



BUSINESS COUNSELING UPDATE

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IRS NOTICE REQUIRES REVIEW OF CERTAIN SPLIT DOLLAR PLANS

This year, the Treasury Department and the Internal Revenue Service jointly issued Notice 2002-8 which addresses split dollar insurance plans. Split dollar arrangements have become a popular tool for executive compensation planning and generally enable companies and executives to share the cost of permanent life insurance and finance large insurance benefits for the executive's family. Over the years they have become a key tool for both executive compensation planning as well as estate and gift tax planning.

In large measure, Notice 2002-8 is the beginning of an attempt by the Treasury and the IRS to establish a defined set of

rules governing the income tax treatment of split dollar arrangements. Proposed regulations mandating certain income tax treatment for these plans were issued in July of 2002. Of interest to those currently involved with a split dollar arrangement is the opportunity afforded by Notice 2002-8 to lock in favorable income tax treatment for certain existing plans. Favorable income tax treatment may be available for equity split dollar arrangements if they are terminated before the end of 2003.

Any equity split dollar plan which either currently has a substantial amount of equity built-up, or is expected to result in a substantial equity build-up should be reviewed in order to determine whether the plan should be terminated in order to take advantage of this opportunity.

Donald L. Erftmier, Jr.



Inside this Issue

EMPLOYMENT

- The Fair Labor Standards Act
Are your employees really exempt?

ESTATE PLANNING

- IRS Notice Requires Review of Certain Split Dollar Plans
- Pitfalls of Joint Accounts

REAL ESTATE

- Recent Title Insurance Reforms

TAX

- New Sales Tax Could Mean More Audits

WORKERS' COMPENSATION

- Workers' Compensation Coverage for Corporate Executive Officers
-

NEW SALES TAX COULD MEAN MORE AUDITS

Beginning October 1, 2002, nine new services became subject to Nebraska sales tax: motor vehicle washing and waxing; motor vehicle painting; motor vehicle towing; security services; pest control services; building cleaning and maintenance services; computer software training; installation and application labor; and labor associated with the sale of property by a capital option one contractor. The sales tax is due on the total amount charged for the service without deduction for any materials used, labor costs, interest paid, delivery charges or any other mandatory charge required to be paid in the purchase of the service. Sellers of these services must obtain a Nebraska Sales Tax Permit and begin collecting and remitting the tax for all sales made on and after October 1, 2002. For one year beginning October 1, 2002, the Nebraska sales and use tax rate will increase from 5% to 5.5%.

If an auditor from the Nebraska Department of Revenue contacts you in reference to a sales and use tax audit, you should immediately contact your tax advisor. Do not give a personal interview. Do not let an auditor conduct his or her audit on your business premises—we routinely require auditors to conduct audits of our clients at our law office. Potential tax issues can be avoided by getting your books and records in order before you are chosen for an audit. Your minute book is a good example of a business record that may not be updated as it should be.

Matthew J. Bock

RECENT TITLE INSURANCE REFORMS

In early 2002, State Title Services filed for bankruptcy protection and terminated its title insurance activities. It soon became apparent that escrowed funds were unaccounted for and that a significant amount of escrowed funds had been stolen. In the aftermath of this unfortunate occurrence, the Nebraska Department of Insurance and the Nebraska Legislature became concerned that there was not adequate regulation in place to prevent a reoccurrence of this event. As a result of this concern, a number of regulatory changes were proposed which eventually took form as LB 1139. This bill was approved by the Governor on April 19, 2002.

LB 1139 provides the Legislature's immediate response to the events surrounding State Title. First, it provides for the repeal of Neb.Rev.Stat. § 44-19,116 (which had provided for an alternative certification in lieu of an annual CPA audit of a title insurance agent's accounts) and imposes, effective January 1, 2004, a requirement for annual CPA audits of all title insurance agent escrow, settlement, closing and security deposit accounts.

Secondly, the bill requires a title insurer to issue a closing protection letter to an insured if the title insurer issues a commitment or title insurance policy, effective January 1, 2003. A closing protection letter generally indemnifies an insured against losses due to an escrow agent's theft of funds or an escrow agent's failure to follow



written closing instructions. While closing protection letters were previously available to insureds upon request under Nebraska law, they were not required to be issued.

The Nebraska Department of Insurance has telegraphed its wishes for additional regulatory requirements aimed at enhancing the solvency of title insurers and the protection of consumers of title insurance and escrow services. Changes that may be coming in the future range from more specific time frames for the issuance of title insurance policies following the closing of a transaction to stricter oversight to ensure that escrow funds are released only in accordance with written instructions.

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The Division of Insurance and the Legislature responded quickly to the failure of State Title Services and the improper actions of its owner. For the most part, the initial regulatory changes discussed above strike a balance between title industry concerns and consumer protection. Occurrences such as the State Title Services matter are rare in Nebraska, and Nebraska's enhanced regulatory approach towards real estate settlements and escrows will help ensure that such occurrences are even rarer in the future.

Ryan N. Boe



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WORKERS' COMPENSATION COVERAGE FOR CORPORATE EXECUTIVE OFFICERS

The Nebraska Legislature made a substantial change in the Workers' Compensation Act which will affect workers' compensation policies. Effective January 1, 2003, executive officers of corporations who own twenty-five percent or more of the common stock of the corporation and executive officers of non-profit corporations who receive annual compensation of \$1,000.00 or less will no longer automatically be covered under the provisions of the Nebraska Workers' Compensation Law. The amendment to the Workers' Compensation Act provides that those executive officers who desire to be covered by workers' compensation policies must individually sign an election form to be covered by workers' compensation. If an election is not filed, these officers will not have workers' compensation coverage effective January 1, 2003.

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An election to be covered by the provisions of the Workers' Compensation Act must be made in writing and filed with the secretary of the corporation and with the corporation's workers' compensation insurance carrier. The election remains in effect until it is terminated in writing by the executive officer, and the termination is filed with the insurer and the secretary of the corporation.

Jon S. Reid

PITFALLS OF JOINT ACCOUNTS

Jointly titled assets are not all treated the same during the lifetimes of the joint owners or upon the death of the first joint owner. There are several different forms of joint ownership, each with its own legal consequences. Many people do not realize that certain kinds of joint titling will cause an asset to pass pursuant to the way it is titled, not pursuant to the instructions left in their will or trust. In many instances, but not always, jointly titled accounts or property will pass to the surviving joint owner upon the first joint owner's death.

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Several problems can occur if a joint account is not titled in the manner you think it is. For many jointly titled accounts, either joint account owner may withdraw the entire balance and wrongfully refuse to repay the other what is rightfully due. In addition, the bank or other creditors may be able to seize the entire account balance to recover money owed by either owner. Many times individuals open joint accounts solely to authorize an assistant to access the account in the event of an emergency or disability and do not realize that upon their death, the assistant will be the sole owner of the entire account. Misunderstandings and disputes caused by joint ownership can be avoided by the use of other common deposit arrangements or a power of attorney.

In some instances, new account personnel at banks are warned against giving advice to customers regarding account choices because they may lack the training and experience needed to advise customers about the complex

legal relationships that accompany accounts bearing more than one person's name.

If you are uncertain how your jointly titled assets will pass upon your death or what rights you have to your jointly titled property during your lifetime, it is worth the time to check the way your assets are titled to make sure it complies with your overall estate plan.

Angela M. Pelan

THE FAIR LABOR STANDARDS ACT

Are your employees really exempt?

More and more employers are learning about the Fair Labor Standards Act. Unfortunately, this is only after a Department of Labor investigator pays them a visit. Such visits often times result in the assessment of penalties and having to pay, what were considered salaried or exempt employees, overtime. Below is a brief description of the major exemptions allowed under the FLSA and how to avoid turning these exempt employees into hourly employees.

The FLSA allows an employer to exempt certain employees from the requirement of overtime. These exemptions are designated as executive, administrative and professionals. The exempt or nonexempt status of any particular employee must be determined by reviewing the employee's actual duties and responsibilities rather than his or her title. If an employee meets the exemption, and is paid more than a minimum threshold established by the Department of Labor, the employer does not have to pay the employee overtime for hours worked in excess of 40. There are also a number of industry and type of work based exemptions, which are not discussed in this article.

In order to qualify for the executive exemption, the employee must primarily manage a department or subdivision and customarily direct two



or more other employees. This employee must also possess the power to hire, fire and promote employees, or his or her suggestions must be given substantial weight in such decisions. This employee must also customarily and regularly exercise discretion and devote less than twenty percent of his or her hours in a workweek to the performance of activities not closely related to management. Generally speaking, managers and directors fall within this category.

The administrative exemption requires an employee to have the primary duty of performing office or non-manual field work related to management policies or general business operations. The employee must further exercise discretion and independent judgment in assisting an executive or administrative official, act in a staff or advisory capacity or perform special assignments for the employer. Employees that generally fit this description include assistant buyers, staff employees who take charge of a functional department, such as credit managers, and personnel directors. This exemption would not apply to an executive assistant who performs mostly routine secretarial duties.

The professional exemption requires the employee to possess advanced learning acquired by a prolonged course of specialized training and instruction, as distinguished from general academic education, apprenticeships or routine training. This employee must also consistently exercise discretion and judgment and cannot devote more than twenty percent of his or her hours to activities not essential to his or her professional activities. Generally speaking, doctors, accountants, actuaries, engineers, teachers and architects fit within this exemption. Computer software

professionals may also fall within this exemption, so long as the employer is paying him or her at least \$27.63 per hour.

In addition to meeting one of these exemptions, employers must also pay salaried employees a minimum threshold salary established by the Department of Labor. In today's economy, the minimum salary is generally met.

Employers must be aware of a number of hazards that could inadvertently cause an otherwise exempt employee to become non-exempt and require the payment of overtime. One most common hazard is encountered when an employer docks an exempt employee's pay for partial day absences. Deductions are simply not permitted from a salary for absences less than a full day. Instead, employers should deduct the leave from the employee's vacation or sick leave accounts. Deductions are, however, permitted when an employee is absent for one or more days for personal reasons, other than sickness or accident, and such deductions may be made for absences of a day or more due to sickness or disability if the deduction is made pursuant to a bona fide plan, policy or practice of providing compensation for a loss of salary caused by sickness or disability.

A second hazard involves variations of an exempt employee's salary based on the quantity or quality of the work performed. Under the FLSA, exempt employees must receive a fixed amount of pay in any workweek in which they perform work *without* variation based upon the quantity or quality of the work performed.

Along the same lines, exempt employees may not have their salary

reduced because of a disciplinary suspension if they perform any work in the applicable workweek. Thus, the employer may either suspend the exempt employee for an entire workweek or forego suspension and implement some other disciplinary punishment. The sole exception to this rule involves "infractions of safety rules of major significance." For this type of infraction, an employer may suspend an exempt employee for less than a full workweek and deduct the appropriate number of days pay from his/her weekly salary.

In sum, it is imperative for employers to audit their employee's duties and position descriptions to determine whether they are in compliance with the FLSA.

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