



## Correct COBRA, HIPAA and Other Group Health Plan Violations Quickly: Here's Why

by Susan H. Sherman; [shermans@millerjohnson.com](mailto:shermans@millerjohnson.com); 616.831.1782

The Internal Revenue Code imposes an excise tax on employers who fail to comply with various federal mandates for group health plans like COBRA and HIPAA. But the IRS has historically not imposed the tax for violations discovered during an audit, and there has been no requirement that employers self-report the tax. As a result, the excise tax has been a minimal concern for employers who failed to comply with these mandates.

Now that has changed. The IRS issued final regulations for self-reporting (and paying) the excise tax for such violations and a new form (Form 8929) to use to self-report, starting this year.

### VIOLATIONS SUBJECT TO THE EXCISE TAX

The excise tax is imposed on employers that violate the following federal laws and regulations issued under them:

- **COBRA**
- **HIPAA's portability and nondiscrimination rules**
- **Genetic Information Nondiscrimination Act (GINA)**
- **Mental Health Parity Act**
- **Newborns' and Mothers' Health Protection Act** (requires a minimum hospital stay for newborns and mothers)

- **Michelle's Law** (requires continued coverage for a dependent child who would otherwise lose eligibility for coverage as a full-time student due to a medical condition)
- **Health savings account (HSA) comparability rules** (requires that employers making contributions to health savings accounts not discriminate when doing so)



Susan H. Sherman

### AMOUNT OF THE EXCISE TAX

The excise tax for violations of mandates other than the HSA comparability rules is \$100 per day for each day of the noncompliance period, which begins on the date the failure to comply with the mandate first occurs. This could be the date a notice is not timely provided or the date coverage is first denied, for example. The noncompliance period ends when the failure is corrected. The failure is treated as corrected if:

- **It is retroactively undone, to the extent possible.**
- **Affected participant is placed in a financial position that is as good as the position he or she would have been in if the failure hadn't occurred.**

### IN THIS ISSUE

2

No Smoking

4

FMLA Leave and Bonuses

5

Text, Tweets and Facebook

6

Superdrunk

7

Court Brief

In the News

# No Smoking in the Workplace

by Marcus W. Campbell; [campbellm@millerjohnson.com](mailto:campbellm@millerjohnson.com); 616.831.1791  
and Joshua D. Meeuwse; [meeuwsej@millerjohnson.com](mailto:meeuwsej@millerjohnson.com); 269.226.2983



Marcus W. Campbell Joshua D. Meeuwse

Michigan's new law banning smoking in the workplace goes into effect on May 1. It forces employers to take aggressive actions to enforce the ban and penalizes passive employers as well as illicit smokers. It prohibits smoking in any building where employees perform services—and that means throughout the building, not just in the areas where the employees actually work.

The law applies to both private and public employers, including all hotels, office buildings, retailers, wholesalers, and manufacturers. It also prohibits smoking in all food service establishments, without exception. Fixed and mobile food service businesses, including coffee shops, luncheonettes, concession stands, rental halls, restaurants, bars, cocktail lounges, and nightclubs are all covered.

There are, however, several exceptions to the new law. It excludes cigar bars, tobacco specialty stores, and the gaming areas of casinos as long as they meet certain conditions. It also allows smoking in enclosed areas that are not used for work, as long as they are not connected to any work areas. For example, employees may smoke in enclosed smoke huts that are not connected to any buildings, as long as they do not perform any work in the huts.

You need to be aware that the law requires employers and managers to take an active role in preventing smoking. If you own, operate, or manage a work site, or a restaurant, you must do the following:

- **Post no smoking signs at the entrance and in every building.**
- **Remove ashtrays and other smoking paraphernalia from the prohibited areas. Paraphernalia is defined broadly to include all devices used in smoking.**
- **Refuse to serve smokers who are violating the act.**
- **Inform smokers that they are violating the act, ask them to stop, and ask them to leave the area if they don't.**

If you do not follow these requirements, you may be fined up to \$100 for the first violation and up to \$500 for further violations. The law also says that an employer or restaurant may not retaliate against an employee who exercises his or her rights under the statute. The law does not explain what those rights are, but this probably means that you can not fire employees who tell customers or co-workers to stop breaking the law.

The Department of Health and local health departments have the primary authority to enforce the new law. A private citizen may also file a lawsuit asking a court to issue an injunction stopping any violations, as long as he or she used the building in the past 60 days. The law states that these remedies are independent and cumulative, which means the Department of Health, local health departments, and private citizens could all file actions against an employer, and they could be entitled to separate remedies.

*If you have any questions about banning smoking in the workplace, please contact one of the authors or your Miller Johnson employment attorney.*

Different rules apply for a failure to comply with the HSA comparability rules. Then, the excise tax is 35 percent of the amount the employer contributed to the HSAs of all employees during the calendar year.

## POTENTIAL RELIEF FROM THE EXCISE TAX

There are some exceptions to the excise tax for violations of mandates other than the HSA comparability rules. First, if the employer doesn't know about the failure and wouldn't have known about the failure if reasonable diligence had been exercised, the noncompliance period does not start until the first day the employer knew or should have known about the failure. Then, if the failure is corrected within 30 days after the employer knew, or should have known about the failure, the excise tax does not apply. This gives you a strong incentive to correct compliance failures as quickly as possible after you discover them.

Again, the rules are different for a failure to comply with the HSA comparability rules. There is no exception to the tax if the violation is corrected within 30 days of its discovery, the IRS can waive the tax if the failure to comply was due to reasonable cause and not willful neglect. It can also waive all or part of the tax if it deems that the amount otherwise due would be excessive relative to the failure involved.

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**“The IRS issued final regulations for self-reporting (and paying) the excise tax on employers who fail to comply with various federal mandates for group health plans like COBRA and HIPAA.”**

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## REPORTING VIOLATIONS AND PAYING THE EXCISE TAX

You must now report violations by filing IRS Form 8928. Form 8928 and the excise tax for violations other than a failure to comply with the HSA comparability rules are due on or before the date the employer's income tax return for the year in which the failure occurred is due, without extensions. Form 8929 and the excise tax for a failure to comply with the HSA comparability rules are due by April 15 of the year following the calendar year in which the failure occurred.

If Form 8928 and the excise tax are not filed and paid on time, the IRS will impose penalties. The penalty for filing a late return is 5 percent of the unpaid tax for each month or part of a month the return is late, up to 25 percent of the unpaid tax. The penalty for late payment of the excise tax is 0.5 percent of the unpaid tax for each month or part of the month the tax is late, up to 25 percent. Interest is charged on the penalties and unpaid tax.

## EFFECTIVE DATE OF NEW REPORTING REQUIREMENT

The requirement to self-report and pay the excise tax for violations of the HSA comparability rules applies for violations that occur in the 2010 calendar year. The requirement to self-report and pay the excise for other violations applies for any Form 8929 or excise tax due on or after Jan. 1, 2010. This appears to require that the excise tax be paid for violations that occurred before the effective date of the regulation and were not timely corrected.

*If you have any questions about the final regulations for self-reporting (and paying) the excise tax, please contact the author or an attorney in Miller Johnson's employee benefits practice group.*

# How Do FMLA Leaves Affect Your Employee Bonuses?

by Sarah K. Willey; [willeys@millerjohnson.com](mailto:willeys@millerjohnson.com); 269.226.2957  
and Rebecca L. Strauss; [straussr@millerjohnson.com](mailto:straussr@millerjohnson.com); 269.226.2986



Sarah K. Willey



Rebecca L. Strauss

Attendance and performance bonuses—so called goal-based bonuses—can be powerful tools to motivate your employees by rewarding performance, safety, attendance, or other behavior you want to encourage. Have you considered incentive bonuses in the past but hesitated to use them because the Family and Medical Leave Act (FMLA) regulations did not make it clear how to treat employees whose bonuses might be affected by their FMLA leave? Fortunately, new FMLA regulations have created a standard that is easier to apply.

Simply stated, the new regulations require employers to treat FMLA absences and non-FMLA absences equally. Employees cannot be treated worse for taking FMLA absences than they would have been had the absences not qualified for FMLA protection. And if a perfect attendance bonus makes no exception for any absences no matter what the cause, an FMLA absence may be counted against an employee's attendance for the purposes of qualifying for the bonus.

To apply the new standards, we suggest using the following series of three questions:

## IS THE BONUS FOR ACHIEVING A SPECIFIC GOAL?

Only goal-based bonuses may be denied or prorated for employees who have taken FMLA leaves. Luckily, the regulations define "goal-based" very broadly, and only bonuses awarded to all employees, like holiday bonuses, are not considered goal-based. So, attendance bonuses, safety bonuses, production bonuses, and sales bonuses are all goal-based bonuses.

## ARE EMPLOYEES "CREDITED" FOR ANY OTHER ABSENCES?

For goal-based bonuses other than attendance bonuses, like production or sales bonuses, employers sometimes give employees a bump to account for time missed. If you do that, you must treat employees who have taken FMLA leave the same as employees who have taken other types of leave. Think of time missed as either paid or unpaid and apply the same standard for all time missed in either category.

## ARE EMPLOYEES "PENALIZED" FOR ANY OTHER ABSENCES?

Some bonuses—usually attendance-based bonuses—are reduced or prorated depending on the time the employee has actually worked. Your approach should be the same as in the preceding situation. That is, if you penalize employees for absences, you must apply the same standard for FMLA and non-FMLA absences. Again, it is easiest to separate absences according to whether they are paid or unpaid and use the same approach for absences in both categories.

We recommend that employers carefully draft bonus programs to ensure that they comply with the FMLA. A well-drafted program may be one of the most effective ways to encourage and reward performance. Miller Johnson has a specialized FMLA Solutions Practice Group to provide expertise on all FMLA concerns.

## "THE NEW FMLA: THE LANDSCAPE AFTER ALL OF THE AMENDMENTS AND REVISIONS"

Join us at this **Miller Johnson workshop.**

**"The New FMLA: The Landscape After All of the Amendments and Revisions."** It will be held in Grand Rapids on April 13. You can register at [www.millerjohnson.com](http://www.millerjohnson.com) in the Events section.

# Texts, Tweets, and Facebook: Drafting an Effective Social Media Policy

by Gregory P. Ripple; [rippleg@millerjohnson.com](mailto:rippleg@millerjohnson.com); 616.831.1797  
and Jeffrey C. Melville; [melvillej@millerjohnson.com](mailto:melvillej@millerjohnson.com); 616.831.1737

The use of social media has exploded in our society, and even if you don't use it, it's almost certain your employees do. Defined broadly, social media is Internet-based media that allows anyone to create content or comment on content posted by others. Social media includes:

- **Social networking sites, e.g., Facebook, MySpace**
- **Video- and photo-sharing websites, e.g., Flickr, YouTube**
- **Micro-blogging sites, e.g., Twitter**
- **Weblogs, including corporate blogs, personal blogs, or blogs hosted by traditional media publications**
- **Forums and discussion boards**
- **Online encyclopedias, e.g., Wikipedia**
- **Any other web site that allows individuals to publish their own content or comment on content posted by others**

Yes, they're doing it, and you need to review your employment policies and practices to make sure they cover all these activities and types of media.

In many ways, a social media policy is very much like Internet or e-mail usage policy. Social media is a new form of communication, just as the Internet and e-mail were a decade ago. Companies need to protect themselves against legal claims for discrimination or harassment and need to protect their confidential information and intellectual property. Twenty-five years ago employers were primarily concerned with face-to-face communications. Ten years ago, they had to start addressing new avenues of communication provided by the Internet and e-mail. Now, they need to address social media. The concerns remain the same.

There is no such thing as a one-size-fits-all social media policy. A company's social media policy needs to reflect the particular concerns of the company, and how it has chosen to embrace social media. However, there are some common themes in any social media policy.



*Gregory P. Ripple*



*Jeffrey C. Melville*

- **Employees who create social media that concerns or relates to the company's business or industry should be required to post a disclaimer stating that they speak only for themselves, not for the company. The employee should not create any content that suggests that the employee has the authority to speak for the company.**
- **Employees must not reveal any confidential information through social media.**
- **Likewise, employees must not use the company's logos, trademarks, or any other intellectual property in any social media content.**
- **Social media content should not violate any other applicable company employment policy, including harassment and computer usage policies. Harassing, threatening, defaming, demeaning social media content cannot be tolerated.**
- **Finally, employees should be reminded to assume that social media content will be accessible to the general public. Once posted on the Internet, information is difficult to control or contain.**

An effective social media policy successfully balances the employee's privacy rights with the employer's legitimate business interests. Developing a social media policy also provides a reminder that all employment policies should be reviewed and updated regularly. Miller Johnson's labor and employment attorneys regularly help clients review and develop employment policies. Please contact your Miller Johnson attorney to discuss the needs of your company and a new social media policy.

# Do Not be “Superdrunk” for Halloween

by Mark P. Hunting; [huntingm@millerjohnson.com](mailto:huntingm@millerjohnson.com); 616.831.1763



Mark P. Hunting

On Oct. 31, 2010 the drunk driving laws in the State of Michigan will change. Slightly over a year ago Governor Granholm signed into law what is being touted as the “Superdrunk” revisions to the current drunk driving statute. And they are likely to have a significant impact on people who end up on the wrong side of them.

The most important provision of the law is a new sub-category of “drunk” within the drunk driving statute. If you are arrested on suspicion of drunk driving and have a blood alcohol content (BAC) of 0.17 or more, you will be subject to enhanced penalties that differ in material respects from “regular” drunk driving penalties.

The consequences are even more severe if you have prior drunk driving convictions. Furthermore, the imposition of the breath ignition interlock device, the so called “blow and go,” on a vehicle can be costly, and any alcohol registered could be used against a defendant as a violation of probationary terms, which will include no alcohol consumption.

It is likely that this new sub-category will also create a new option for plea negotiations. Depending on the BAC, it may be possible to plead a “superdrunk” driving charge down to a “regular” drunk driving charge, saving money and drivers license suspension time. However, each prosecuting attorney’s office will handle these new cases in its own way, and only time will tell how they will do that.

HOW DO THEY COMPARE?	
REGULAR DRUNK	SUPERDRUNK
Up to 93 days in jail	Up to 180 days in jail
Fines between \$100 and \$500	Fines between \$200 and \$700
Suspension of driving privileges for six months. No driving for any reason for the first 30 days, followed by a restricted license.	Suspension of driving privileges for one year. No driving for any reason for the first 45 days, followed by a restricted license with a mandatory approved breath ignition interlock device requiring a breath sample essentially free from alcohol be provided before the vehicle will start. The cost is to be borne by the defendant.
A mandatory substance abuse assessment.	Mandatory participation in and completion of at least one alcohol treatment program for a period of not less than one year.

*If you have any questions about this new law, please contact the author or a member of Miller Johnson’s criminal law practice group.*

# COURT BRIEF

## LEVERAGED BUYOUT HELD TO BE PROTECTED UNDER SECTION 546(e)

The U.S. Supreme Court has recently declined to review a decision of the Sixth Circuit Court of Appeals, which determined that payments made to former shareholders of Quality Stores, Inc. as part of a leveraged buyout could not be recovered under the Uniform Fraudulent Conveyance Act. The decision is particularly noteworthy because the stock of Quality Stores was privately held. The shareholders relied on Section 546(e) of the Bankruptcy Code, which provides that a bankruptcy trustee may not avoid a prepetition transfer that is a settlement payment made by or to a financial institution. The settlement payment was transferred by the acquiring company to HSBC

Bank as the “transfer agent.” The bank then paid the shareholders in exchange for their stock. The trustee argued that Section 546(e) was intended to apply only to transactions involving publicly held stock transferred over public exchanges. The Sixth Circuit held that Section 546(e) is not limited to publicly held stock and that plain language interpretation does not lead to an absurd result. *The shareholders were represented by Miller Johnson’s Boyd Henderson; hendersonb@millerjohnson.com; 616.831.1719.*



*Boyd A. Henderson*

## MILLER JOHNSON IN THE NEWS

**MILLER JOHNSON** celebrated Martin Luther King Jr. Day with 65 attorneys and 79 staff doing service projects for 17 charitable organizations in West Michigan on Jan. 18. This was promoted in the *Kalamazoo Gazette* and WZZM TV 13. FOX 17, WOOD TV 8, *Business Review*, and *Michigan Lawyers Weekly* covered the projects.

**T.J. ACKERT** was quoted in the article “Building Information Modeling (BIM): Shaping the future of construction” in the winter 2010 issue of *Michigan Merit*.

**FRANK E. BERRODIN** was appointed to the Board of Education of the William C. Abney Academy.

**CHRISTOPHER M. BROWN** was appointed to the National Association of Estate Planners and Councils board and received his Accredited Estate Planner designation.

**MARCUS W. CAMPBELL** spoke on “Health Care Provider Reimbursement in the Worker’s Compensation System” at the Michigan Patient Accounting Association’s general meeting in Lansing on March 19.

**GARY A. CHAMBERLIN** presented “FLSA/Wage and Hour Issues with Furlough Days” on Feb. 25 at the Michigan Negotiators 2010 Spring Conference. He also presented “Family and Medical Leave Act Changes/Updates” at the Southwest Michigan School Business Officials Spring Conference on March 4.

**CAROL J. KARR** was named one of “50 Most Influential Women in West Michigan” by *Grand Rapids Business Journal*. She was recently appointed Vice Chair of the Grand Rapids Community Foundation. She is also speaking at a GVSU retirement planning seminar on April 8.

**JOHN F. KORYTO** presented at the “International Student Employment Regulations Information Session” for Western Michigan University’s Career and Student Employment Services on Jan. 26.

**JON G. MARCH** was named one of 25 “Leaders in the Law” by *Michigan Lawyers Weekly*.

**GREGORY P. RIPPLE** will present “How to Develop and Maintain a Safety Program: MIOSHA Rules and Regulations” for the Michigan Chamber of Commerce on May 5, in Lansing, May 11 in Grand Rapids and May 13 in Novi.



**MANAGING MEMBER**

**Craig A. Mutch**  
616.831.1735  
mutchc@millerjohnson.com



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**GRAND RAPIDS**

**p** 616.831.1700  
**f** 616.831.1701

**KALAMAZOO**

**p** 269.226.2950  
**f** 269.226.2951

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**BUSINESS SECTION**

**CHAIR**  
**Ronald E. Roden**  
616.831.1745  
rodenr@millerjohnson.com

**VICE CHAIR**  
**Mark Rizik**  
616.831.1744  
rizikm@millerjohnson.com

**EMPLOYMENT SECTION**

**CHAIR**  
**Peter J. Kok**  
616.831.1724  
kokp@millerjohnson.com

**VICE CHAIR**  
**John F. Koryto**  
269.226.2979  
korytoj@millerjohnson.com

**LITIGATION SECTION**

**CHAIR**  
**James R. Peterson**  
616.831.1740  
petersonj@millerjohnson.com

**VICE CHAIR**  
**David J. Gass**  
616.831.1717  
gassd@millerjohnson.com

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