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**COLLECTIONS AND OTHER
VALUABLE PERSONAL
PROPERTY SHOULD NOT
BE OVERLOOKED IN
AN ESTATE PLAN**

Complications can arise when artwork or other valuable collections are transferred off the books to the next generation. Many collectors hope to avoid paying sales tax, capital gains and estate taxes by paying cash, using money orders and never insuring their collections. Upon a collector's death, oftentimes the artwork is quickly removed from the collector's home by heirs. However, by hiding these assets from the IRS, the collector is potentially creating a major problem for heirs.

Sometime collectors don't anticipate unforeseen circumstances, such as death, divorce and debt, which can force the sale of their collections. It can be difficult to sell collections anonymously and even more difficult to explain the proceeds of the sale to the IRS. If the IRS discovers a collection which has not been reported, the costs can be great. There is no statute of limitations for estate tax fraud and there are penalties imposed by the IRS for underreporting the value of an asset or not reporting it at all. The fines can

raise the transfer cost of an unreported piece of artwork from 47 percent to 82 percent.

In order to avoid creating problems for their heirs, collectors need to create a plan for their collection. Collectors can consult their estate planning attorney to properly make gifts of their collectable items to the next generation. In addition, collectors can strategically sell their collections. The most important thing for collectors to do is to formulate a plan so their heirs are not left with unanticipated problems with the IRS.

Angela M. Pelan

**AN OUNCE OF PREVENTION IS
WORTH A POUND OF CURE:
CONDUCTING AN
EMPLOYMENT RELATIONS
AUDIT**

A proactive approach to employment issues can pay substantial dividends in reduced legal challenges and associated costs. Many employers find that the best time to review and revise their employment practices is before a potentially costly and disruptive issue arises. The following list highlights a few of the important issues employers should review as part of a comprehensive employment relations audit.

Prohibition of Harassment and Discrimination. Ensure that an anti-harassment policy includes all forms of harassment, not just sexual harassment, and that the policy has effective reporting and investigative procedures. The policy should also include a clear and direct anti-retaliation provision and should be distributed to all employees upon hire and at periodic intervals thereafter, included in the employee handbook and posted in prominent places.

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Exempt/Non-Exempt Status.

Paying an employee a salary is not, by itself, enough to meet the exempt status tests under federal overtime law. Regulations interpreting the Fair Labor Standards Act's overtime exemption provisions were revised last year, as were the regulations governing deductions from the salary of exempt employees. Employers should review the actual duties of all salaried employees to determine if they are appropriately classified as exempt. Further, employers should implement a policy which limits the amount of deductions that can be made from an exempt employee's salary. An employer should also have a procedure by which exempt employees can challenge what they believe are inappropriate deductions. Implementation of such a policy and procedure will enable an employer to take advantage of a "safe harbor" protection provided for in the new regulations.

Independent Contractors. Merely paying an individual on a contract basis, or issuing a 1099, does not make the individual an independent contractor for purposes of state or federal law. The IRS and/or the Department of Labor may determine that an independent contractor is actually an employee subject to withholdings and overtime. Employers should therefore review the nature and scope of services rendered by "independent contractors" under the criteria established by for each of these areas.

Employees with Disabilities. An employer is required to accommodate the disabilities of applicants and employees if doing so does not pose an undue hardship. An employer should ensure that it has, and follows,

an appropriate policy that requires an interactive process to attempt to meet the employee's needs. Employers with no-fault attendance policies must consider whether the employee's time off may be a reasonable accommodation under certain circumstances.

Separating Medical and Personnel Records. An employer is required to keep employee medical records separate from other personnel records. Employers should review personnel files and remove records relating to disabilities and accommodations, work-related injuries, fitness for duty examinations, physician notes or any other documents pertaining to an employee's medical condition. An employer must maintain a separate file for each employee's medical records.

Pre-employment Inquiries. Whether in an interview or on an employment application, employers are prohibited from asking applicants particular questions. Application forms should be reviewed, and where necessary, revised. An employer should also ensure that all individuals responsible for interviewing applicants know what interview questions are prohibited.

Notice Posting Requirements. Both federal and state regulations require employers to post notices in conspicuous places on a wide variety of state and federal laws. The employer should ensure that the proper notices are posted and updated as needed.

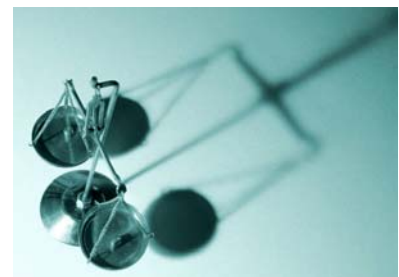
FMLA. An employer's obligations under the Family and Medical Leave Act begin before a leave commences and continue after an employee returns to work. Employers subject to the FMLA should ensure that they have a proper FMLA policy.

Employers with no-fault attendance policies might need to make an exception for FMLA related absences.

Employee Handbooks. If the employer has adopted an employee handbook, it should be reviewed and revised as necessary to meet evolving needs and to comply with changes in state and federal law. The revised handbook should be reissued and employees should be required to sign an acknowledgement of receipt. If the employer has not adopted an employee handbook, it should consider whether doing so would be beneficial to the company.

Verification of Eligibility for Employment. Employers are required to verify that their employees are either U.S. citizens or authorized for employment in the United States. The verification process requires that employers complete an Immigration and Naturalization Services (INS) Form 1-9 for every employee hired, based upon documents that establish both the employee's identity and employment authorization. The documents that an employer may rely upon are listed on the form. The employee portion of the form must be completed before the employee starts work. The employer must complete the eligibility verification section within three business days of the employee's start date, and must retain the completed forms for a specified period of time.

Brian J. McGrath



DON'T TOSS YOUR LIABILITY INSURANCE POLICIES

Those general liability policies you have purchased over the years to protect your business should be saved and not tossed. General liability policies which provide that the insurer will defend and indemnify the insured against claims for bodily injury or property damage occurring during the policy period may cover such claims even though the periods covered by the policy expired many years ago. Thus, you should keep indefinitely copies of your general liability policies in case your company is sued for bodily injury or property damage that may have occurred many years ago. The older policy may be the only one that will cover your potential liability.

If you no longer have your old insurance policies and you need to establish coverage, other sources might be of help to you. For example, premium receipts, correspondence with the insurer or claims documents may be sufficient to establish the existence and essential terms of a policy. Also, your agent may have records of your coverage. However, the surest and safest method is to permanently maintain a copy of all general liability policies.

Lawrence F. Harr

NEW BANKRUPTCY ACT – PART II

Background. In our last issue we discussed in general the Bankruptcy Abuse, Prevention and Consumer Protection Act of 2005 (“BAPCPA”), which took effect for most purposes on October 17, 2005. We focused on some of the consumer-oriented provisions, noting, for example, that the new law will make it impossible for consumer debtors to discharge

fraud-based claims in a Chapter 13 case. Also significant is the overall philosophy and scheme of BAPCPA, which will make it far more difficult for debtors to “wipe the slate clean” in a Chapter 7 case. BAPCPA contains a number of provisions, including a means test, intended to divert persons to Chapter 13 who previously would have filed under Chapter 7. This will require such debtors to repay a portion, often a substantial portion, of their debts before being entitled to a discharge of their indebtedness. Clients should consult knowledgeable counsel if they have any questions concerning how the new law will impact the ability of consumer debtors to discharge or eliminate specific debts.

Business Provisions. Although the new law’s consumer provisions have received far more coverage in the popular and professional media, there are a number of significant provisions which will change Chapter 11 reorganization law for businesses. There is also a specific subtitle in BAPCPA entitled “Small Business Bankruptcy Provisions,” which will be discussed in a future issue.

Chapter 11. Significant changes in favor of business creditors have been made with respect to the **reclamation** procedures under present law, whereby a seller of goods may make a written “reclamation demand” upon the debtor for return of goods delivered within 10 days prior to the filing of the bankruptcy (or 20 days after receipt of the goods by the debtor, if the 10-day period expires after the commencement of the case). Under former law, the bankruptcy court could provide an administrative priority claim or lien for the reclaiming creditor as a substitute for the return of the goods. The new law grants to selling creditors

a claim for the value of any goods received by the debtor in the ordinary course of business within 20 days before commencement of the case, and accords it an administrative expense priority payable at 100%. This priority is not dependent upon the seller having made a written reclamation demand. Also, a reclaiming seller under the new law will be dealing with more generous deadlines, e.g., it may provide a written reclamation demand to the debtor within 45 days after the debtor receives the goods or within 20 days after the beginning of the bankruptcy case, whichever is later.

Under former law claims for **salaries and wages** earned by any employee before the filing of the bankruptcy were given an administrative priority status up to \$4,000. The new law raises the cap to \$10,000, which is subject to adjustment for inflation (as was the \$4,000 cap). In addition, under former law this priority applied only to wages and salary earned within 90 days prior to the filing of the bankruptcy case; that period has now been expanded to 180 days.

Generally, under former law it was very difficult to obtain the appointment of a **trustee** in a Chapter 11 case. Rather, the Chapter 11 debtor is simply left in possession of its assets, and is accountable to the court and its creditors as a “trustee.” The standards for obtaining the appointment of a trustee in Chapter 11 have been somewhat relaxed.

BAPCPA places significant limits on the obtaining of any priority claims for various kinds of **executive compensation and severance** in bankruptcy.

For cases commenced on or after April 21, 2006, the time frame within which a **fraudulent transfer** action

may be brought by the debtor in possession or a representative of the debtor has been extended to two years from one year prior to the filing of the bankruptcy case.

A very significant change which may benefit trade creditors pertains to **preferences**. A “preference” has been defined generally as any transfer of the debtor’s property made within 90 days prior to the filing of the bankruptcy and, for our purposes, most often means payments made by the debtor within that 90-day period for goods and/or services. The burden is upon the creditor to establish that such payments are subject to one of the exceptions to avoidance; otherwise the payments are subject to return to the debtor. The most frequently utilized exception is the “ordinary course of business” provision, which protected the payment to the creditor if the creditor was able to establish that the payment was made in the ordinary course of business of the creditor and debtor *and* was made according to ordinary and general business terms. The new law requires only that the payment meet one or the other of these tests. There is also a provision for business cases that transfers or payments aggregating less than \$5,000 to any given creditor may not be set aside.

The provisions regarding **leases of**

real property have also been modified. Under former law the debtor in possession had to assume or reject an unexpired lease of nonresidential real property within 60 days after the filing of the bankruptcy, and the period could be extended by the court. There was no limit to the number of extensions available, and debtors frequently obtained multiple extensions. The initial 60-day decision period has been extended by BAPCPA to 120 days, but the new law provides that the court may only grant one extension of that period, for up to 90 days.

Under former law a debtor in possession had the **exclusive right to file a Chapter 11 plan** for the first 120 days after the case was filed, which period could be, and often was, extended multiple times “for cause.” BAPCPA will limit the total time frame within which the debtor is the only entity permitted to file a Chapter 11 plan (as opposed to a creditors’ committee or a creditor) to 18 months.

Former law established certain simplifying procedures for **single-asset real estate** cases. These simplifying procedures were available only for debtors whose secured debts amount to less than \$4 million. That ceiling has been eliminated, so a much larger number of properties

will qualify for single-asset real estate status.

Conclusion. The foregoing discussion highlights some of the more significant provisions affecting business debtors and creditors. As noted above, anyone with a question concerning the application of bankruptcy law to a specific situation should consult competent counsel. In the next issue we will discuss some of the new law’s provisions which are specifically applicable to **small business debtors**.

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