



# Legal Advisory

IDEAS AND STRATEGIES FOR YOU AND YOUR BUSINESS / FOURTH QUARTER 2011

*inside*

## CUT YOUR TAXABLE ESTATE

Recent changes encourage generous holiday gifts

## Protect the Company Network

## Famed Hacker Off to Jail

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## SUPREME COURT RULES ON RETIREMENT BENEFITS

**A** new U.S. Supreme Court decision is expected to have a significant impact on employee benefits for years to come. Under the new ruling, damages may be awarded to employees if they have suffered harm due to an unlawful denial of benefits or if an employer has misrepresented the amounts employees are entitled to receive. But who really won?

**Key facts:** In 1998, the health insurance firm CIGNA replaced its traditional defined benefit plan with a cash balance plan using a lump-sum amount based on annual pay credits and interest credits. In its handouts and face-to-face meetings, CIGNA informed employees that they would be entitled to the greater of their traditional defined benefit at the time the old formula was frozen or their cash balance benefit under the new formula.

But the company failed to explain that participants might not expe-

rience any increase in their retirement benefits for an extended period of time. Reason: When CIGNA converted employees' existing benefits to the hypothetical lump-sum figure, this "opening account balance" of many long-term employees was not worth 100% of the old pension amount. Instead, the figure could be worth as little as 50% to 70% of the old pension. This meant the pension would not increase until the pay credits in the new pension formula built up to the 1998 value, which could take years.

Use of these opening balances is called "wear-away." It is as if the employer told its employees that their prior pensions had been overpaid, so they would have to work off the debt, or "wear it away," before they received more compensation. The Pension Protection Act of 2006 now prohibits wear-away in plan benefits.

*(see Retirement benefits on next page)*



## WRAPPING UP YEAR-END GIFTS

**D**ue to recent tax law changes, you may want to consider giving generous holiday gifts to family members. The gifts can cut down the size of your taxable estate. Here is a brief overview of the basic rules.

**Annual gift-tax exclusion:** Under the annual gift-tax exclusion, you can give away a specified amount each year to a recipient without paying any federal gift tax. The exclusion, which is indexed for inflation, is \$13,000 for 2011. For example, you might give up to \$13,000 to each of your two children and three grandchildren—a total of \$65,000 in gifts—without triggering any gift tax.

Furthermore, the annual gift-tax exclusion is doubled to \$26,000 if your spouse joins in the gifts. In other words, you might give away \$26,000 to each of the five family members, free of gift tax. That totals \$130,000 in tax-free gifts. By taking this approach for five years in a row, you can reduce your taxable estate by \$650,000.

**Cumulative gifts:** The amount of any gifts made above the annual gift-tax exclusion may be sheltered by the lifetime gift-tax exemption (although this reduces the available tax shelter for your estate). Prior to the 2010 Tax Relief Act, the estate- and gift-tax systems were severed, with the lifetime gift-tax exemption remaining locked at \$1 million. But now the 2010 tax act reunifies the two systems with a maximum exclusion amount of \$5 million per person for 2011 and 2012. (The exemptions are also portable between spouses.)

Therefore, going back to our previous example, a married couple could effectively give away up to \$10 million in addition to the \$650,000 covered by the annual gift-tax exclusion. That provides plenty of flexibility for most families.

**Educational and medical gifts:** You can pay qualified expenses directly to a medical provider or an educational institution on behalf of others without incurring any gift-tax liability. For instance, if your child or grandchild is attending college, pay the youngster's tuition directly to the school. These gifts do not count against the amounts sheltered from gift tax by the annual gift-tax exclusion.

Now that the end of the year is approaching, you can set up a gift-giving program to maximize the tax benefits. **Reminder:** The estate-tax laws are scheduled to "sunset" after 2012, so be sure that your plan can accommodate changes. 📌

## SUPREME COURT RULES ON RETIREMENT BENEFITS

*(continued from front page)*

A group of employees filed a class action lawsuit on behalf of 25,000 CIGNA employees. The district court determined that CIGNA had violated its obligation to notify employees of plan changes that would reduce future benefits and to provide employees with materials accurately describing their rights under the plan. And the U.S. Supreme Court concurred.

This is an apparent victory for employees, but here's the catch: The Supreme Court agreed with CIGNA on one critical aspect. If there is a conflict between documents containing a summary of the plan rules and the actual plan document, which employees rarely view, the court said that the employees cannot sue to enforce the terms of the summary. That is what the CIGNA employees had requested. As a result, the case was remanded to the lower court for reconsideration.

**Bottom line:** It may be difficult for employees to sue an employer if the plan summary or other information provided by the employer is incomplete or incorrect. This effectively strengthens the employer's position. We will stay tuned for any new developments in this case. 📌



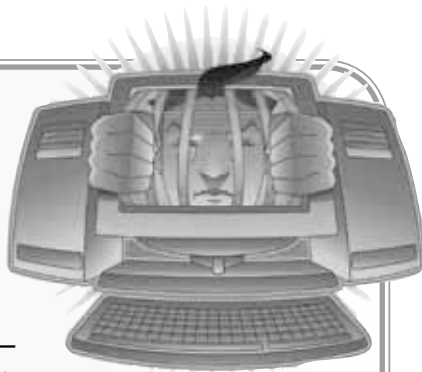
## Hacker Gets Jail Time

In a new case, a computer hacker was sentenced to nine years in prison and ordered to pay more than \$31,000 in damages.

**Facts of the case:** Jesse William McGraw—known as “Ghost Exodus”—was the leader of a hacking organization. He used his position as a night clerk at a Dallas medical office to remove security features and install malicious codes, or “bots,” on several computers.

McGraw even made a video of his exploits and posted it on YouTube with the theme song from *Mission Impossible* playing in the background. It showed how he inserted a compact disc enabling him to bypass security protection. Subsequently, the FBI found the compact disc in McGraw’s home and located the source code for the bots on his laptop. This information led to his conviction.

**Lesson to be learned:** With so much potential risk involved, be careful about granting access to your company’s computer system. Be selective.



tire system down with one flip of a switch? The network server should be kept in an area that is off-limits to most personnel. You might even install security software that limits access to the keyboard and screen.


2. **Install a firewall.** A firewall simply separates the Internet from your company’s computer network. In effect, it screens or blocks outside intrusions that look suspicious. Firewalls can also be used to partition one department of your company from another.

3. **Review the list of network users.** Make sure that passwords are changed on a regular basis. Instruct your employees to use nonsensical passwords rather than common words or family names. Also, supervisory privileges should be limited to a select group of high-ranking employees. Is file-sharing too

rampant? This may give outsiders easy access to sensitive data.

4. **Seek protection against computer viruses.** The most common method is to acquire software that protects you against the type of viruses that could infect your network. Keep up-to-date with the latest updates.

5. **Use a classification system.** Establish classifications for data based on the permissible use. For example, data may be labeled as public, internal, restricted or confidential. By implementing a system of these classifications, employees would not be able to gain access to data without having the requisite clearance. This would also incorporate use of protected passwords.

There are no absolute guarantees, but these five basic precautions can provide some measure of safety. Consult your business adviser for details. 



## FIVE WAYS TO PROTECT THE COMPUTER NETWORK

**D**o you leave the keys in your car when it is parked outside? Probably not. However, if you are a regular traveler on the information superhighway, you may not be as careful with the “keys” to your company. At least not until someone breaks into your network and disrupts your business (see *Hacker Gets Jail Time*, above).

Outsiders can gain access to a company network in several ways. Hackers may use a password-guessing program that seeks and identifies e-mail addresses. Another program allows users to scan multiple host computers for vulnerabilities. And certain sophisticated computer programs that were originally designed as theft deterrents are now being used for illicit means.

How can you stop the hackers in their tracks or, at the very least, slow them down? Here are five safety measures to consider.

1. **Maintain physical security.** Is it possible for someone to walk up to your network and shut the en-

## KEEPING AN EYE ON EMPLOYEES

**C**an you fire an employee for consulting with competitors? This is a tricky issue because federal law is not entirely clear. Taking action could trigger a lawsuit based on discrimination or invasion of privacy. As a rule of thumb, employers have more leeway to regulate off-duty conduct of workers when the activities are illegal, especially if it specifically relates to the job.

In addition, many states have enacted laws that prevent employers from discriminating against employees who participate in legal activities when they are outside the workplace, even if those actions may be detrimental to the company.

For employers in states that do not provide a statutory right to privacy, it is generally illegal to unreasonably intrude into an employee's "seclusion." Significantly, an employer cannot physically enter an employee's home without his or her consent.

Here are several key areas involving off-duty contact.

**Illegal activities:** It is questionable whether an employer may discipline or discharge employees who have been arrested for driving intoxicated or for the commission of a crime. State law often offers legal protection to the employee. Generally, employers may investigate further only if the conduct will have a direct impact on the business.

**Drug testing:** As a general rule, drug testing is permitted in the course of applying for a job, or if an employee performs security-sensitive work or has given the employer

cause to believe that he or she is impaired by drugs at work.

**Religious beliefs:** An employee's religious beliefs (and activities relating to those beliefs) are generally protected by both federal and state laws. However, if an employee exhibits unreasonable behavior in the workplace—for example, attempting to convert other employees—he or she may be subject to discipline.

**Outside employment:** There is no strict legal prohibition against moonlighting. However, an employer is able to restrict after-hours work that is in conflict with its business.

**Marital status:** Generally, employers cannot discriminate on the basis of marital status or monitor such status, except for its need to regulate employee benefits.

Each case must be analyzed on its own. Consult an attorney experienced in employment issues. 



## BRIEFS

♦♦**Early Bird**—A new case showed it is difficult to be compensated for "commuting time." **Fact:** Every morning a Black & Decker employee responded to e-mails, prepared displays and loaded his car with supplies before leaving for stops at various Home Depot stores. When he was fired, he argued that he should receive compensation for his daily ritual. But the Second Circuit Court disagreed because he could have performed those tasks any time during the work day.

♦♦**A Bad Rap**—Ja Rule (real name, Jeffrey Atkins) received a sentence of up to 28 months in prison for income tax evasion. The rapper and sometime actor allegedly failed to report more than \$3 million in earnings over a three-year period. The IRS now says that he owes \$1.1 million in back taxes. For his part, Ja Rule blamed the tax problems mainly on receiving bad advice.

♦♦**Planning Ahead**—Estate planning is not just for married couples. In fact, it may be argued that it can be even more critical for unmarried couples because state law might not adequately address their particular situations. **Practical approach:** Meet with professional advisers to go over the available options and make legally binding arrangements for the future. Otherwise, state law will control the outcome.

♦♦**Health Care Law**—In a significant new case, the Eleventh Circuit Court of Appeals has ruled that a provision of the 2010 health care legislation is unconstitutional. The court determined that Congress does not have the power to mandate that all individuals obtain health insurance coverage or pay a penalty. The new ruling, which conflicts with a decision from another appellate court, could be reviewed by the U.S. Supreme Court.