

# Computer & Internet

COMMENTARY

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## Springing Ahead to Daylight-Saving Time Liability?

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Seven months ago, at 2 a.m. on the first Sunday of April, we moved our clocks ahead one hour, and recently, at 2 a.m. on the last Sunday of October, we changed them back, following the federally mandated daylight-saving time rules. But the law has just been changed. As a result, we will go through this cycle one more time, in 2006, before switching to a new DST cycle for 2007.

This seemingly innocuous change has the potential to create serious difficulties for software and hardware designers, manufacturers and programmers due to a simple fact that Congress and the White House appear to have overlooked. In recent years, with each successive change of the clock, many people have had to change *fewer* clocks. This is because more and more computers and devices are being programmed to automatically adjust themselves for DST.

Recently, many people did not have to change the clocks on their Windows-based computers, because Windows is programmed to automatically adjust for DST based on current DST rules. They also did not have to change the clocks on many other devices, such as wristwatches, video cameras, lighting timers and outdoor clocks, which were likewise programmed to automatically adjust themselves for DST.

But this is all set to change in 2007, because the expanded DST period has the potential not only to cause confusion, but to give rise to litigation, and possibly liability, for companies caught unawares.

### The DST Rules

The United States' DST rules are set forth in the Uniform Time Act of 1966.<sup>1</sup> The UTA, last amended in 1986, has three sections. Section (a) references the basic rule:

During the period commencing at 2 o'clock antemeridian on the first Sunday of April of each

year and ending at 2 o'clock antemeridian on the last Sunday of October of each year, the standard time of each zone ... shall be advanced one hour and such time as so advanced shall ... be the standard time of such zone during such period.

Section (a) also includes opt-out provisions. States lying entirely within one time zone may choose to observe standard time year-round, and states lying in multiple time zones may either choose to observe standard time for the entire state or to exempt the portions of the state lying in a particular time zone.<sup>2</sup> The state of Hawaii, for example, has opted out of DST, and the Indiana Legislature has only recently voted to adopt DST, but individual counties are being given the option to choose between the Central and Eastern time zones.<sup>3</sup>

Section (b) of the UTA provides that the federal DST rules supersede all state laws.<sup>4</sup> Section (c) gives the U.S. secretary of transportation the power to enforce the DST rules by applying to the federal district courts, which have the express authority to issue injunctions to stop violations or to ensure compliance with the rules.<sup>5</sup>

On Aug. 8, 2005, President Bush signed into law the Energy Policy Act of 2005.<sup>6</sup> Among its provisions was Section 110, the full text of which reads as follows:

(a) AMENDMENT—Section 3(a) of the Uniform Time Act of 1966 (15 U.S.C. 260a(a)) is amended—

(1) by striking "first Sunday of April" and inserting "second Sunday of March"; and

(2) by striking "last Sunday of October" and inserting "first Sunday of November."

(b) **EFFECTIVE DATE**—Subsection (a) shall take effect one year after the date of enactment of this act or March 1, 2007, whichever is later.

(c) **REPORT TO CONGRESS**—Not later than nine months after the effective date stated in subsection (b), the secretary shall report to Congress on the impact of this section on energy consumption in the United States.

(d) **RIGHT TO REVERT**—Congress retains the right to revert the daylight-saving time back to the 2005 time schedules once the department study is complete.<sup>7</sup>

Subsection (a) modifies the start and stop dates of DST by amending the UTA. Subsection (b) makes these changes effective March 1, 2007, which means that in 2007, we will spring ahead “early” on March 11 and fall back “late” on Nov. 4. While this always adds one week to the end of DST, it adds either three or four weeks to the beginning, depending on the number of Sundays in March each year.<sup>8</sup>

Subsections (c) and (d) are interesting. The former requires the secretary of energy to report to Congress by Dec. 1, 2007 (after we complete our first cycle under the new DST rules) on the impact of the new DST rules on energy consumption. In subsection (d), Congress expressly reserved the right to “revert” to 2005 DST rules “once the department study is complete.” Although “department” is defined as the Department of Energy, the term “study” is not defined, leaving this section (and the time at which Congress can choose to revert) somewhat ambiguous.

According to the House Energy and Commerce Committee, however, “study” refers to the “report” cited in section (c).<sup>9</sup> This means that Congress may choose as early as Dec. 1, 2007 — after just one cycle under the new DST rules — to revert to the current rules. While this reservation may not actually give Congress any legislative power greater than that which it already enjoys,<sup>10</sup> it is significant that Congress signaled that it may change the DST rules again in the near term.

### Impact of the New DST Rules

The effects of the new DST rules will likely vary widely from company to company, depending on the extent to which the company’s business involves time accuracy and the extent to which its business involves computers or devices that already automatically adjust themselves for DST.

If a company’s business is not impacted by automatically adjusting computers or devices, then the problem could

be solved through education — alerting those people who now adjust the company’s clocks according to the current rules of the new rules. In today’s world, however, such a company is difficult to envision.

Let us consider what may be the most prevalent example: Microsoft Windows. Current versions of Windows give users the option of automatically adjusting the computer’s clock for DST, and many computers are configured for automatic adjustment. Microsoft (and other operating system manufacturers) will almost certainly offer downloads to upgrade Windows to the new DST rules.

Relying on downloadable patches, however, comes with some risk. First, a download is only as good as its installer; companies will have to take steps to make sure all of their systems are upgraded. Second, downloads are not always perfect. Indeed, in 2002, Microsoft made available the “Australian daylight-savings transition time fix for Windows,”<sup>11</sup> but then apparently had to replace it in 2004 due to difficulties in interpreting the Australian legislation.<sup>12</sup>

Companies also should consider the extent to which their businesses interact with computers not under their control (especially computers outside of the United States) and whether these interactions pose any risk.

Moving beyond computers and other devices connected to the Internet brings one to some of the more difficult challenges posed by the new DST rules, for there are many standalone products and devices that also automatically adjust themselves for DST, many of which cannot be upgraded with the relative ease of downloading a patch. Companies that use such products should consider whether they should seek replacements, and companies that manufacture or distribute such products should consider their obligations and potential liabilities, as well.

Another very important practical consideration that should not be overlooked is Congress’ express statement that it may choose to revert to 2005 DST rules in or after December 2007 and the unstated but very real possibility that it may choose to make further changes to the rules in the future. When making plans to deal with the upcoming changes, companies should consider ways to make their plans flexible enough to be implemented again, should the need arise.

### Potential DST Liability

Just as the impact of the new DST rules will be a company-by-company analysis, potential exposure to liability will also be a heavily fact-intensive analysis. A company that fails to properly adjust or upgrade its own computers, or fails to recognize the impact of outside, unad-

justed computers, could face litigation from those who depend upon its services. Likewise, a company producing software or devices that fails to take steps now to prepare for 2007 may also face litigation from its customers. Such litigation could take many forms, including claims of breach of contract, breach of warranty and product liability.

Discussing the impact of the new DST rules naturally leads to comparisons to the Y2K programming issues and Y2K-related liability. One factor that makes DST liability potentially more dangerous than Y2K liability is that Congress does not appear to be making any moves to limit companies' liability and exposure, as it did in the period leading up to Jan. 1, 2000.

There does not appear to be any legislation in the works akin to the Y2K Act,<sup>13</sup> which placed restrictions on Y2K-related litigation, including limitations on class-action claims, limitations on punitive damages, and pleading and timing restrictions placed on plaintiffs. The Internal Revenue Service also allowed for deduction of certain types of Y2K-related expenditures, but there has been no public indication that it plans to do the same for DST in 2007.

### Taking Steps

Once companies decide for themselves the extent to which they will be impacted by the new DST rules, they can take a variety of steps to deal with it, and they may wish to employ counsel as appropriate in the process. The following framework may provide a useful means of approaching the issues:

First, companies should put plans in place well in advance of March 2007 for the upgrade of their internal systems and should run tests of those systems as companies did prior to Y2K.

Second, companies concerned about their own liability for products already on the market should conduct thorough examinations of their current contracts and decide whether amendments are necessary.

Third, companies concerned about liability arising from future activity, such as the future sales of software or products, should begin the redesign and testing process now, to make future products compliant with the coming changes and adaptable to any future changes, especially if they envision their contractual counterparts making claims for remediation or liability.

Fourth, although the DST rule changes were passed into law over the objections of industry groups (including the

airline industry), there is nothing to stop companies from educating their legislators about the particular impact the new DST rules will have on different types of companies and from pressing for measures to safeguard companies' interests by changing or repealing the law, delaying its effective date, or passing protective measures along the lines of the Y2K Act.

### Notes

<sup>1</sup> 15 U.S.C. § 260a.

<sup>2</sup> *Id.* § 260a(a).

<sup>3</sup> A. Schatz, *Central, Not Eastern! Indiana Sports Guy Tackles Time Zones*, WALL ST. J., Oct. 19, 2005, at A1.

<sup>4</sup> 15 U.S.C. § 260a(b).

<sup>5</sup> *Id.* § 260a(c).

<sup>6</sup> Energy Policy Act of 2005, Pub. L. No. 109-58, 119 Stat. 594 (Aug. 8, 2005).

<sup>7</sup> *Id.*, 119 Stat. at 615.

<sup>8</sup> In 2007, 2010, 2011, 2012 and 2016 DST will begin three weeks "early" (because March has four Sundays), while in 2008, 2009, 2013, 2014 and 2015 it will begin four weeks "early" (because March has five Sundays).

<sup>9</sup> Telephone call between Hillel I. Parness and House Energy and Commerce Committee (Sept. 16, 2005).

<sup>10</sup> In introducing the Energy Policy Act, President Bush specifically noted that "[t]he executive branch shall construe the statement in Section 110(d) of the act, that the Congress reserves the right to revert to previous schedules for daylight-saving time, as referring to reversion by enactment of a law in accordance with the bicameral passage and presentment requirements specified in the Constitution." Statement by the President on Energy Policy Act of 2005, 2005 WL 1864962 (Aug. 8, 2005).

<sup>11</sup> See "Australian Daylight Savings Transition Time Fix for Windows," available at <http://www.microsoft.com/downloads/details.aspx?FamilyID=e1841242-9fff-45e7-9379-46f5a938ee85&DisplayLang=en#top>.

<sup>12</sup> See "Australian Daylight Savings Time Transition Is Incorrect," available at <http://support.microsoft.com/default.aspx?scid=kb%3Ben-us%3B304303>.

<sup>13</sup> Y2K Act, Pub. L. No. 106-37, 113 Stat. 185 (July 20, 1999).

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