

## Employers' Challenges Under Federal Health Reform

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The *Wall Street Journal* recently reported the conclusion of management consultants, McKinsey & Co., that between 30% and 50% of the 1300 employers surveyed are likely to drop health benefit coverage for their employees after the Obama health reforms fully take effect in 2014. (The more the employer knew about the health reforms, the more likely it was inclined to drop coverage.) If the survey results speak for the majority of U.S. employers, then a significant shift may be close at hand either away from employer-sponsored health benefits coverage or away from the current version of the new federal healthcare law, or both.

The potential added cost of the federally-mandated benefits is one of the major reasons many employers are re-thinking the feasibility of providing employees ongoing healthcare benefits. For example, the cost of expanding coverage to persons with pre-existing conditions will tend to drive up health insurance costs, as will covering children under family coverage who are past their majority and up to age 27. Group health plans sponsored by employers must also cover a "nondiscriminatory" group of employees. However, the regulators have declined to state, at this writing, whether discrimination will be design-based or utilization tested. The resolution of that question in favor of utilization tested discrimination could also have a significant cost impact on many employers.

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In addition, the new federal laws define for the first time the medical services that must be covered if an employer offers health coverage. These "essential services" include substance abuse disorders, prescription drug coverage, and rehabilitative services in addition to the customary preventative care, hospitalization, mental health services and maternity and newborn care.

In addition, the regulators imposed annual dollar floors on the value of essential services that must be offered to each person covered under an employer health plan, whether or not that plan is "grandfathered." These are:

- \$750,000 for a plan year beginning on or after September 23, 2010 but before September 23, 2011;
- \$1.25 million for a plan year beginning on or after September 23, 2011, but before September 23, 2012;
- \$2 million for a plan year beginning on or after September 23, 2012 but before January 1, 2014.

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## Amazing Clients<sup>®</sup>

American  
Traffic Solutions<sup>™</sup>

### Cameras and Road Safety

George J. Hittner, General Counsel, Corporate Secretary & V.P. Governmental Relations  
Amy L. Rasor, Deputy General Counsel  
Geni Tunstall, Associate General Counsel

Times are tough. Everywhere you look, companies are shedding payroll or just treading water, waiting for the "recovery" to take hold.

But not at American Traffic Solutions ("ATS"), which is the leading provider of traffic intersection safety cameras and digital radar speed cameras in North America.

Business is booming at ATS as cash-strapped municipalities, counties and states look for ways to do more with less, opting for digital safety

cameras that promise reduced law enforcement costs, improved driver and pedestrian safety and enhanced enforcement revenues.

According to George J. Hittner, the General Counsel, Corporate Secretary & V.P. for Governmental Relations at ATS, the company has been adding approximately 100 new clients for every five that it loses in the past few years. The once fledgling, Arizona-based company has also undertaken three acquisitions in recent years, and now has nearly 900 employees and close to 3,000 safety cameras in action, serving 21 states, the District of Columbia and two Canadian provinces.

"These systems are gaining acceptance because they work and they save lives," says Hittner, who further states that the cameras "retrain drivers that red really means stop and yellow means slow down." He also cites a number of statistics and studies to support his claim, including the following:

- On average, it takes just 18 months after system installments to see a 50 percent reduction in roadway violations.

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## Litigation Holds

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If your business hasn't been through the harrowing process of litigation in the past few years, the terms "litigation hold," "preservation order" and "spoliation" probably sound unfamiliar and slightly ominous. They should – if your business doesn't recognize its obligations under these recently enacted rules, it runs the risk of making fatal mistakes right at the outset of the litigation.

In 2006, the federal courts instituted changes to litigation discovery rules to deal with new issues and problems presented by the explosion of electronic data. Simply put, companies are now required to take steps to "hold" or preserve all electronic records *even before the litigation begins*.

A "litigation hold" is the process by which a company advises its employees of pending or anticipated litigation, and instructs them about their obligation to preserve all potentially relevant or discoverable documents. A legal hold should give detailed instructions that the company's employees can easily follow in order to preserve data. This notification is a critical step that is often the company's best defense against claims of "spoliation," which means the improper destruction or loss of evidence. The possible sanctions for such a failure to preserve evidence can be extremely serious or

even fatal to your position in the case. As a federal court in New York recently observed: "By now, it should be abundantly clear that the duty to preserve means what it says and that a failure to preserve records – paper or electronic – and to search in the right places for those records, will inevitably result in the spoliation of evidence."

An effective litigation hold letter should be drafted by the company's lawyer who is most familiar with the details of the pending or threatened litigation. It is critical to include in the notice enough details about the litigation so that employees can easily understand the subject matter and types of records that must be preserved.

Although the process need not be torturous, for a quick mnemonic device to keep in mind for your first or next encounter with litigation, think "S.A.D.I.S.M.": Suspend any destruction of electronic or paper data relevant to the litigation. Alert your lawyer. Define the scope of relevant information including data residing in any location or on any system under the company's control. Instruct the proper employees about the details of the litigation hold and be sure to include your IT director. Secure the data in an accessible and searchable format. Monitor (and document) your company's ongoing compliance with the terms of the preservation order.

Once you have ensured that your company has met its obligations to preserve its data, you can move on to the important business of building a successful case. ■■■

*Hollie Capuano, Litigation Technology Paralegal, was a contributing author to this article.*

## When You See Someone "Slowing Down" ...Slow Down

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We are witnesses to the largest inter-generational transfer of wealth in history as the generations that came of age during World War II and thereafter pass on. Unrecognized cognitive decline and real dependence on others for care create great opportunities for mischief against the elderly and infirm. In a growing number of court cases, we see the struggles for control over this wealth transfer played out – mostly, but not always, in bitter intra-family disputes. These disputes take many forms, from contested guardianship cases to lawsuits claiming theft or embezzlement under powers of attorney, trusts or access to bank accounts. At the heart of these contests are legal questions of competence and undue influence. Preventing the abuses that give rise to these disputes would be better than winning any lawsuit to recover the lost assets. This article presents points to watch for and act on before problems grow out of control.

An increasingly common theme is for property to be transferred, or instruments to be signed, by someone who only appears to understand what is going on. Sometimes, we refer to such people as "slowing down." Recent studies reveal that a significant number of persons above the age of 65 have undiagnosed, and potentially disabling, forms of dementia. This can often be the case for an

Alzheimer's victim, but Alzheimer's is only one of many causes of cognitive impairments. Others include mini-strokes, vascular disease, medication, depression or another underlying health issue. In many cases, family members and friends will say, in hindsight, that they missed or misread warning signs of failing mental status and that they often held back from interfering for the sake of preserving "independence." Forms of dementia, such as Alzheimer's disease, may well have reached a point where a person has lost legal competence to sign a will or trust, to make a contract, or to take other legally significant steps; the person still appears "fine," but just a little "slow" or "forgetful." This is a stage of great vulnerability.

Ailments or conditions that do not affect cognitive abilities also are ripe for exploitation. The threat of a nursing home, fading physical independence, loneliness and a sense or a need to please a care provider often lead people who are nevertheless competent, to do what someone else wants. In cases of undue influence, a victim is "competent" to have signed a document or transferred assets, but does so at the will of another. Age, illness or infirmities, medications and other factors that affect a person's ability or willingness to act for himself – weakening conditions – make it easier to convince an elder or dependent person. Forms of dementia or conditions that have not progressed to the point of creating incompetence still may render a person at risk for undue influence. At earlier stages these conditions may not even be detected by a primary care physician. Care providers sometimes develop a higher sense of entitlement to be compensated or rewarded, and use their positions to get their rewards.

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## Cameras and Road Safety

### American Traffic Solutions

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- In Seattle, Washington, a 50 percent reduction in red light violations was accompanied by a reduced rate of crashes and injuries, and more than \$1 million in fines collected during a period of “driver retraining.”
- In New York City, there are 175 intersection safety cameras in use, and Mayor Bloomberg has praised their use in the busy metropolis, noting that “people get killed crossing the street when [drivers] run through red lights.”
- In Apopka, Florida, crashes at two major intersections decreased by 72 and 64 percent, respectively, after system installments.
- In Gallatin, Tennessee, fatalities were reduced by 50 percent, intersection crashes by 19 percent, and total vehicle crashes by more than 20 percent.

“These camera intersections are like school zones. They become safer for pedestrians, as well as drivers, so people come to accept them once they are installed,” Hittner says.

He points to other collateral benefits as well, noting that footage from the high-resolution digital cameras has been used to solve crimes, such as murders, car-jackings and assaults. Arizona cameras were even checked for evidence relating to the shooting of U.S. Representative Gabrielle “Gabby” Giffords earlier this year.

“One of the great features for our clients is that they incur no costs to install the systems, which are valued at more than \$100,000 per installation,” Hittner says. In most cities, “We get paid a flat rate per camera per month, and that flat rate includes ticket printing, mailing, call center administration and other administrative costs as well,” he explains.

Hittner says there are “many common misconceptions about the technology and legalities of these systems,” noting that roadway camera systems have been in use for decades in Europe (the first cameras were used in the Netherlands in the 1960s).

He points out that the high resolution digital technology is good enough to produce a “facial image” of the driver when required by law, as is the case in Arizona, California and Colorado.

But most states simply impose liability by statute on the registered owner of the car, much like they do for parking tickets; and at least two federal appellate courts have issued a decision validating this practice, stating that owners should exercise caution in loaning out their cars.

“Court decisions have proven these systems to be constitutional,” says Hittner, who cites a 2009 opinion written by Judge Easterbrook of the U.S. Court of Appeals for the 7th Circuit in the case of *Idris v. City of Chicago*.

Hittner also points to a decision by the U.S. Court of Appeals for the 6th Circuit in the case of *Mendenhall v. U.S.* “The courts have made it clear that there is no fundamental right to run a red light and no fundamental right to privacy in your car on a public roadway,” he says.



ATS Traffic Safety Camera

The validity of the systems has also been repeatedly upheld in attempted class actions, and ATS has yet to suffer a class-action defeat in court on the merits, according to Hittner.

Interest in road safety camera programs continues to grow. Cities like New York are looking to expand their current program while states like Massachusetts, Rhode Island, Connecticut, New Jersey and Pennsylvania are all looking at ways to broaden the use of road safety cameras to school zones, work zones and even on school buses.

The increasing acceptance of these systems and the increasing legal work associated with that acceptance have kept Hittner busy in recent years, growing his law and government relations department from one person in October 2008 to eight people currently.

Deputy General Counsel Amy L. Rasor affirms that the department has its hands full handling new contracts, lawsuits, subpoenas for camera videos, payment and collection issues, garnishments, and even patent portfolios associated with the technology.

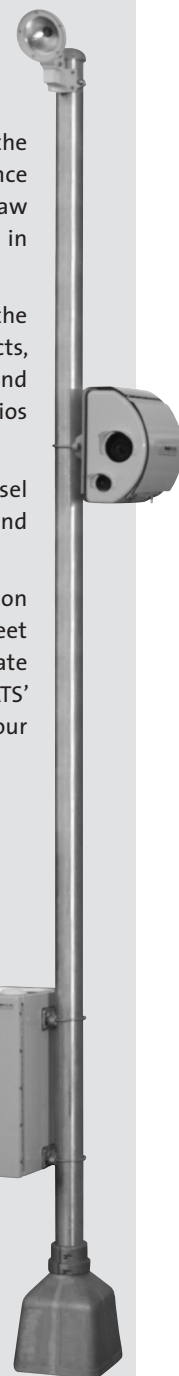
That is one reason ATS values the support of outside counsel Scott H. Moskol at Burns & Levinson, who has a background in general corporate work, acquisitions and financing.

“Scott Moskol and the other attorneys at Burns & Levinson understand the nature of our business and strive to meet the evolving needs of ATS in both litigation and corporate matters. They provided invaluable services during ATS’ first acquisition in 2009, and continue to serve as both our advisors and advocates,” says Hittner. ☐☐☐

- John O. Cunningham, freelance writer/editor



ATS LEGAL TEAM (left to right): Amber Nabity, Paralegal; Amy Rasor, Deputy General Counsel; George Hittner, General Counsel, Corporate Secretary & V.P. for Governmental Relations; Geni Tunstall, Associate General Counsel; Amanda Bastanchury, Paralegal



## Employers' Challenges Under Federal Health Reform

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No lifetime limits on essential health benefits may be imposed at all. While these dollar floors will not significantly raise the cost of most insured medical programs that Massachusetts employers offer, they will essentially eliminate an entire market of "mini-med" plans. Many employers with large, transient or low-paid workforces have been offering employees very cheap, limited health coverage, as opposed to giving them no coverage at all. Besides setting dollar floors for coverage of annual service, the regulators have also imposed a requirement that at least 80 to 85% of the premium cost be applied to medical services ("medical loss ratio"). This requirement also targets "mini-med" plans that apply far less of the premium to medical services. Although the Secretary of Health and Human Services allowed some employers to receive waivers of the dollar floor and "medical loss ratio" requirements until 2014, that very limited program for waivers is now closed.

In 2010, McDonald's Corp. warned the federal government that it would drop health insurance entirely for its nearly 30,000 hourly restaurant employees unless regulators waived the requirement that its "mini-med" plan apply 80 to 85% of the cost of premiums to services. Although many restaurants and other employers of large populations of part-time, seasonal or high-turnover employees do not offer health insurance, McDonald's provides "mini-med" plans for thousands of workers. By capping annual benefits at levels of \$2,000 or \$10,000 per worker, the premium costs can be drastically reduced to an amount between \$1,500 and \$2,000 per year. However, under these "mini-med" plans, much less than 80 to 85% of the premium cost is used to pay benefits. Insurers have argued that the high administrative costs resulting from frequent worker turnover combined with relatively low spending for benefits prevent the medical loss ratio from meeting the new federal requirements. By seeking to impose medical loss ratios, the federal administration is trying to prevent insurers from allocating too much of the medical premium costs to expenses of the insurance business, outside of paying medical costs for persons covered under the insurance. However, the rule risks the widespread elimination of medical coverage for low-paid workers and the elimination of "mini-med" plans from the market.

If an employer has at least 50 full-time employees and does not offer "affordable" health coverage beginning in 2014, it will owe a fine equal to \$2,000 per year for each full-time employee exceeding 30 employees, and its employees will be obligated to pay for coverage separately. To avoid the penalty, covered employers must offer health benefits meeting federal requirements, and cannot ask the employee to contribute more than 9.5% of his or her household income toward that coverage. Since "household income" is effectively deemed the employee's wages from the employer, this rule can translate to significant costs to an employer which might choose instead to pay the fine.

Whether the government intended it or not, the new healthcare law creates significant disincentives for continued employer-sponsored health coverage, exacerbating the differences between high and low paid workers. Nevertheless, careful strategizing may allow employers to keep health benefits in place for employees, at least in the short-term. ❏

## When You See Someone "Slowing Down"...Slow Down

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Common warning signs for possible exploitation include a victim's age, a condition that limits mobility (like arthritis), the recent loss of a spouse, and withdrawn behavior or a sense that the person is being isolated. Isolation can often be seen if a family member or other companion is providing increasing amounts of care to the exclusion of others. If someone's relationship with a longtime doctor, accountant, lawyer or financial advisor is interrupted, questions are in order. These signs should prompt an investigation, both to ensure a care provider is not overburdened and to protect against possible exploitation of the person receiving such care. Frequent visits and outings, or attempts at them, are good ways to get the information that is needed. In difficult situations, local protective services agencies can be called in to conduct formal investigations.

How powers of attorney and trusts are used and how the attorneys-in-fact and trustees are supervised can give real insight into the risks for exploitation. Generally, broad authority is given to these fiduciaries but the holders may not honor their duties. In the case of an Alzheimer's patient, for example, as the disease progresses, a person loses the ability to supervise. In our practice, we have successfully recovered assets from fiduciaries and care providers who took advantage of the declining abilities of those with dementia to hold them accountable.

Lawyers can play a key role in helping protect against financial exploitation. The Probate and Trust Litigation Group at Burns & Levinson has extensive experience in will contests and other litigation in this area. ❏



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