FOCUS on Benefits

Willis

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In This Issue

- CMS Hopes the Third Time Is the Charm
- Congress to Revisit Mental Health Parity
- Washington Update: Healthy Families Act
- Congress and Pension Reform
- Oral Contraception Coverage Optional
- Dirty Dozen Tax Scams for 2007
- Reemploying Reservists
- Higher Costs Mean Fewer Buyers
- Spotlight On . . . FMLA Complaints Shifting Focus

CMS Hopes the Third Time Is the Charm

For the third time in as many years, the Centers for Medicare and Medicaid Services (CMS) has revised the creditable coverage disclosure notices that employers use in conjunction with Medicare Part D obligations. These notices explain whether the plan is equivalent (creditable) or not equivalent (non-creditable) compared to Medicare's prescription drug benefit.

They are important because an individual is charged a penalty if there is a gap in creditable coverage of 63 days or more before joining Medicare's program. (For additional information about Medicare Part D requirements please see Chapter 12 of the *Willis Online Compliance Manual*.)

The key change in the updated guidance relates to electronic delivery. CMS requirements for electronic delivery were burdensome and different from the Department of Labor (DOL) requirements for electronic communications; few employers chose this delivery method. This new guidance retains previous CMS guidance as one option – but now employers may instead choose to follow the DOL requirements for electronic delivery. The DOL requirements allow disclosure notices to be sent electronically to those with daily work-related access to electronic documents.

In another noteworthy change, CMS requires the plan sponsor to advise the plan participant that he or she is responsible for

providing a copy of the electronic disclosure to covered Medicare-eligible dependents. (Additional information about these requirements may be found in Chapter One of the *Willis Online Compliance Manual.*) Notices and guidance are available on CMS's web site at www.cms.hhs.gov/creditablecoverage.

Few Other Changes

The new notices now include references to an Employer Group Special Enrollment Period for individuals who leave or lose employer- or union-sponsored coverage. Those covered by creditable coverage also have a Special Enrollment Period if they lose creditable coverage through no fault of their own. The notice now uses the member's date of birth or ID number for personal identification. Use of the personalized notice is optional.

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Distribution and Reporting

Annual deadlines for distribution of the notices and reporting to CMS remain the same. Sponsors of plans that are not on a calendar-year basis can distribute the disclosure notices at the same time as their open enrollment materials – provided a notice is sent once per year. Reporting to CMS about the plan's creditable status is due within 60 days after the first day of the new plan year. Employers who sponsor plans that do not run on a calendar year cycle may find that sending the notices at open enrollment is an easier way to satisfy the mandate.

Congress to Revisit Mental Health Parity

Although a decade old, the Mental Health Parity Act still evokes passion whenever Congress revisits the issue of extending the law. (For more information about the Mental Health Parity Act as currently enacted, please see Chapter 15 of the *Willis Online Compliance Manual.*)

New Mental Health Parity hearings are underway, according to the American Benefits Council (ABC), a national employer organization that monitors all types of employee benefits-related legislation. (Willis actively participates with the ABC at the Board of Directors level.)

This year, the focus in the House of Representatives is on expanding provisions of the act – not merely renewing it. Earlier this spring, the Health Subcommittee of the House Ways and Means Committee held a hearing on mental health parity legislation. Subcommittee Chairman Pete Stark (D-CA) called for Congress to "end discrimination" in mental health coverage by requiring health plans and Medicare to establish cost-sharing requirements or other limits that are no more restrictive for mental health benefits than they are for medical and surgical services covered by the same plan.

Before the hearing, ABC issued a statement urging Congress to adopt the Senate's Mental Health Parity Act (S. 558) rather than the more expanded House measure. The Council noted that provisions of the House bill go beyond parity for mental healthcare benefits by mandating certain advantages to mental health coverage. The bill mandates that any plan covering mental health services would be required to cover the entire set of mental health conditions in the diagnostic manual of psychiatric disorders.

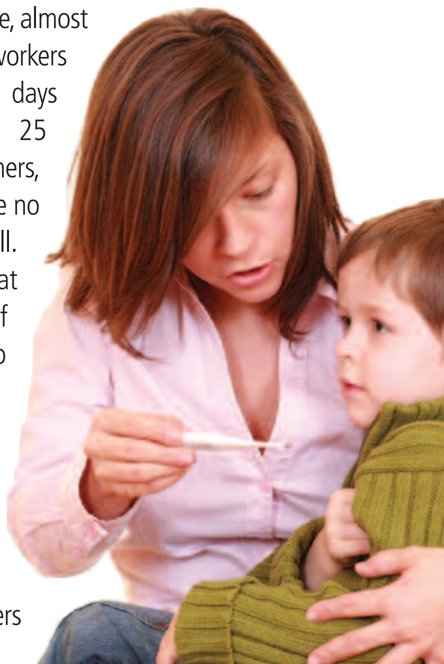
The House bill also expressly allows states to add their own consumer protection, parity and remedy requirements beyond those in the federal bill. Such a provision would almost certainly guarantee that employees under one health plan who reside in different states would have unequal standards applied to their mental health benefits. Willis will continue to monitor developments related to this important piece of benefits legislation.

Washington Update: Healthy Families Act

A recently introduced bill (S. 1085) that would mandate paid sick days is raising questions about how it would affect companies that already offer paid time off (PTO).

Under the Healthy Families Act as currently proposed, companies with at least 15 employees would have to provide seven days of paid sick leave annually for each person working 30 or more hours each week. Many companies already offer paid leave and will likely need clarification on whether PTO days would count toward the mandated days or be on top of existing benefits. Most legislative experts believe the measure has no hope of passing unless PTO days that employers now make available would count towards the law's mandated time off. The bill's definition of full-time employee as someone who works 30 hours or more per week is another concern, as it could present problems for employers who define full-time differently.

According to one source, almost half of private-sector workers are denied paid sick days and, of the bottom 25 percent of wage earners, almost 80 percent have no paid sick days at all. Supporters argue that some minimum level of protection is needed to safeguard worker paychecks from illness. Critics contend that such a mandate only serves to reward workers who "play hooky" while employers foot the bill.



Current estimates suggest that the Healthy Families Act would give more than 45 million workers access to paid sick days; another 19 million would gain some paid sick days for doctors' visits and family care.

Congress and Pension Reform

According to *Employee Benefits News*, legislative analysts believe that Democrats will lobby for legislation to strengthen retirement security and create more transparency with 401(k) plan administration. Anticipated are some minor amendments to the Pension Protection Act (PPA) and revival of retirement security proposals such as the Women's Retirement Security Act, the Retirement Saving Security Act, and the Lifetime Pension Annuity for You Act.

Another bill that may resurface is AmeriSave, which Democrats first introduced in 2005. AmeriSave was designed to help middle- and working-class families achieve retirement security by making a matching government contribution to an IRA, 401(k), or similar retirement plan – up to $1,000 – funded by higher taxes. Representative George Miller (D-CA) argues that the PPA should be amended, because it allows companies to reduce or even eliminate pension plans. Miller also contends that workers need more complete, accurate and clear information about the total costs of different investment options so that they can choose the most suitable ones.

Another retirement plan under consideration permits a portion of an employee's wage to be directly deposited into an IRA account. The automatic IRA deposit would give workers an opt-out payroll deduction at firms that do not offer another qualified retirement savings vehicle. One Brookings Institution researcher suggests that the automatic IRA deposit plan could increase national savings by $10 billion per year.

Oral Contraception Coverage Optional

A recent federal court decision is expected to have far-reaching impact for employers sponsoring group health plans. The case is *Standridge v. Union Pacific Railroad*, 2007 U.S. App. LEXIS 5914, March 15, 2007. The US Court of Appeals for the Eighth Circuit said Union Pacific did not violate the federal Pregnancy Discrimination Act (PDA) by excluding oral contraceptives, because it does not cover any form of contraception – prescription, non-prescription or surgical – for men or women. The appeals court disagreed with a lower federal court and the Equal Employment Opportunity Commission (EEOC) that the PDA requires employers to include prescription contraception in their plans if they generally chose to cover any prescription drugs and devices used to "prevent" other medical conditions.

This is the first time that an appellate court has examined the issue. According to *Benefitnews.com*, one prominent attorney said, "For the past seven years, district courts have reached different conclusions about the viability of PDA claims in such circumstances. This case may tip the balance in favor of employers and insurers." Other experts note that employers may not have long to savor this victory as Congress may use this decision as a basis to draft legislation that promotes or mandates access to contraception in employer-sponsored health plans.

Pregnancy discrimination complaints and lawsuits against employers are on the rise. EEOC statistics show that pregnancy discrimination complaints have jumped by over 30 percent since the early 1990s. The Eighth Circuit includes Arkansas, Iowa, Minnesota, Missouri, Nebraska, North Dakota and South Dakota.

Dirty Dozen Tax Scams for 2007

The Internal Revenue Service (IRS) recently published the 2007 Dirty Dozen – its latest annual tally of some of the country's most notorious tax scams. The IRS warns taxpayers to watch out for schemes that promise to reduce or eliminate taxes and encourages taxpayers to rely on reputable and professional tax advice.

This year, five new schemes made the Dirty Dozen. These include: fraudulent claims relative to the Telephone Excise Tax refund, abuses related to Roth IRAs, the American Indian Employment Credit, domestic shell corporations, and structured entities credits.

Of the scams carried over from last year, schemes designed to exploit charitable organizations were especially scandalous. Also notable were scams that encourage taxpayers to claim they do not owe taxes. Despite the fact that such arguments have been thrown out of court time and again, surprisingly large numbers of taxpayers still try these dubious tactics.

IRS representatives warn that involvement with tax schemes can lead to imprisonment and stiff fines. The IRS pursues and shuts down promoters of these and numerous other scams. Anyone pulled into these schemes can also face repayment of taxes plus interest and penalties.

The following are the 2007 Dirty Dozen – common tax schemes and scams to avoid.

Telephone Excise Tax Refund Abuses. Some individual taxpayers request large and improper amounts for this refund. The refund is limited to the three percent tax paid on long-

distance and bundled services. Some requests are for a refund of the entire amount of the taxpayer's telephone bills.

Abusive Roth IRAs. Advisers encourage taxpayers to move under-valued property to Roth individual retirement accounts (IRAs). Such a shift attempts to circumvent maximum contribution limits and allow otherwise taxable income to go untaxed.

Phishing. This is a technique used by identity thieves to acquire personal information to gain access to the financial accounts of unsuspecting consumers, run up charges on their credit cards or apply for new loans in their names. These internet-based criminals sometimes pose as representatives of a financial institution and send out fictitious email correspondence in an attempt to trick consumers into disclosing private information. Some scammers pose as the IRS itself. A typical email notifies a taxpayer of an outstanding refund and urges the taxpayer to click on a hyperlink and visit an official-looking web site. The web site then solicits a social security and credit card number. In a variation of this scheme, criminals have used email to announce to unsuspecting taxpayers they are "under audit" and could make things right by divulging private financial information. The IRS does not use email to initiate contact with taxpayers about issues related to their accounts. A taxpayer questioning the authenticity of a contact from the IRS should call 1 800 829 1040.

Disguised Corporate Ownership. In an attempt to disguise business ownership or financial activity, domestic shell corporations and other entities are being formed and operated in certain states. Upon formation, these "anonymous" entities are used to aid in the underreporting of income, non-filing of tax returns, listed transactions, money laundering, financial crimes as well as possible terrorist financing.

Zero Wages. A taxpayer attaches to his or her return either a Form 4852 (Substitute Form W-2) or a "corrected" Form 1099 that shows zero or little wages or other income. The taxpayer may include a statement indicating the taxpayer is rebutting information submitted to the IRS. An explanation on the Form 4852 may cite "statutory language behind IRC 3401 and 3121" or may include some reference to the employer refusing to issue a corrected Form W-2 for fear of IRS retaliation. The 4852 or 1099 forms are usually attached to a "Zero Return" (i.e., taxpayers enter all zeros on their federal income tax filings).

Return Preparer Fraud. Dishonest tax preparers can cause many headaches for those who fall victim to their schemes. Such preparers skim a portion of their clients' refunds and charge inflated fees for return preparation services. They attract new clients by promising large refunds. Taxpayers should select their tax preparer carefully. No matter who prepares the return, the taxpayer is ultimately responsible for its accuracy. Since 2002, the courts have issued injunctions ordering dozens of individuals to cease preparing returns, and the Department of Justice has filed complaints against many others. During fiscal year 2006, 109 tax return preparers were convicted of tax crimes and sentenced to an average of 18 months in prison.

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American Indian Employment Credit. Taxpayers attempt to illegally extend an American Indian employment or treaty credit to reduce their taxable income. Although such credits are available to businesses employing Native Americans or their spouses, these credits are not extended to other employees. In a related scam, tax scheme promoters inform Native Americans that they are not subject to federal income taxation. The promoters solicit individuals to file a Form W-8 BEN seeking an exemption from the withholding of federal income tax. In connection with this, promoters will use false IRS letterhead to solicit personal financial information that they claim the IRS needs to process the non-tax status. (Form W-8 BEN is used by foreign persons who are subject to federal tax on certain types of income that they receive from US sources.)

Trust Misuse. For years unscrupulous promoters have urged taxpayers to transfer assets into trusts. They promise reduction of income subject to tax, deductions for personal expenses and reduced estate or gift taxes. However, some trusts do not deliver the promised tax benefits – and the IRS is actively examining

these arrangements. More than 150 active investigations are currently underway, and 49 injunctions have been obtained against promoters since 2001. As with other tax arrangements, taxpayers should seek the advice of a trusted professional advisor before entering into a trust.

Structured Entity Credits. In this newly identified scam, promoters set up partnerships to own and sell state conservation easement credits, federal rehabilitation credits and other credits. These credits are the only assets the partnership owns and once they are fully used, an investor receives a K-1 indicating that the initial investment is a total loss. The investor then deducts the loss on his or her individual tax return. However, since forming such an entity is not for a viable business purpose, the investment is not valid, and the losses are not deductible.

Abuse of Charitable Organizations and Deductions. The IRS has observed an increase in the use of tax-exempt organizations to improperly shield income or assets from taxation. This can occur, for example, when a taxpayer moves assets or income to a tax-exempt supporting organization or donor-advised fund but maintains control over the assets or income, thereby obtaining a tax deduction without transferring a commensurate benefit to charity. Contributions of non-cash assets continue to be a problem, particularly in terms of overvaluation of the contributed property. The IRS is also seeing private tuition payments being disguised as charitable contributions to religious organizations.

Form 843 - Tax Abatement. This strategy rests on the faulty interpretation of the Internal Revenue Code. The filer requests abatement of previously assessed tax using Form 843. Many using this scam have not previously filed tax returns, and the tax they are trying to have abated has been assessed by the IRS through the Substitute for Return Program. The filer uses the Form 843 to list reasons for the request. Often, one of the reasons is: "Failed to properly compute and/or calculate IRC Sec 83 – Property Transferred in Connection with Performance of Service." The IRS is carefully scrutinizing taxpayer requests for this type of tax abatement.

Frivolous Arguments. Promoters have been known to make the following outlandish claims: the Sixteenth Amendment concerning Congressional power to lay and collect income taxes was improperly ratified; wages do not represent income; filing a return and paying taxes are merely voluntary; and being required to file Form 1040 violates the Fifth Amendment right against self-incrimination or the Fourth Amendment right to privacy. These arguments have been repeatedly thrown out of court.

Reemploying Reservists

USERRA is the acronym for the Uniformed Services Employment and Reemployment Rights Act of 1994. USERRA provides various protections to individuals who leave their jobs to serve in the military – including those called up from the reserves or National Guard – or perform certain other service. Virtually all employers – public and private, and regardless of size – are subject to USERRA.

Employees who are protected by USERRA have the right to return to their pre-service jobs and be restored to either the same job or a promoted position if there is a reasonable certainty that the employee would have otherwise attained that new position. Employees returning from service are protected under what is sometimes called the "escalator principle," where service personnel step back into their civilian employment on a seniority "escalator" that places them at the position that they would have occupied had they never taken a leave from work.

Mental Integration into Civilian Life

Although the provisions of USERRA provide many protections for returning service personnel, it cannot prepare the employee for

the return to civilian work. An article in *Business Insurance* considered the readjustments that reservists must make upon their return to family and civilian work life. Among the challenges faced by these employees were the following: post-traumatic stress disorder which resulted in sensitivity to noise, anger, depression, fatigue; predisposition to nightmares, drug and alcohol abuse and marital problems.

While not every returning soldier faces these challenges, the National Center for Post-Traumatic Stress Disorder estimates that a reservist's risk of experiencing post-traumatic stress disorder is at least 18 percent after serving in Iraq. Some experts who provide therapy for employee assistance plans sponsored by employers believe that 18 percent is a conservative number and that returning soldiers face a 30 percent chance of post-traumatic stress disorder. Some experts assert that this number would jump to 70 percent for service personnel who serve a second tour of duty.

Many employers provide employee assistance plans for their employees, and these programs can certainly be offered to returning reservists. Employers might also consider directing the reservists to the Department of Veterans Affairs which can often link soldiers to support groups focused on making the transition to non-military life.

To provide a supportive and welcoming environment for a reservist who suffers from post-traumatic stress disorder an employer might:

- Consider providing a private workspace for those individuals who find movement and sound extremely distracting
- Divide larger assignments into smaller units that are easier to understand and accomplish to minimize confusion and "overload"
- Follow up verbal assignments with a written description of the assignment to help with memory and distractibility problems
- Provide longer or more frequent work breaks for employees who appear to overreact to sounds or work expectations

In addition to helping a reservist return to work, employers need to know what is legally required of them under USERRA.

Posting Requirement

Employers must notify all employees of their rights under USERRA and can satisfy this requirement by posting a notice where other employee notices are customarily posted. Employers also may use alternative means of providing notice, including hand delivery or mailing.

Employee Benefits Requirements

USERRA regulations include provisions relating to employers' obligations to continue benefits for those on military leave and to reinstate benefits for those who return. In the continuing benefits category, USERRA requires that:

- Employers allow a COBRA-like opportunity to continue health coverage for up to 24 months during military leave
- Employers allow those on leave for military service to continue non-seniority benefits other than health plan coverage (e.g., accrual of vacation pay, life insurance, and disability coverage) on the same basis as other employees on comparable leaves

The USERRA regulations also cover a variety of other employee benefits issues, including the following.

Cafeteria Plans. Healthcare flexible spending account (FSA) plans provided through cafeteria plans are considered health plans under USERRA. So, employees on military leave must be allowed to continue health FSA participation for up to 24 months. (The COBRA rule that allows termination of COBRA coverage under certain health FSAs at the end of the plan year in which the qualifying event occurs does *not* apply to USERRA continuation rights.)

Health Benefits upon Reemployment. Employers are responsible for negotiating with third-party health insurers to provide health coverage that is compliant with USERRA. That is, an employer remains liable for violating USERRA even if the violation is caused by an insurer's refusal to reinstate coverage as required by USERRA. All employers should take care to have that provision included in their contracts.

Time for Making Contributions to Pension Plans. Generally, an employer is required to credit make-up contributions to a defined contribution plan for an employee returning from military leave in the same amount and manner as it made contributions on behalf of other employees during the military leave. No make-up contributions are required unless the employee is actually reemployed.

In the case of plans that do not require or allow participant contributions, the employer must make required contributions no later than the date they are normally due for the year in which the military service was performed or, if later, 90 days after the date of reemployment. If employer contributions to a plan are contingent on employee contributions and the employee funds the make-up contributions as permitted under USERRA, the employer's matching contributions must be made according to the plan's terms.

Repayment of Plan Distributions. Only defined benefit plans are required to permit an employee to repay amounts distributed from the plan in connection with a period of uniformed service upon reemployment with the same employer.

Higher Costs Mean Fewer Buyers

Plansponsor.com recently featured excerpts from a Kaiser Foundation study indicating that fewer workers are electing health coverage – even if it is available through their employer. The article attributes this fact to a variety of cost factors. The Kaiser study shows that the number of workers who enroll in a workplace healthcare plan goes down as employees' share of the coverage costs rises. The study showed that low-income workers are least likely to sign up for employer coverage no matter what the form of employer contribution.

Kaiser said there was a 5.8 percent drop in the "take-up rate" of employer-sponsored insurance for low-income workers from 1999 to 2002. Cost sharing efforts by employers were largely driven by healthcare cost increases during the period, which Kaiser said contributed to a decline in the number of firms offering insurance. Cost sharing tactics also encouraged firms to hire part-time or contract workers or to raise eligibility requirements. Kaiser statistics note that from 2000 to 2006, the number of firms offering health insurance benefits fell from 69 percent to 61 percent.

Spotlight On . . .

FMLA Complaints Shifting Focus

As many employment lawyers around the country would quickly attest, the Family Medical Leave Act (FMLA) is becoming an increasing source of confusion and litigation. A growing number of employees are suing their employers alleging that employers are not granting unpaid leave under the FMLA when they should, or that they impermissibly retaliate against employees for seeking the time off. Last December, the Labor Department published a request for information and public comments to find out what's working – and what's not – with the FMLA.

The DOL's Wage and Hour Division tracks FMLA complaints and, although the number of complaints has remained relatively constant over the last several years, the types of complaints have changed. Complaints still center on illegal refusals to grant FMLA leave and complaints about determining the FMLA "key person" exception. However, the DOL notes a dramatic rise in complaints related to the denial of the FMLA recipient's original job (or equivalent position) upon return from leave. Employers should remember that failure to reinstate an individual to their original position may generate a complaint to the Department of Labor, as well as produce other types of possible legal liability.

Since You Asked: "FMLA-like" Protections for Domestic Partners

State recognition of same-sex marriages has generated numerous questions about the implications for benefit plans. Recently, an employer wanted to know what could happen if it chose to allow same-sex domestic partners to exercise FMLA rights in the same manner as other married workers.

The FMLA defines "spouse" in Section 825.800 of the Labor Department's FMLA as: "...a husband or wife as defined or recognized under state law for purposes of marriage in the state where the employee resides, including common law

spouses in states where it is recognized." The Massachusetts position about same-sex marriage raises the questions of how this definition should be interpreted and applied.

Defense of Marriage Act

The Defense of Marriage Act of 1996 (DOMA), as signed by President Clinton, arrived after the FMLA regulations were published. DOMA is a federal law providing that, in interpreting any federal statute, ruling, or regulation a spouse can only be a person of the opposite gender who is a husband or wife. Consequently, a health (or pension) plan cannot be required to recognize a same-gender spouse even if same-gender marriages are permitted under state law.

As a result, the appearance of DOMA trumps the use of FMLA's regulatory definition. Even the Department of Labor itself has acknowledged this fact. In 1998 a Department of Labor opinion letter supported application of DOMA to FMLA by explicitly advising that DOMA restricts the FMLA's definition of "spouse" to opposite-gender spouses (DOL Letter Ruling; November 18, 1998; FMLA-98).

So, to the employer's question: if DOMA restricts FMLA to opposite-gender spouses – what does this mean for the employer who goes ahead and provides leave for same-gender spouses?

We believe that such leave could not be designated as FMLA, and an employee who took the leave to care for a same-gender spouse would therefore be entitled to the full FMLA leave – in addition. Leave to care for a same-sex spouse would have to be considered employer-authorized non-FMLA leave. The employee would still be left with an untouched 12-week period of leave available for any bona fide FMLA event which might occur within the same 12-month period.

This situation underscores the unexpected repercussions of attempting to replicate marital benefits for partners who, by legal definition, are not married.

Key Contacts

US Benefits Office Locations

Atlanta, GA
(404) 224-5000

Austin, TX
(800) 861-9851

Baltimore, MD
(410) 527-1200

Birmingham, AL
(205) 871-3871

Boston, MA
(617) 437-6900

Cary, NC
(919) 459-3000

Charlotte, NC
(704) 376-9161

Chicago, IL
(312) 621-4700

Cincinnati, OH
(513) 762-7855

Cleveland, OH
(216) 861-9100

Columbus, OH
(614) 766-8900

Dallas, TX
(972) 385-9800

Denver, CO
(303) 218-4020

Detroit, MI
(248) 735-7580

Eugene, OR
(541) 687-2222

Farmington, CT
(860) 284-6147

Florham Park, NJ
(973) 410-1022

Ft. Worth, TX
(817) 335-2115

Grand Rapids, MI
(616) 954-7829

Greenville, SC
(864) 232-9999

Houston, TX
(713) 625-1023

Jacksonville, FL
(904) 355-4600

Knoxville, TN
(865) 588-8101

Las Vegas, NV
(702) 562-4335

Long Island, NY
(516) 941-0260

Los Angeles, CA
(213) 607-6300

Louisville, KY
(502) 499-1891

Memphis, TN
(901) 248-3100

Miami, FL
(305) 373-8460

Milwaukee, WI
(414) 271-9800

Minneapolis, MN
(763) 302-7100

Mobile, AL
(251) 433-0441

Naples, FL
(239) 659-4500

Nashville, TN
(615) 872-3700

New Orleans, LA
(504) 581-6151

New York, NY
(212) 344-8888

Omaha, NE
(402) 391-1044

Orange County, CA
(949) 885-1200

Orlando, FL
(407) 805-3005

Philadelphia, PA
(610) 964-8700

Phoenix, AZ
(602) 787-6000

Pittsburgh, PA
(412) 586-1400

Portland, OR
(503) 224-4155

Roswell, NM
(505) 317-3397

St. Louis, MO
(314) 721-8400

San Diego, CA
(858) 678-2000

San Francisco, CA
(415) 981-0600

San Jose, CA
(408) 436-7000

San Juan, PR
(787) 725-5880

Seattle, WA
(206) 386-7400

Tampa, FL
(813) 281-2095

Washington, DC
(301) 530-5050

Wilmington, DE
(302) 477-9640