Try it, you’ll be amazed!”

Company ABC, however, has no reliable evidence that its lotion cures eczema, which is why the claim is not made in ABC’s advertising. In fact, ABC never even knew Jane had a blog, was using the ABC lotion, or making claims about ABC’s lotion. Yet, under the new FTC guidelines on endorsements and testimonials, ABC could be liable for the unsubstantiated performance claim made by Jane regarding ABC’s lotion. And, in light of the FTC’s broad definition of “endorsement,” ABC’s liability could extend to Jane’s statements on her Facebook page or Twitter account.

Now, let’s assume that Jane’s endorsement is substantiated and ABC does have reliable and competent evidence that its lotion cures eczema. Jane’s blog is still a problem under the new FTC guidelines because Jane does not disclose on her blog that she is an employee of ABC, the company whose product she is endorsing. Under the new guidelines, any endorser who has a “material connection” with the product manufacturer must clearly and conspicuously disclose that fact. This “material connection” includes an employment relationship, even if the employee is not paid by the company to write the blog or endorse its products.

How do you protect your company from liability for this type of unsolicited endorsement? The issue is best managed through the company’s social media policy, which should: (a) prohibit employees from making false or misleading claims about the company’s products or services and, if employees do make claims in any social media, the employees must clearly and conspicuously disclose the employment relationship; or, (b) ban employees from making any comments regarding the company’s products or services in any social media. Once your company has chosen which policy path it will take, it should then ensure that appropriate and effective education, compliance and enforcement procedures are in place. If you need help establishing a social media policy for your company, give a member of our Labor and Employment Group a call.



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