

PATIENT PRIVACY **NEW LAW, NEW RIGHTS, NEW PROBLEMS?**

On April 14, 2003 a new federal law will go into effect dealing with the unauthorized disclosure of personal medical information. That new law, the Health Insurance Portability and Accountability Act, provides for civil and criminal penalties of up to \$250,000 in fines and up to 10 years in jail. The penalty provisions will certainly get the attention of the health care industry, which is in fact the specific intention of the Act.

In brief provisions of the Act require doctors, hospitals and other health care providers to take specific and delineated steps to assure that medical information is private and protected. The Act gives patients certain rights in managing their medical records and requires patient consent before doctors disclose information to employers, marketers or life insurance firms; furthermore, the Act permits patients to seek additional specific restrictions on disclosure of medical records. Finally, the Act provides that patients may examine their own health care records and, where necessary and appropriate, seek corrections of those records.

Patient advocacy groups will certainly
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BUSINESS; BENEFITS **FAMILY AND MEDICAL LEAVE ACT**

What exactly is the Family and Medical Leave Act ("FMLA")?

The FMLA provides covered employees the right to 12 weeks of unpaid, job-protected leave within a 12-month period to address family and medical responsibilities.

Who Does the FMLA Apply To?

The FMLA applies to private sector employers employing 50 or more employees for 20 or more weeks during the current or preceding year within a 75-mile radius of the work site. The FMLA applies to all public agency employers. All schools, whether public or private, are considered public agencies.

Which Employees Are Eligible for FMLA?

An employee must have worked for the employer at least 12 months and at least 1,250 hours within the 12-month period before the leave begins.

When Can Someone Take an FMLA Leave of Absence?

Both men and women can take leave for (1) the birth of the employee's son or daughter, (2) placement of a son or daughter with the employee for adoption or foster care, (3) family leave in order to care for a spouse, son, daughter, or parent of the employee, if that individual has a serious health condition, and (4) for a serious health condition that makes the employee unable to perform their job.

What is Considered a "Serious Health Condition"?

This is an illness, injury, impairment or physical or mental condition that includes at least one of the following:

- Any period of incapacity or treatment connected with inpatient care in a hospital, hospice or residential medical facility; or

- A period of incapacity requiring absence of more than three calendar days from work, school or other regular daily activities that also involves continuing treatment by, or under the supervision of, a health care provider; or
- Any period of incapacity, or treatment therefor, due to a chronic serious health condition (e.g., asthma, diabetes, epilepsy, etc.); or
- Any period of incapacity that is permanent or long-term due to a condition for which treatment may not be effective (e.g., alzheimer's, stroke, terminal disease, etc.); or
- Any absences to receive multiple treatments (including any period of recovery that follows) by, or on referral by, a health care provider for a condition that likely would result in incapacity of more than three consecutive days if left untreated (e.g., chemotherapy, physical therapy, dialysis, etc.)

When Does an Employee's Serious Health Condition Qualify for FMLA?

When the employee is unable to perform any one of his/her job functions or must be absent in order to receive medical treatments for that condition.

Can FMLA leave be paid leave?

Yes, FMLA allows the substitution of certain types of paid leave for unpaid leave if the employee wants it or the employer requires a substitution.

What Are the Employer's Duties With Regard to FMLA?

1. When an employee requests FMLA leave, the burden is on the employer to show that an employee has *not* worked the required 1,250 hours. If the employer cannot show a record of hours worked, then the employee is eligible to use FMLA leave.

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NEGLIGENCE
D.C. COURT EXPLAINS
PRESUMPTION OF
NEGLIGENCE IN REAR-END
AUTO ACCIDENT

Following local trial outcomes, it is remarkable how often juries return defense verdicts in “rear-ender” auto accident cases. While most claims arising from rear-enders—in fact most auto claims of any sort—settle prior to trial or before suit is even filed, it is not at all uncommon for a jury to accept a defendant’s explanation and rule in his or her favor.

The District of Columbia Court of Appeals recently faced a procedural variation on that theme when it considered a trial court’s “directed verdict” for defendant in a rear-end accident case. It was not the jury that sympathized with the driver-defendant; the trial judge had determined that evidence was insufficient to even let the jury consider it.

In *Warrick v. Walker*, D.C.App. No.01-CV-1151 (Jan. 16, 2003), the Court of Appeals focused on the long-recognized *presumption* of negligence in rear-end collisions. Angela Walker and her son were passengers in Mr. Walker’s taxicab when Walker rear-ended a truck legally stopped at a traffic signal. The Warricks’ case relied on the *rebuttable presumption* of negligence recognized in *Fisher v. Best*, 661 A.2d 1095 (D.C. 1995). The defense successfully argued that more proof was needed, that pursuant to *Pazmino v. WMATA*, 638 A.2d 677 (D.C. 1994), a rear-end collision by itself does not mean the following driver was negligent. The trial judge agreed with the defense argument and granted the defense motion for a directed verdict.

The Court of Appeals reversed the trial judge’s ruling. In *Fisher*, the court had explained that absent emergency or unusual circumstances, there will be a rebuttable presumption that the following vehicle’s driver was negligent. The *Warrick* situation differed somewhat from *Fisher* because, in *Fisher*, there was additional evidence that the driver had diverted his attention and that he was speeding. Nonetheless, if the only evidence of negligence is based on the presumption in a rear-end case, the matter should be left to the jury. The plaintiff satisfies his threshold burden by proving the facts establishing the presumption of

negligence. The defendant then bears the burden of *going forward* with evidence to rebut the presumption. The plaintiff, though, retains the burden of *persuasion*. Since the defendant here had presented no evidence of emergency or unusual circumstances that could have caused the accident, the determination of liability should have been left to the jury. The case now returns to Superior Court for a new trial.

LAWRENCE CARR

INTERNATIONAL ESTATE
PLANNING

THE USE OF FOREIGN
PARTNERSHIPS TO HOLD
U.S.-SITUS ASSETS

In prior issues of this publication, we have discussed the use of foreign corporations as a vehicle for nonresident aliens (NRAs) to invest in U.S.-situs assets and thus avoid the U.S. estate tax, while preserving income tax advantages. More specifically we have discussed the use of regular foreign corporations to hold U.S. realty, Foreign Personal Holding Companies to hold U.S. stock when the NRA does not have U.S. citizen beneficiaries, and Passive Foreign Investment Companies to hold U.S. stock when the NRA has U.S. citizen beneficiaries. The use of foreign corporations is virtually obligatory since NRAs are only allowed a \$60,000 applicable exclusion amount for U.S.-situs assets such as U.S. realty or stock in U.S. corporations.

Recently, we have been asked about the use of foreign partnerships by NRAs to hold U.S.-situs assets. Some U.S. investment houses have been offering investment vehicles to NRAs as foreign partnerships, rather than as foreign corporations. As usual in international tax law the answer to the question is tentative and complicated. The case-law on foreign partnerships is ambiguous. In some cases the courts and the Internal Revenue Service (IRS) take the position that a foreign partnership is a separate entity (“entity theory”), so that the IRS will not look through the entity to the underlying assets. Under the entity theory, therefore, it is safe to hold U.S.-situs assets through a foreign partnership.

On the other hand there are cases that view foreign partnerships under the “aggregate theory”; that is, the partnership is viewed as a collection of its underlying assets. Under this theory the IRS would look through the partnership and tax any U.S. realty or U.S. stock held by the partnership as if the partnership did not exist. To further muddy the waters, if an NRA decedent was a tax resident of a country with which the U.S. entered into an estate tax treaty, all the normal revenue rules are superseded by the treaty and the estate’s attorney would need to study the treaty carefully to see what treatment the estate would receive.

Needless to say treaties may be quite useful after the fact in some instances; but, planning as if the treaty were going to be in force forever is imprudent because treaties can be revoked so easily. It is much safer to plan according to the rules in the Internal Revenue Code using treaties only as a last resort.

To sum up, the use of partnerships by NRAs who wish to invest in U.S. real estate or in the U.S. stock market is not recommended. The foreign investor (and we) will sleep much better if he or she sticks to the tried and true use of foreign corporations. And, speaking of sleep, if you are still awake after reading this article, please feel free to call Roy Morris or the author.

NÉSTOR CRUZ

PATIENT PRIVACY
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applaud the new law. Many in the health care industry, though, believe that the requirements of the new law are cumbersome, complicated and, in certain instances, might actually impede patient care.

The Act will be enforced by the Office for Civil Rights of the Health and Human Services Department. An individual who believes the Act has been violated must make a complaint to that office in writing within 180 days of the alleged violation. It should be noted that, as with the enactment of any new and controversial law, many aspects of the privacy provisions will be refined and identified through application, enforcement proceedings and litigation.

STEPHEN GRAEFF

NEGLIGENCE TRIAL COURT'S STATUTE OF LIMITATIONS RULING REVERSED

In its recent decision in *Doe v. Medlantic Health Care Group, Inc.*, D.C.App. No.00-CV-247 (Jan. 16, 2003), the District of Columbia Court of Appeals was once again called upon to explain and apply the law regarding when a cause of action *accrues* for statute of limitations purposes.

John Doe and TG were co-workers with an evening janitorial services company. Both held daytime positions elsewhere, with TG working as a receptionist at the Washington Hospital Center (WHC). Unbeknownst to TG or his other co-workers, Doe is HIV positive. In April 1996, after treatment at WHC, Doe visited TG at her station. Doe did not disclose his condition, but TG inquired as to the unusual spelling of his surname. In the ensuing days and weeks, Doe's HIV condition became widely known at the janitorial service, and he was viciously teased and ridiculed. Although TG denied being the source of the rumors, other information and TG's reaction to a pointed exchange on May 20 led Doe to believe she was indeed the source—and that she had accessed the information improperly at WHC. One year later, on May 20, 1997, Doe filed suit for invasion of privacy and breach of confidential relationship. The breach of confidential relationship count focused on the hospital defendant for its failure to safeguard information from TG.

After the jury returned a verdict for John Doe and awarded him damages of \$250,000, the trial judge granted defendant's motion for judgment notwithstanding the verdict, ruling that Doe's action was filed after the one-year statute of limitations period. The judge ruled that, applying the *discovery* rule, Doe's action *accrued* earlier than May 20 and that, therefore, his suit was time barred.

The Court of Appeals disagreed and, in a split decision, reversed the trial court's ruling. The Court reasoned that it was reasonable for the jury to conclude from evidence presented that Doe did not have *inquiry* notice sufficient to start the limitations period prior to May 20. Among

other things, the close relationship between Doe and TG added to the credibility of TG's denial that she was the source of the rumors; and, the jury, not the judge, should have weighed that evidence. Moreover, at least regarding the breach of confidentiality count, the appellate court explained that Doe's awareness of hospital wrongdoing was not evident until May 21, when he called the hospital to confirm its policy of confidentiality. The Court concluded that the statute of limitations issue had been properly submitted to the jury and that the trial judge's rejection of that verdict was improper.

In a comprehensive dissenting opinion, Judge Belson supported the trial court ruling as well founded and consistent with longstanding precedent. Judge Belson summarizes evidence of numerous incidents and exchanges in April 1996 that should have given John Doe *inquiry* notice of his cause of action. A plaintiff need not fully appreciate his loss (damages). For an action to *accrue*, one must know or by the exercise of reasonable diligence should know (1) of the injury, (2) its cause in fact, and (3) some evidence of wrongdoing. Even giving Doe the benefit of all favorable inferences from evidence presented, Judge Belson concludes that Doe "simply failed to pursue the matter with reasonable diligence after he was first informed that (TG) was indeed the culprit."

BUSINESS; BENEFITS

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2. The employer must give the employee written notice, within two business days of a FMLA request, if the employee is not eligible for FMLA leave. If the employee is eligible, the employer must tell him/her that the leave will be counted toward FMLA and how much time is being recorded toward FMLA.
3. Once leave has been granted or the employee provides approval notice, the employer cannot alter the leave, even if the employer then drops below the threshold of eligibility for the FMLA.
4. The employer is allowed to ask for

documentation of relationship if taking off to care for another, or a medical provider's certificate.

5. The employer must continue the employee's benefits during the leave, the same as they would have before the leave.
6. Every employer covered by FMLA must post in a conspicuous place and keep posted a notice outlining the Act's provisions, whether or not the have any currently eligible employees.

What Are the Employee's Duties With Regard to FMLA?

1. The employee must provide 30 days notice for foreseeable events that require FMLA (*e.g.*, scheduled surgery, adoption, birth of a child). The employer is allowed to delay the onset of FMLA without a 30-day notice.
2. In the event an employee's need for leave is unforeseeable, notice must be given as soon as practicable, generally within one or two business days of becoming aware of the need.
3. Notice should include information indicating the leave is covered under FMLA and specifying the timing and duration of the leave.
4. The employee must continue to pay his portion of benefits, the same as if he were not on leave.
5. The employee has the right to return to the same or equivalent position, pay and benefits at the conclusion of their leave.
6. An employee has a minimum of 15 calendar days following an employer's written request to submit a medical certification

Does FMLA Leave Have to be Taken All at Once?

No, the leave can be taken on an intermittent basis.

Is Substance Abuse Covered Under FMLA?

Substance abuse is covered when the employee is seeking treatment, but not if or when they are just impaired by their usage.

BRENDA HANKINS

CARR, MORRIS & GRAEFF, P.C.

Carr, Morris & Graeff, P.C., was established in 1982 by the named principals—Lawrence Carr, Roy Morris and Stephen Graeff. It is a diversified firm structured primarily to meet the legal needs of businesses and their principals.

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STAFF NOTES

Roy Morris's mid-life motor-mania has reached the motorcycle phase. After taking the requisite safety course, Roy bought himself a gentleman's sport bike (Honda VFR). At his son Robert's invitation, the two of them will spend the last week of March cruising the wide open spaces of northern New Mexico and Navajo country. Roy will be renting a Harley-Davidson Electra Glide dresser for that trip, and is having some trouble reconciling himself to the Harley image. His son advised, it's like opera. Once you get over the inherent ridiculousness of it, it's kind of cool.

* * *

King of the Neighborhood. People scoffed four years ago when Phil Schwartz bought a snow blower. Well, who's laughing now? This year's miserable weather made Phil look like a genius.

* * *

Correction: In our last issue, we included an announcement regarding Adam Wilk's departure. Our claim that Adam's contributions to the firm could not be *understated* was inadvertent. We meant *overstated*, of course. In the tradition of several sports autobiographers, we would like to explain that we misquoted ourselves.

* * *

As a member of the Board of Trustees of the Washington Opera, Néstor Cruz helped organize a lunch honoring artistic director Plácido Domingo. The gathering was hosted by First Lady Laura Bush at the White House.

CARR, MORRIS & GRAEFF, P.C.

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