

### CORPORATE ALERT

January 2016

#### [Delaware Enacts Online Privacy Laws: Requires Certain Website Operators to Post Privacy Policies](#)

On August 7, 2015, Delaware enacted a package of online privacy laws, the two most substantial of which are the Online Privacy and Protection Act and the Student Data Privacy Protection Act. The new laws have implications for businesses nationwide, as they require website operators who collect personally identifiable information from Delaware residents to conspicuously post privacy policies on their websites. The laws also include protections for student data and place limitations on the types of marketing that can appear on websites aimed at children. In enacting these laws, Delaware follows California's lead in regulating the practices of website operators and in protecting its residents' online activities.

#### **Online Privacy and Protection Act**

The Online Privacy and Protection Act regulates internet service operators' use of privacy policies and contains requirements aimed at shielding children from certain harmful online content.

The statute requires the operator of any website, mobile application or other internet service that collects personally identifiable information from Delaware residents for commercial purposes to make a privacy policy conspicuously available on its website, application or other service.

The statute requires the privacy policy to include information regarding the collection, use and disclosure of personally identifiable information through the website, application or service, including: (1) the categories of personally identifiable information that the operator collects; (2) the process (if any) that the operator maintains for users to review and request changes to their personally identifiable information that is collected by the website operator; (3) the process by which the operator notifies users of material changes to its privacy policy; (4) the effective date of the privacy policy; (5) how the operator responds to web browser do-not-track signals or other similar mechanisms and (6) whether third parties may collect personally identifiable information about a user's online activities over time and across different internet services when a user uses the operator's internet service.

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The privacy policy requirement is modeled after a similar law in effect in California but has a somewhat broader scope than the California law.

The statute also contains certain provisions that are aimed at protecting children from harmful marketing content on the internet. The statute contains a list of products and services deemed harmful to children which may not be marketed or advertised on websites that are directed to children. Among the items included on that list are alcoholic beverages, tobacco products, sexually oriented materials, firearms, fireworks, tanning equipment, certain dietary supplements, lotteries, tattoos, and piercings. The act requires operators of internet sites that are directed to children to notify any third party providers of advertising or marketing services on their sites that the sites are directed to children. The statute prohibits operators of websites (even those not directed to children) from using any personally identifiable information of a user it knows to be a child, to market any of the listed prohibited products or services to such child.

### **Student Data Privacy Protection Act**

The Student Data Privacy Protection Act regulates education technology service providers, including operators of websites and mobile applications used for school purposes. The law requires such service providers to implement reasonable measures to protect student data and requires them to promptly delete student information following a request from a school or district. The law prohibits education service providers from: (a) selling student data, (b) disclosing student data (except for certain limited purposes), (c) using student information for targeted advertising purposes, or (d) using student information to create a profile of the student for non-educational purposes.

In enacting this bill, Delaware joins the growing number of states that are passing laws protecting student data.

The Online Privacy and Protection Act will become effective on January 1, 2016 and the Student Data Privacy Protection Act will become effective on August 1, 2016.

In addition to the two laws outlined above, Delaware simultaneously passed two additional online privacy laws addressing a variety of other issues, including placing restrictions on the ability of employers to view the personal social media accounts of employees and enacting online protections for victims of domestic violence, sexual assault, and stalking.

In light of the new legislation, businesses with an online presence in Delaware should review their privacy policies to ensure compliance with Delaware's privacy laws. Further, education technology providers and operators of websites that are directed to children should evaluate their practices to confirm that they are consistent with the new Delaware laws.

### **[Delaware Corporate Law Update](#)**

Recently, Delaware enacted Senate Bill 75, which amends the Delaware General Corporation Law (DGCL) effective as of August 1, 2015. The new law invalidates any provision in a Delaware stock corporation's certificate of incorporation or bylaws that would purport to "impose liability on a stockholder for the attorney's fees or expenses of the corporation or any other party in connection with an internal corporate claim." The prohibition on such fee-shifting clauses eliminates a possible deterrent to shareholder litigation by removing a penalty for unsuccessful claims.

New Section 115 of the DGCL defines “internal corporate claims” as “claims, including claims in the right of the corporation, (i) that are based upon a violation of a duty by a current or former director or officer or stockholder in such capacity, or (ii) as to which [the DGCL] confers jurisdiction upon the Court of Chancery.”

In addition, the new legislation provides that a stock corporation’s certificate of incorporation or bylaws can specify Delaware courts as the exclusive forum for internal corporate claims, subject to jurisdictional requirements. The legislation does not address the validity of a provision which selects the courts of another jurisdiction for internal corporate claims, but it prohibits such provisions if they would preclude litigating such claims in Delaware courts.

These amendments arise in response to recent litigation which had sparked discussion as to how Delaware law should apply to forum selection clauses in a corporation’s bylaws. The Delaware Court of Chancery ruled in Boilermakers Local 154 Retirement Fund v. Chevron Corp., 73 A.3d 934 (Del. Ch. 2013) that a bylaw provision selecting Delaware as the exclusive forum for intra-corporation disputes was valid and binding. In City of Providence v. First Citizens BancShares, Inc., 99 A.3d 229, 234 (Del. Ch. 2014), a case relying on the ruling in Boilermakers, the Court of Chancery granted a corporation’s motion to dismiss a claim challenging the validity of a corporate bylaw that designated the courts of North Carolina as the exclusive forum for intra-corporate disputes. The recent amendment validates the Chancery Court’s decision in Boilermakers, while rejecting its decision in City of Providence. It is now clear that forum selection clauses in a corporation’s bylaws are valid so long as they do not preclude such claims from being brought in Delaware.

The above amendments do not prevent the application of fee-shifting or forum selection provisions in a stockholders agreement or another similar writing signed by a stockholder against whom the provision is to be enforced.

*Application to New Jersey Corporations.* New Jersey courts have not yet ruled on the enforceability of such provisions, but New Jersey courts have historically followed Delaware courts on corporate law issues. The NJ Senate is currently considering proposed legislation that would amend the New Jersey Business Corporation Act (N.J.S.14A:1-1 et seq.) to explicitly state that a corporation’s bylaws may contain a provision making the federal and state courts of New Jersey the exclusive forum for intra-corporate disputes. The current draft of the proposed New Jersey statute would allow fee-shifting to shareholders who file an action in breach of such a forum selection requirement.

Corporations should consider whether a forum selection clause for in-house disputes would be beneficial to the company and its shareholders. By selecting a convenient forum for the corporation, frivolous shareholder litigation, which can be burdensome to the corporation, may be limited without unduly harming or restricting worthwhile claims.

We will continue to track the proposed New Jersey legislation and post an update when available.

**[New Jersey Tax Court Finds Non-Profit Hospital Must Pay  
Property Tax if Property is used for a 'Profit-Making Purpose'](#)**

In *AHS Hospital Corp., d/b/a Morristown Memorial Hospital v. Town of Morristown* (2015 WL 3956132, decided June 25, 2015), the Tax Court of New Jersey denied virtually all of Morristown Medical Center's claims for a property tax exemption for the years 2006 through 2008. The decision was based on Morristown Medical Center (the "Hospital"), a member of the Atlantic Health System, Inc. ("Atlantic"), being used "substantially for profit" despite being owned and operated by a non-profit corporation.

The criteria for a non-profit organization to qualify for a property tax exemption are set forth in the New Jersey Tax Code and related case law. The New Jersey Tax Code provides, in pertinent part, that property shall be exempt from taxation if used "exclusively for hospital purposes, provided that any portion of a building used for hospital purposes is ... used for purposes which are not themselves exempt from taxation, that portion shall be subject to taxation." (N.J. Stat. Ann. 54:4-3.6). New Jersey case law further establishes that a property will not be exempt from taxation to the extent such property is being used for a "profit-making purpose." In this case, the court found several factors persuasive in making its determination that the Hospital's property is being operated for a profit-making purpose.

First, the court noted that existing New Jersey case law holds that a property tax exemption may not be preserved to the extent that for-profit and non-profit activities cannot be separately stated and accounted for. Specifically, the court found it relevant that two types of physicians provide care to patients at the Hospital: those who are employed by and receive a salary from the Hospital, and those who are self-employed but performing their services for profit at the Hospital facilities. Both types of physicians provide patient care in all areas of the Hospital. Since there is no separate area of the Hospital where the activities of "for-profit" physicians are conducted, the court found that it could not determine which areas should be subject to property tax and which should not. Moreover, in denying the Hospital's argument that the court should disregard fees generated by "for-profit" physicians because the Hospital itself does not profit from such activities, the court stated that it is not "the profitability of the tax-exempt entity that owns the property' at issue here" but rather the doctors' "for-profit activity ... conducted on it." (*AHS Hospital* at 26).

In addition, the court considered benefits flowing to 'for-profit' entities from their use of the Hospital's property, and determined that "[b]y entangling its activities and operations with those of for-profit entities, the Hospital allowed its property to be used for profit" (*Id.* at 30). Specifically, the evidence presented at trial indicated that for-profit physician practices owned by the Hospital routinely operated at a loss and money from more profitable departments at the Hospital were transferred to these practice groups to subsidize their activities. Moreover, employees of the Hospital often served as officers and directors of these entities and other for-profit subsidiaries of the Hospital and Atlantic, including AHS Insurance Co. LTD. ("AHS Insurance", an offshore subsidiary organized as a self-insurance trust to insure the Hospital against certain liabilities), and the Hospital frequently conferred working capital and other loans to these entities. With respect to AHS Insurance in particular, the court found evidence that the Hospital loaned millions of dollars, paid millions in expenses, and guaranteed a line of credit for AHS Insurance persuasive that "there is no meaningful separation between the for-profit and non-profit subsidiaries of Atlantic." (*Id.* at 31) The court was not persuaded that arms-length transactions between these entities would be possible in such circumstances.

Also, the court found certain contractual arrangements between the Hospital and its employees or unaffiliated third parties relevant in determining that the Hospital property was not eligible for a tax exemption. In particular, the Hospital entered into various revenue sharing arrangements with its employees (for example, a bonus payable to a physician to the extent hospital revenues and fees exceeded a certain amount) or certain arrangements with non-affiliated, third party vendors (for example, an arrangement whereby to the extent certain expenses were kept below budget, the third party vendor was entitled to a percentage of any such cost savings). The court held that such contracts evidence a profit-making purpose because a portion of the surplus revenues could be traced to “someone’s personal pocket” (*Id.* at 38), and that the corresponding areas of the Hospital where such providers operate are therefore subject to taxation.

In total, the court found that the only areas of the property where the Hospital’s claim for a property tax exemption were proper were the auditorium, fitness center and the visitors’ garage, since those areas of the property were the only areas that could be specifically identified as not being used for profit-making purposes.

In November 2015, the town of Morristown and Atlantic announced that they had reached an agreement to settle the outstanding 2006-2015 property tax appeals, whereby the Hospital will pay Morristown a total of \$15.5 million over the next ten years. This will include \$5.5 million in penalties and interest and an annual tax payment of \$1.05 million from 2016 through 2025 (based on approximately 24 percent of the Hospital’s property being taxed at an assessed value of \$40 million).

A bill was passed by the New Jersey legislator on January 11, 2016 that would maintain the property tax exempt status of nonprofit hospitals with for-profit medical providers on site. In lieu of paying property taxes, it would require such nonprofit hospitals to pay an annual community service contribution to their host municipalities, of \$2.50 per licensed bed per day for acute care hospital properties or \$250 per day for satellite emergency care facilities, with annual 2% increases for inflation. Such funds would be dedicated to property tax relief and public safety costs that also benefit hospitals, such as police, fire and emergency services. The bill would also permit nonprofit hospitals to apply to the New Jersey Health Care Facilities Financing Authority for an exemption from such contributions if the hospital does not meet certain financial metrics in the applicable year. On January 19, 2016, Governor Christie “pocket vetoed” the proposed legislation and allowed it to expire without taking action. Given the Morristown Medical Center decision, nonprofit New Jersey hospitals are vulnerable to lawsuits concerning property taxes on their for-profit operations.

#### **WE’VE MOVED OUR NEW YORK OFFICE**

Our New York office has moved to:  
54 West 40<sup>th</sup> Street  
New York, New York 10018

We’re located on the south side of 40<sup>th</sup> street, between Fifth and Sixth Avenues (just south of Bryant Park). Reception is located on the ground floor.

Our telephone number in New York remains the same: 212-763-6464

We are looking forward to seeing our clients at our new location in New York.

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