

ON THE MERITS

Summer 2020
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*Michael N. Rhinehart
President Dayton Chapter,
Federal Bar Association*

FIRST CHAIR: PRESIDENT'S MESSAGE

BY: MICHAEL N. RHINEHART, ESQ., FBA DAYTON CHAPTER PRESIDENT
THE VIEWS EXPRESSED IN THIS COLUMN ARE HIS OWN, AND DO NOT REPRESENT THE OFFICIAL POSITION OF ANY AFFILIATED ENTITY

The last several months have been a difficult time for many, and the pandemic has impacted everyone and every organization in many different ways. Throughout the legal community, courts are closed, offices are scarcely occupied, and judges and lawyers are conducting business from home.

The significant public health threat created by the pandemic has also affected opportunities for law students, including those in our Student Division at the University of Dayton School of Law, to gain valuable legal experience. Many employers have either cancelled summer associate, clerkship, or extern opportunities altogether or converted them to remote positions. While remote positions still provide valuable legal experience for aspiring lawyers, the attendant networking opportunities traditionally provided to students while working are diminished.

To mitigate the loss of summer networking opportunities for aspiring lawyers, the Dayton Chapter took the Federal Court's longstanding Lunch & Learn program online. In the past, the Court's Lunch & Learn program had been held two or three times a week in a courtroom for court externs and summer associates working in the Dayton area. While the traditional face-to-face format allows students to meet judges and lawyers in-person, the online format is more accessible to law students not only working throughout Dayton region, but those working all over the country.

The Summer Lunch & Learn Series – which is FREE to attend – began on May 14th and will continue through mid-July. So far, the Lunch & Learns have included a panel of Career Law Clerks working with the District Court in Dayton; a panel of attorneys working at Wright-Patterson discussing careers in the United States Air Force; Glen McMurry – who is not only a valuable member of the Chapter but the national chair of the FBA's Law Student Division – providing information about the benefits of law student FBA membership; and Judges Sharon Ovington and Michael Newman explaining practice before United States Magistrate Judges.

In June, students will hear from Judge Guy Humphrey about practice before the United States Bankruptcy Courts, federal criminal defense work, life as a law firm associate, careers with the United States Attorney's Office, and much more.

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TRANSITIONING TO THE NEW UNIVERSAL MEMBERSHIP MODEL

BY: MEETAL H. REED, ESQ.

The FBA is beginning to implement a new universal membership model. Previously, membership renewal was based on the anniversary date a member joined.

Under the new universal membership model, all members will have a single annual membership effective date of September 30th. The process to convert all memberships to the new model by September 30, 2021 is currently underway. How an individual’s membership will be converted is based on the member’s annual renewal anniversary date. Membership renewals will fall into one of three categories:

- (1) Those with memberships expiring prior to September 30, 2020 will pay for 12-months on their present anniversary date for renewal and, in 2021, those members will pay for a prorated number of months to get their membership renewal date to be September 30th;
- (2) Those with memberships expiring on September 30, 2020 will be on-cycle for the new universal membership date; and
- (3) Those with memberships expiring after September 30, 2020 will pay a prorated number of months to get their membership renewal date to be September 31, 2020.

New members will pay a prorated number of months for membership. In addition, it is anticipated that student memberships will continue to extend one-year beyond graduation.

SUMMER LUNCH & LEARN SERIES FOR SUMMER EXTERNS

BY: SABRA L. TOMB, ESQ., U.S. AIR FORCE

Despite the COVID-19 pandemic and related social distancing measures and restrictions, the Chapter hosted its annual summer Lunch & Learn series for externs, with one difference—rather than in-person, the series was hosted virtually, on the Chapter’s GoToMeeting application. Each Lunch & Learn consisted of a panel of attorneys and/or non-attorneys with J.D.s to discuss their backgrounds, career paths and tips for success. The series is moderated by Michael Rhinehart, the Chapter President. The Lunch & Learn are open to all law students. The virtual Lunch & Learn provides an opportunity for externs to learn about diverse career opportunities in the local community and beyond, network, stay engaged during this virtual period, and for members of the Chapter and Dayton legal community to continue connecting with students through outreach.

The month of May kicked the series off, but additional Chapter Lunch & Learn will be offered throughout the summer!

**SUMMER LUNCH & LEARN SERIES
JUNE 2 – 16, 2020**

HOSTED BY THE DAYTON CHAPTER OF THE FEDERAL BAR ASSOCIATION

NOON-1 PM VIA [GoToMeeting](#)
ALL LAW STUDENTS ARE INVITED

- JUNE 2** PRACTICE IN THE UNITED STATES BANKRUPTCY COURTS
- JUNE 4** FEDERAL CRIMINAL DEFENSE
- JUNE 9** LIFE AS A YOUNG LAW FIRM ASSOCIATE
- JUNE 11** LIFE OF A CIVIL CASE
- JUNE 16** CAREERS WITH THE UNITED STATES ATTORNEY’S OFFICE

DATES AND TOPICS ARE SUBJECT TO CHANGE

TO PARTICIPATE, DOWNLOAD THE [GoToMeeting](#) APP ON YOUR COMPUTER, CELL PHONE, OR TABLET.
JOIN THE MEETING BY ENTERING ACCESS CODE: **972-636-237**

TO PARTICIPATE BY PHONE, DIAL 1-786-595-3211



Federal Bar
Association
Dayton Chapter

ADDITIONAL FLEXIBILITY FOR FLEXIBLE SPENDING ACCOUNTS

BY: BILL C. WELLS, ADMINISTRATIVE LAW JUDGE IN MEDICARE'S OFFICE OF HEARINGS AND APPEALS

THE VIEWS EXPRESSED IN THIS COLUMN ARE HIS OWN, AND DO NOT REPRESENT THE OFFICIAL POSITION OF ANY AFFILIATED ENTITY



*Bill C. Wells,
Administrative Law Judge*

While the primary purpose of the Coronavirus Aid, Relief, and Economic Security Act, Public Law 116-136, commonly known as the CARES Act was to provide funding for Covid-19 pandemic relief, it also addressed a great many other topics related to the dislocations caused by the pandemic. Several of these related to the use and administration of Health Savings Accounts (HSA) which are also known as Flexible Spending Accounts (FSA). While the Public Law number has been assigned, the text of P.L. 116-136 has not yet been posted on Congress.gov, so all section numbers will refer to the text of the enrolled bill, H.R. 748.

SEC. 3702 of the CARES Act repealed the Affordable Care Act requirement that Over-the-counter (OTC) drugs and medicines must be prescribed in order to be reimbursed under FSAs. This means that these plans can now pay for or reimburse OTC drugs and medicines without a prescription. This provision is retroactive to January 1, 2020 and does not have an expiration date. Section 3702 also expanded the definition of medical care to include menstrual care products. Note that covered OTC drugs and products must be intended to “alleviate or treat” personal injuries or sickness. They cannot be “merely beneficial to general health” because Revenue Ruling 2003-102 held that dietary supplements were not considered qualified medical expenses.

While the law governing Dependent Care Flexible Spending Accounts (DCFSA) was not changed by the CARES Act, the circumstances related to the Covid-19 pandemic and the resulting dislocations to work place routines may qualify as a qualifying life event (QLE) that will allow midyear changes to the amount being withdrawn from an employee’s pay to fund the DCFSA. For example, if a dependent care provider is no longer providing care because they have been closed by the pandemic related shutdown or if the care is no longer needed because a previously employed family member is now providing the care, the contribution could be reduced. Conversely, if alternative arrangements had to be made that are more expensive, the amount withheld from an employee’s pay could be increased. If at a later point in time the Covid-19 related restrictions are canceled or relaxed, this would be a second QLE, and additional adjustments could be made so that the amount withheld from the employee’s pay correctly tracks the expenses likely to be incurred for the remainder of the year.

FBA PROVIDES SUPPORT TO MEMBERS OF LEGAL COMMUNITY IN NEED THROUGH SOLACE PROGRAM

BY: SABRA L. TOMB, ESQ., U.S. AIR FORCE

In light of the COVID-19 global pandemic and associated effect on our individual communities, the Dayton Chapter would like to remind our members of the FBA’s SOLACE program. SOLACE stands for "Support of Lawyers/Legal Personnel—All Concern Encouraged." SOLACE provides a way for the FBA legal community to reach out in small, but meaningful and compassionate ways, to FBA members and those related to them in the legal community who experience a death, or some catastrophic event, illness, sickness, injury, or other personal crisis. If you or your family need assistance, please don't hesitate to reach out to Mr. Steve Justice, Dayton Chapter SOLACE Committee Chairperson, justice@dunganattorney.com, or submit a request at:

<https://www.fedbar.org/about-us/outreach/solace/solace-submission-form/>

No request is too big or too small.

The Dayton FBA Chapter is here to assist in any way possible during this national time of crisis.

I'M FROM THE GOVERNMENT AND I'M HERE TO HELP YOU - COVID-19 REGULATION CHANGES

STAFF REPORT

Several federal agencies have granted special regulatory relief in matters under their jurisdiction as part of the response to the Covid-19 Public Health Emergency that had been declared on January 31, 2020. The PHE was effective as of January 27, 2020, and was extended on April 26, 2020. What follows is not guaranteed to be comprehensive or complete. If you have a particular client question that deals with something not addressed here, you will have to review the Federal Register and the relevant agency websites. Instead, this article intends to provide a summary of the general Covid-19 related regulatory relief provisions that had been issued on or before May 17, 2020, so that you can be aware of them, and share the information with medical clients if they are not already aware of and taking advance of the regulatory relief.

On May 12, the Food and Drug Administration (FDA or Agency) announced the availability of a final guidance document entitled "Policy for Coronavirus Disease-2019 Tests during the Public Health Emergency." 85 FR 28010. The guidance documents identified in the notice address issues related to the COVID-19 PHE and were issued in accordance with the process announced in a March 25, 2020 document. These guidance documents were effective without prior comment but remain subject to comment in accordance with the Agency's good guidance practices. A full list of the applicable guidance documents is found in Table 1 of the notice, and the documents can be obtained from the FDA's website at:

<https://www.fda.gov/emergency-preparedness-and-response/coronavirus-disease-2019-covid-19/covid-19-related-guidance-documents-industry-fda-staff-and-other-stakeholders>

On a more practical level, but likely to be of interest to health care providers in the Miami Valley given the large number of active duty and retired military members and families, on May 12, 2020, the Assistant Secretary of Defense for Health Affairs issued an interim final rule with comment period that provided an exception to the prohibition on telephone, audio-only telehealth services. The rule also authorized reimbursement for interstate or international practice by TRICARE-authorized providers when such authority is consistent with governing state, federal, or host nation licensing requirements; and eliminated copayments and cost-shares for telehealth services. 85 FR 27921-27927.

Likewise, on April 6, 2020 (but effective retroactively from March 31, 2020), the Centers for Medicare and Medicaid Services issued an interim final rule with comment period (IFC) that gave individuals and entities that provide services to Medicare beneficiaries additional flexibilities during the Public Health Emergency (PHE) for the COVID-19 pandemic intended to allow them to respond effectively to the serious public health threats posed by the spread of COVID-19. 85 FR 19230 -19292.

The intent of the changes effected by the rules was to modify pre-existing Medicare payment rules that might inhibit the innovative uses of technology and capacity that might otherwise be effective in the efforts to mitigate the impact of the pandemic on Medicare beneficiaries and the American public. The first part of this was to change the rules so that physicians and other practitioners, home health and hospice providers, inpatient rehabilitation facilities, rural health clinics (RHCs), and federally qualified health centers (FQHCs) would be allowed broad flexibilities to furnish services using remote communications technology to avoid exposure risks to health care providers, patients, and the community at large. The expanded authorities also altered the applicable payment policies to allow specimen collection fees for independent laboratories collecting specimens from beneficiaries who are homebound or inpatients (not in a hospital) for COVID-19 testing.

DAYTON CHAPTER MONTHLY BOARD MEETINGS

The Board of the Dayton Chapter of the FBA meets at noon on the second Monday of every month in Judge Newman's Courtroom, unless otherwise indicated. All FBA members are invited and encouraged to attend! Interested in joining the FBA or getting involved with the Dayton Chapter? Join us—guests are welcome!

FIRST CHAIR: PRESIDENT'S MESSAGE (CONTINUED FROM PAGE 1)

All are invited to attend and participate, so please spread the word to students you know and those working with your offices this summer.

In addition to letting members know about the Summer Lunch & Learn Series, I also want to take this opportunity let members know that the Dayton Chapter was selected by FBA National to participate in beta testing of the FBA's new MyFedBar web platform, which can be accessed online at www.MyFedBar.org. The MyFedBar.org website allows Chapter members to discuss topics in a community forum, and post and view upcoming Chapter events. I encourage everyone to view our Chapter's Community page on MyFedBar.org and to use the platform to communicate with other Chapter members, view upcoming Chapter events, and to read blog posts written by Chapter members all over the country.

Finally, in light of the difficult times presented by the COVID-19 pandemic, I want to remind all of you about the FBA's SOLACE program. As many of you know, SOLACE stands for "Support of Lawyers/Legal Personnel—All Concern Encouraged." The program – which was created by United States District Judge Jay Zainey of the Eastern District of Louisiana – is designed to help FBA members and those related to them in the legal community who are suffering from a range of personal crises, including deaths in the family, illness, injury, or other catastrophic event. More information about the FBA's SOLACE program can be found on the FBA's website at <http://www.fedbar.org/about-us/outreach/solace/>. For assistance locally, please reach out to Steve Justice, who serves as the Dayton Chapter's SOLACE Chair. The Chapter greatly appreciates all of Steve's efforts with the SOLACE program, both nationally and at home.

Thank you for the opportunity to serve the Chapter as President. I remain confident that, as a community, we will get through this pandemic and on to better times.

– Michael N. Rhinehart, President, FBA Dayton Chapter

**DAYTON FBA
COMMITTEE MEMBER SPOTLIGHT**
Michael Scarpelli



Mike is an attorney with Dungan & LeFevre Co., LPA, in Troy. His practice consists of general civil litigation, criminal defense, and civil and criminal appeals. Prior to joining the firm, Mike served as an assistant prosecuting attorney at the Montgomery County Prosecutor's Office and as a law clerk to the Honorable Michael J. Newman. Mike is currently the Chair of the CLE Committee of the Dayton Chapter. Mike is also an active member of the Dayton Bar Association and Ohio State Bar Association. He lives in Vandalia with his wife and young son.

I'M FROM THE GOVERNMENT AND I'M HERE TO HELP YOU - COVID-19 REGULATION CHANGES (CONTINUED FROM PAGE 4)

The rule also expanded, on an interim basis, the list of destinations for which Medicare covers ambulance transports under Medicare Part B (note – for those not familiar with the structure of Medicare, Part B covers services other than hospitalization).

Additional programmatic changes were made to the Medicare Diabetes Prevention Program (MDPP) and the Comprehensive Care for Joint Replacement (CJR) Model in light of the PHE, and program-specific requirements for the Quality Payment Program to avoid inadvertently creating incentives to place cost considerations above patient safety. The IFC will modify the calculation of the 2021 and 2022 Part C and D Star Ratings to address the expected disruption to data collection and measure scores posed by the COVID–19 pandemic and also to avoid inadvertently creating incentives to place cost considerations above patient safety. The rule also amended the Medicaid home health regulations to allow other licensed practitioners to order home health services for the period of this PHE for the COVID–19 pandemic in accordance with state scope of practice laws. It also modified the under arrangements policy for the duration of PHE for the COVID–19 pandemic to allow hospitals broader flexibilities to furnish inpatient services, including routine services outside the hospital.

While this is a long (62 pages) and complex IFC, it provides considerable and valuable flexibility to Medicare providers, as do the other agencies similar rule changes discussed above. Anyone representing health care providers will want to be aware of and familiar with temporary authorities made available by these interim final rules because they have the potential to make your clients' practices more efficient and more profitable.

CALLING ALL WRITERS!

FEDERAL BAR ASSOCIATION YOUNG LAWYER'S DIVISION

The FBA Young Lawyer's Division (YLD) is putting together its next newsletter for publication in late summer/early fall 2020 and is seeking submissions.

Articles should be between 1,000 to 1,500 words and can cover topics such as COVID-19 related legal issues (e.g. self-care tips, insurance, force majeure and contract issues, employment law issues, estate planning, etc.), events your local YLD has sponsored, insight into specific federal practice areas, federal legal developments, recent case law, pro bono experiences, tips on writing or advocacy, leadership or management advice, lawyer wellness, judicial profiles, and beyond.

If you would like to submit an article, please send your submissions to Erin McAdams Franzblau at efranzblau@freeborn.com by July 15, 2020. Please also send a 2-3 sentence biography and headshot for publication.

The Dayton Chapter of the Federal Bar Association has its own website, <http://www.fedbar.org/Chapters/Dayton:Chapter.aspx>. Please save this website to your favorites, as it has information on the Chapter's upcoming events, as well as, current and past copies of the On The Merits newsletter!



Brennan Champion, J.D., Spring 2020
Air Force Research Laboratory
Legal Extern

NUTS AND BOLTS OF THE DEFENSE PRODUCTION ACT

BY: BRENNAN CHAMPION, J.D.

The Defense Production Act (DPA) grants the President the authority over the manufacturing of specified goods in response to a national emergency. Through the DPA, the President can, among other activities, prioritize government contracts for goods and services over competing customers, and offer incentives within the domestic market to enhance the production and supply of critical materials and technologies when necessary for national defense or national security.¹

Specifically, the President may designate certain goods as critical and mandate that critical goods are given high priority. By making this designation, the private sector is commanded by law to comply with the DPA through two measures: (1) the private sector must prioritize government contracts over competing contracts; and (2) the private sector may be required to direct all of their manufacturing abilities towards specific goods.

For example, a company that traditionally makes both paper products and medical masks may be instructed to focus solely on producing medical masks. While the DPA gives the government control during emergencies to direct industrial production, the DPA does not grant government authority over employment contracts. Further, if the government wants to use wage and price controls, then the government must seek congressional approval.

The DPA is broken into three primary categories: (1) Priorities and Allocations; (2) Expansion of Productive Capacity and Supply; and (3) General Provisions. Under Title 1, Priorities and Allocations, the President may require a corporation to accept and prioritize contracts deemed necessary by the government or appropriate to promote national defense. Title 2, Expansion of Productive Capacity and Supply, grants the President the authority to create incentives for industries to produce critical material.

Title 3 authorities are intended to help ensure that the nation has an adequate supply of, or the ability to produce, essential materials and goods necessary for the nation. Using Title 3 authorities, the President may provide appropriate financial incentives to develop, maintain, modernize, restore, and expand the production capacity of domestic sources for critical components, critical technology items, materials, and industrial resources essential for the execution of the national security strategy of the United States. The President is also directed to use Title 3 authorities to ensure that critical components, critical technology items, essential materials, and industrial resources are available from reliable sources when needed to meet defense requirements during peacetime, graduated mobilization, and national emergency.²

Title 3, General Provisions, broadly establish the government's authority to formulate and enter agreements. Further, Title 3 grants the President an array of authorities to create, maintain, protect, expand, or restore domestic industrial base capabilities essential to the nation. These authorities include, but are not limited to, the following: (1) purchasing or making purchase commitments of industrial resources or critical technology items; (2) making subsidy payments for domestically produced materials; and (3) installing and purchasing equipment for government and privately owned industrial facilities to expand their productive capacity.³

The DPA involves states and private companies. Under the DPA, the federal government has the authority to determine the order in which states will receive critical material and can require manufacturing participation from the private sector. Moreover, the private corporations are notified which material is deemed critical and are obligated to prioritize critical material. A valid order form from the government to a private contractor must include four elements. First, the order should designate the appropriate priority rating (discussed below, DX or DO). Second, the order must specify a required delivery date. Third, the order must contain a written or digital signature.

(Continued on next page)

Last, under the current regulation, the order must include a statement that reads “[t]his is rated order certified for national defense use, and you are required to follow the provisions of the Defense Priorities and Allocations System regulation.”⁴

The DPA includes two priority allocations for rated orders. DX is the highest priority rated order, and all DX orders are of equal priority with each other and take priority over DO rated orders or non-rated orders. DO rated orders are of equal priority with each other and take priority over non-rated orders.⁵ Contractors must accept or reject a DX or DO rated order within 10 working days or 15 working days after receipt of the request.

Executive Order 13606, The National Defense Resources Preparedness Executive Order, authorizes the President to initiate the DPA. Specifically, the President delegates the authority under the DPA to various federal agencies who oversee the DPA’s implementation. This authority remains available to the President for the duration of the DPA.

The DPA was most recently reauthorized by Congress in 2019 and bears a sunset date of September 30, 2025. The powers granted under the DPA remain effective until either (i) it expires or (ii) a new expiration date is set by Congress. The powers afforded to the President under the DPA do not operate as an on or off switch. Simply put, these powers are always available until the DPA is no longer effective. The powers under the DPA grant the President wide latitude to determine when to employ the powers and the duration accompanied therewith.

¹The Defense Production Act of 1950: History, Authorities, and Considerations for Congress. March 2, 2020. Pg. 6. <https://fas.org/sgp/crs/natsec/R43767.pdf>

²U.S.C. §4517; Section 107(b)(1) of the DPA.

³50 U.S.C. §4533(a), Section 303(a)(1)(A) of the DPA. The terms “critical technology item” and “industry resource” are further defined in 50 U.S.C. §4552, Section 702 of the DPA.

⁴15 C.F.R. § 700.12(d)

⁵Littlejohn, Michael. “Articles, Using all the King’s Horses for Homeland Security: Implementing the Defense Production Act for Disaster Relief and Critical Infrastructure.” 36 Pub. Cont. (2006)

Dayton FBA Committee Member Spotlight *Meetal Reed*



Ms. Meetal Reed serves as a Term Law Clerk to the Honorable Michael J. Newman in the United States District Court for the Southern District of Ohio. Prior to joining Judge Newman’s chambers, Meetal was an Acquisition Fraud Counsel in the Procurement Fraud Division of the Air Force Materiel Command Law Office at Wright-Patterson Air Force Base. Meetal serves as the Membership Chair for the Dayton Chapter. She is a former President of the Wright-Patterson Bar Association. Additionally, she dedicates time as a mentor for the University of Dayton’s Diverse Mentoring Program and the Pro Bono Partnership of Ohio.

ABOUT THE DAYTON CHAPTER

The mission of the Dayton Chapter of the FBA is to advance the profession and science of jurisprudence and to promote the welfare, interests, education, and professional growth and development of the members of the Federal legal profession.

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**Interested in joining a committee?
Contact Michael Rhinehart at
Michael.Rhinehart@ohsd.uscourts.gov*



On The Merits is the official publication of the Dayton, Ohio Chapter of the Federal Bar Association. If you are interested in submitting content for publication consideration, please contact Sabra Tomb at sabratomb@hotmail.com.



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