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A PRIMER ON PROTECTING INTELLECTUAL PROPERTY

BY: ROBERT L. FREY, ESQ.

In today's world, we are inundated with names that identify products we use everyday. These products range from tennis shoes to candy bars to software. Large corporations are identified merely by symbols, the Nike "swoosh" being among the most recognizable. In an effort to establish and maintain name or symbol recognition and to protect business innovation in product or service uniqueness, large companies aggressively seek to legally protect the company's intangible assets from competitors. A company's name, logo, brand name and distinctive goods and services are entitled to copyright protection. Proprietary computer software and many other creations may be eligible for trademark registration. Patents are often thought to cover only machines and other manufactured products, but can also protect processes. Collectively, trademark, copyright and patent are referred to as "intellectual property." Intellectual property registrations can help a business protect that unique thing which gives it a competitive advantage in the marketplace.

A copyright is a form of protection provided to the authors of "original works" that may include literary, dramatic, musical, artistic and certain other published and unpublished intellectual works. The Copyright Act of 1976 affords the owner of a copyright the exclusive right to reproduce the copyrighted work, to prepare derivative works, to distribute copies and to disseminate the copyrighted works to the general public. The copyright protects the form of expression, not the subject matter. An example would be a description of the services offered by a business. This protection would prevent others from copying a description, but would not prevent them from writing a description of their own for a similar service.

By comparison, a trademark is a word, name, symbol or device that is used to indicate the source of the goods or services and to distinguish them from other similar goods and services. When used in reference to providing services alone, a trademark is referred to as a servicemark. Trademarks and servicemarks are used to prevent others from using a confusingly similar mark, but not to prevent others from making similar products or providing similar services under a clearly different mark. Trademarks may be registered with the Patent and Trademark Office.

A patent is the grant of a property right to the inventor. Generally, the term of a new patent is 20 years from the date on which the application for the patent was filed in the United States Patent and Trademark Office. The right conferred by the patent grant is, in the language of the statute and of the grant itself, "the right to exclude others from making, using, offering for sale, or selling" the invention in the United States or "importing" the invention into the United States. What is granted is not the right to make, use, offer for sale, sell or import, but the right to exclude others from making, using, offering for sale, selling or importing the invention.

So you may be asking yourself, "Does my business have a need for intellectual property protection?" Smart business planning always includes preventing problems before they happen and making sure the business is protected against potential problems. The significance of intellectual property issues should not be downplayed by small businesses. For example, Internet domain names have become an integral part of any business, from large to small, and are an essential method of contacting both new and existing customers and clientele.

*(See **PRIMER,** page 3)*

MA REIMBURSEMENT NOTES

By: Steven M. Montresor, Esq.

On August 17, 2004, DPW published notice of several proposed rules in the Pennsylvania Bulletin. The notice contains regulations governing provider appeals before the Department of Public Welfare's ("DPW") Bureau of Hearing and Appeals ("BHA"), peer grouping under the case mix reimbursement system, and the definition of the term "MA Day of Care."

BHA Hearing Rules

The proposed rules governing provider appeals are based in large part on the Standing Practice Order ("SPO") issued by the BHA that became effective July 1, 2003. The SPO will remain in effect until the conclusion of the regulatory review process. Most of the provisions in the SPO have been carried forward into the proposed rules, which would have several practical effects on provider appeals. First, the mandatory deadlines contained in the proposed rules will prevent providers from filing "protective" appeals that are designed to simply preserve appeal issues. Despite objections by the provider community, providers will no longer be able to maintain open appeals while waiting for an IGT or other global resolution to a particular issue.

Second, given the specificity requirements of the proposed rules, providers must carefully choose which issues to pursue on appeal. Providers must be able to develop a good faith argument in support of their position that each DPW action challenged is unwarranted and must be changed. Accordingly, before filing an appeal, providers should attempt to eliminate unnecessary or unsupportable issues. Finally, given the mandatory deadlines, any provider considering an appeal of a DPW action governed by the proposed rules should be prepared to take the appeal to the Position Paper stage.

Peer Grouping

DPW also published notice of a proposed rule which would amend the rules relating to peer group price setting. The regulations specify that, in setting net operating prices, the Department will classify nursing facilities participating in the MA Program into peer groups based on both Metropolitan Statistical Areas ("MSA") group classification and bed complement. The current regulations state that the Department will use the most recent MSA group classification, as published by the Federal Office of Management and Budget ("OMB").

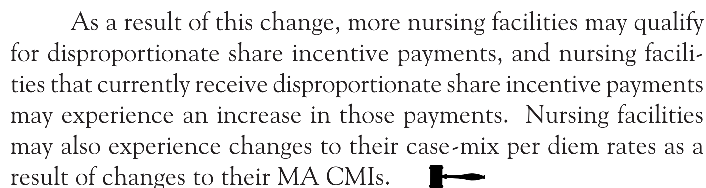
On June 6, 2003, the OMB revised the definitions of MSAs, adding definitions for Micropolitan Statistical Areas and Combined Statistical Areas and eliminating the use of the MSA group levels A, B and C that are specifically referenced in the peer group price setting regulations. DPW's analysis indicated that if it were to follow the OMB's new classification system, a majority of nursing facility providers would be adversely affected. Instead of adopting the new Federal definitions, the Department has proposed amending its regulations to specify that it will continue to use the old MSA group classification system, rather than adopt the new one. DPW anticipates that the effect of this amendment will be to preserve the status quo.

MA Day of Care Definition

Finally, DPW proposed to amend the definition of "MA Day of Care" to include additional categories of days of care provided to nursing facility residents. MA Days of Care are used for two purposes: to determine which residents are included in the calculation of the quarterly MA Case Mix Index ("CMI"), and to determine which nursing facilities are eligible to receive a disproportionate share incentive payment.

As it is presently written, the definition only recognizes an MA Day of Care as a day for which payment is made under the Department's Fee-For-Service Program. The current definition excludes MA recipients who receive nursing facility services through the HealthChoices Program and the Long Term Care Capitated Assistance Program ("LTCCAP"). Accordingly, the Department has proposed expanding the definition of MA Day of Care to include days of care for which an MA Managed Care Organization ("MA MCO") or an LTCCAP provider pays the negotiated rate or fee for the MA residents' care in a nursing facility. The Department is also proposing to amend the definition to clarify that days of care provided to an MA resident receiving hospice services in a nursing facility which are paid for by the Department are also considered as MA Days of Care.

As a result of this change, more nursing facilities may qualify for disproportionate share incentive payments, and nursing facilities that currently receive disproportionate share incentive payments may experience an increase in those payments. Nursing facilities may also experience changes to their case-mix per diem rates as a result of changes to their MA CMIs.



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NLRB RULING ON WEINGARTEN RIGHTS FAVORS EMPLOYERS

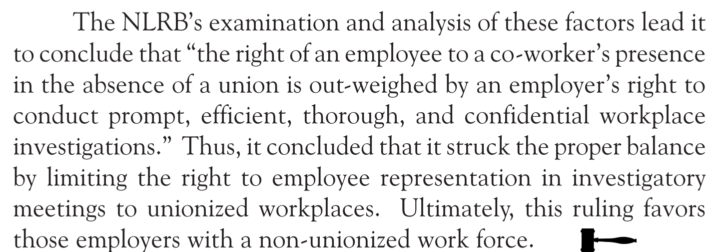
By: Angela L. Thomas, Esq.

On June 9, 2004, the Nation Labor Relations Board ("NLRB" or the "Board") issued a significant ruling in favor of employers with non-unionized workforces. The Board revisited and overruled its 2000 decision in Epilepsy Foundation of Northeast Ohio, in which it had ruled that an employee in a non-union setting was entitled to have a representative present at an investigatory interview, commonly referred to as the "Weingarten Right."

The Weingarten right received its name from the case of NLRB v. J. Weingarten, in which the United States Supreme Court ruled that an employer violates the National Labor Relations Act when it denies an employee's request to have a union representative present at an investigatory interview which the employee reasonably believes might result in disciplinary action. The Supreme Court left open the question of whether an employee of a non-unionized employer has the same right to representation. After the Weingarten decision, that question was addressed by the NLRB. In 1982, the Board held that even non-unionized employees were entitled to representation in investigatory interviews. Three years later, however, the Board abandoned its prior ruling, finding that Weingarten rights do not apply in the absence of a workforce with a certified or recognized union. This remained the Board's position until 2000, when it issued its decision in the Epilepsy Foundation case. At that time, the Board held that the right to employee representation at an investigatory interview was not dependent on union representation.

Now, four years later, the Board has reversed itself yet again. In concluding that Weingarten rights should not extend to the non-union workplace, the Board cited four important factors. Initially, it noted that co-workers, unlike union representatives, do not represent the interest of the entire workforce. Therefore, the employee representative at an investigatory interview would not necessarily take steps to safeguard the entire workforce, as a union representative would be charged to do. The second factor cited by the Board was a co-worker's inability to address the imbalance of power between employers and employees. The Board noted that a union representative has a different status in his relationship with an employer than a regular co-worker. Third, the Board noted that co-workers do not have the same skills as union representatives; the Board concluded a "knowledgeable" union representative can influence the interview process by eliciting information, clarifying issues and eliminating irrelevant material.

Finally, the Board concluded that the presence of a co-worker could compromise the confidentiality of information. It cited the various legal obligations of employers to provide workers with a safe and secure workplace environment. Specifically, it noted that employers, "face ever heightening requirements to conduct workplace investigations pursuant to federal, state, and local laws, particularly laws addressing workplace discrimination and sexual harassment." It further noted the rise in the instances of workplace violence, corporate abuse and fiduciary lapses. Also, the Board cited the presence of real and threatened terrorist attacks following the events of 9-11. The Board concluded that all of these developments have resulted in an increased need for investigatory interviews. The Board determined that such investigations required discretion and confidentiality. Limiting the number of persons present during an interview, an employer can better control the likelihood of disclosure of such information. According to the Board, a union representative by virtue of his or her legal duty of fair representation, may not, in bad faith, review or misuse information obtained during the interview. A co-worker, however, is under no similar legal constraints.

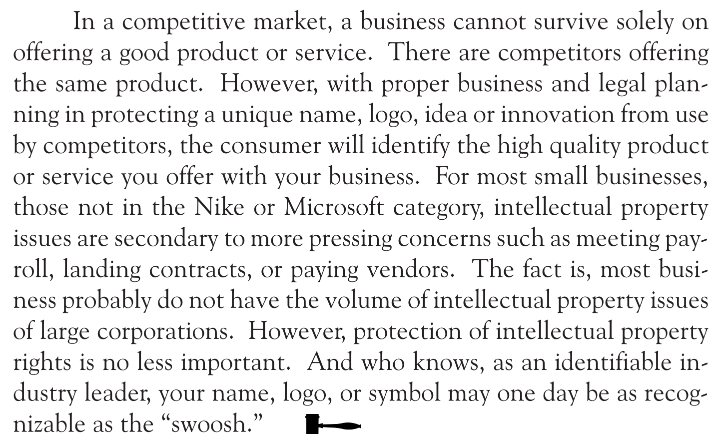


The NLRB's examination and analysis of these factors lead it to conclude that "the right of an employee to a co-worker's presence in the absence of a union is out-weighed by an employer's right to conduct prompt, efficient, thorough, and confidential workplace investigations." Thus, it concluded that it struck the proper balance by limiting the right to employee representation in investigatory meetings to unionized workplaces. Ultimately, this ruling favors those employers with a non-unionized work force.

(**PRIMER,** *continued from p.1)*

As businesses grow and realize the potential for exposure over the Internet, more and more domain names become unavailable. As such, once your business establishes a domain name for its usage, that domain name should be protected from use by others. As only one business can own an exact term like a domain name, no matter what type of business the company is in, ownership of an appealing domain name gives a company both a valuable asset and powerful competitive advantage.

When business planning involves intellectual property issues, consulting an attorney is an important step in addressing the intellectual property needs of your business. An attorney will aid you in analyzing what intellectual property needs to be registered, potential infringements of the intellectual property of others, and the infringements by others of your intellectual property rights. An initial investment for the review and analysis of intellectual property issues can help prevent major problems down the road.



In a competitive market, a business cannot survive solely on offering a good product or service. There are competitors offering the same product. However, with proper business and legal planning in protecting a unique name, logo, idea or innovation from use by competitors, the consumer will identify the high quality product or service you offer with your business. For most small businesses, those not in the Nike or Microsoft category, intellectual property issues are secondary to more pressing concerns such as meeting payroll, landing contracts, or paying vendors. The fact is, most business probably do not have the volume of intellectual property issues of large corporations. However, protection of intellectual property rights is no less important. And who knows, as an identifiable industry leader, your name, logo, or symbol may one day be as recognizable as the "swoosh."

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Mortgage Bankers Association	September 9, 2004	"Costly Employment Mistakes and How to Fix Them"	Glenn R. Davis, Esq.
Latsha Davis Yohe & McKenna, P.C./ Orrstown Bank	September 14, 2004 Carlisle	"2004 Employment Law Seminar"	Glenn R. Davis, Esq. & Angela L. Thomas, Esq.
HFMA Appalachian Chapter of Central Pennsylvania	September 23, 2004	"Long Term Care Compliance Issues"	David C. Marshall, Esq.
Latsha Davis Yohe & McKenna, P.C./ Orrstown Bank	October 12, 2004 Chambersburg	"2004 Employment Law Seminar"	Glenn R. Davis, Esq. & Angela L. Thomas, Esq.
PACAH	October 13, 2004	"Aggressive Collection Practices and Regulatory Compliance"	Kimber L. Latsha Esq. & Steven M. Montresor, Esq.
AAHSA	October 27, 2004	"Legal Update"	Kimber L. Latsha, Esq.
AAHSA	October 27, 2004	"Corporate Governance Issues for the 21st Century"	Kimber L. Latsha, Esq. & Douglas C. Yohe, Esq.
AAHSA	October 27, 2004	"Understanding the HIPAA Security Rule"	David C. Marshall, Esq.
PHCA/CALM	November 15, 2004	"Recognizing the Significance of Your Admission Agreement"	Kimber L. Latsha, Esq.