



LAMSON, DUGAN AND MURRAY, LLP
ATTORNEYS AT LAW

BUSINESS COUNSELING

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SMALL BUSINESS HEALTH CARE TAX CREDIT

If you own a small business that provides health care coverage to employees, your business may be entitled to a federal income tax credit. As part of the recent health care reform, Congress has adopted Section 45R of the Internal Revenue Code which enables qualifying small employers that provide health care coverage to their employees to claim a federal income tax credit for health insurance premiums they pay for certain employees. The credit also applies to employers that are exempt from tax under IRC 501(c), although a different method of calculation applies. The new Section 45R is effective beginning in the 2010 tax year.

In order to qualify for the tax credit, (1) the employer must have fewer than 25 full-time equivalent employees ("FTEs") for the tax year, (2) the average annual wages of its employees for the year must be less than \$50,000 per FTE, and (3) the employer must pay the premiums under a "qualifying arrangement". A qualifying arrangement is one in which the employer pays a uniform percentage (not less than 50 percent) of the total health insurance premium cost for each employee enrolled in health care coverage offered by the employer.

Understandably, if an employer pays only a portion of the premiums under the arrangement (with employees paying the rest), the amount of premiums considered in calculating the credit is limited to the portion actually paid by the employer. In addition, the cost of an employer's premium payments considered for purposes of the credit cannot exceed the average premium cost for the small group market in the state in which the employer offers coverage. The average small group market premium per state is set forth in a recent IRS Revenue Ruling.

For tax years beginning in 2010 through 2013, the maximum credit

available to the employer is 35 percent of the employer's qualifying premium expenses. Employers with 10 or fewer employees and an average wage of \$25,000 or less will get the full credit of 35%. Employers with 10 to 25 employees, or with 25 or fewer employees with an average wage of \$25k to \$50k, will get a partial phase out credit.

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OVERTIME PAY UPDATE

Under the federal Fair Labor Standards Act (FLSA), employers must pay an employee an overtime rate of at least one and one-half times the regular pay rate for any hours in excess of 40 hours a week. There are exemptions from this requirement for several types of employees, including employees in executive, administrative or professional capacities.

Two recent decisions by federal appellate courts illustrate the fine distinctions that are sometimes made between employees who are deemed entitled to overtime and those who are not because they are employed in an “administrative” capacity.

Under the FLSA and its regulations, an employee earning at least a threshold amount per week is an administrative employee if his or her primary duties consist of the performance of office or nonmanual work directly related to the management policies or general business operations of the employer or the employer’s customers, and if the work requires the exercise of discretion and independent judgment.

Insurance Adjusters Exempt

In one federal appellate case, the court held that an insurance company’s automobile damage adjusters who participated in the assessment, negotiation and settlement of automobile damage claims were exempt from the FLSA overtime pay provision. The fact that the adjusters engaged in total-loss negotiations 20 times per year demonstrated that their duty included the exercise of discretion and independent judgment.

The adjusters also worked in the absence of immediate supervision the majority of the time and made decisions that were reviewed only after the estimate had been written

and the claim had been paid. They had full authority to settle claims within their limits of \$10,000 or \$15,000, as long as they could justify their decision on the facts of each claim, thereby binding their employer financially.

Saleswoman Entitled to OT

By contrast, in the second case, an advertising saleswoman for a magazine publisher, who was also compensated weekly above the threshold amount, was not an “administrative employee” for the purposes of the FLSA and thus was entitled to overtime pay.

The employer pointed out that the employee’s responsibilities included developing new clients, with the goal of increasing sales generally, and that this task concerned general management and business operations. Nonetheless, the fact remained that the employee’s primary duty, consuming over 50% of her time, was simply to sell specific advertising space to clients. Since, in the court’s view, the employee was “plainly a salesperson,” she had to receive overtime pay whenever it was earned.

BASEBALL STRIKES OUT ON STATS

Millions of sports fans participate in fantasy sports games in which the participants “draft” the names of real professional athletes and compete against other teams based on the actual statistical performances of the athletes during their seasons. In the case of baseball, until several years ago a fantasy sports company was licensed to use of the names and information about big league players from the Players Association for Major League Baseball (MLB). When that deal expired, the Association granted an exclusive license to an online arm of the MLB, which operated its own fantasy baseball business.

The excluded company sued the MLB, seeking a ruling that it could use the names and statistics of the players, even without a license. Essentially, the question was whether the players themselves, or the public at large, own that information. A federal court sided with the excluded company. Simply put, the information at issue was already placed in the public domain, and there is a First Amendment right available to everyone to make use of it.

The court rejected an argument by the MLB that the names and information about the players are not “speech” at all. On that issue, the court held that the names and statistics in a fantasy game are not appreciably different from the constitutionally protected pictures, graphics, concept art, sounds, and other components of video games.

Fantasy baseball may not represent the purest form of protected speech since it is mainly about entertainment more than informing the public, but the information comes within the protection of the First Amendment. There is some informational value to the information in the fantasy games, since, as the court put it, “[t]he records and statistics remain of interest to the public because they provide context that allows fans to better appreciate (or deprecate) today’s performances.”

CHOOSING A PERSONAL REPRESENTATIVE FOR YOUR WILL

The designation of a personal representative in a will is one of the critical steps in effective estate planning. The personal representative will be the individual responsible for the administration of the estate. He or she must execute the necessary documents to submit the will for probate. Then the personal representative must gather all of the

decedent's (person who makes the will) assets and distribute them in accordance with the terms of the will. Good recordkeeping will be essential because an accounting must be filed with the probate court. Creditors' claims must be addressed, and estate tax returns may have to be filed.

In short, the job of the personal representative is a substantial responsibility and can be very time-consuming, especially when it comes to large or complicated estates. The testator should take a variety of factors into account so that a suitable candidate can be named. These include the trustworthiness, sound judgment, financial acumen, age and physical and mental capacity of the proposed personal representative. More than one personal representative can be named by the testator, and these co-personal representatives can share the duties of administering the estate.

In the case of married couples, the first instinct may be simply to name the other spouse as the personal representative and be done with it. While this may work just fine in some cases, the decision deserves more deliberation regarding the ramifications of choosing one's spouse as the personal representative. For example, will the mourning surviving spouse be up to fulfilling all of the personal representative's responsibilities after suffering such a loss? If the spouses are about the same age, will the surviving spouse be too frail, physically or mentally, to do the job when the time comes, perhaps many years after the personal representative has been named? All in all, a better choice may be an adult son or daughter, a sibling, niece or nephew, or close and trusted friend. Those individuals certainly

make for a good successor ("back up") nominee.

The job of personal representative will be substantially easier if the testator has first done his or her job by keeping complete and accurate records of the assets that will comprise the estate. Upon naming the personal representative, the testator should review this information with the personal representative in detail. Another seemingly obvious matter that is often overlooked is simply making sure that the personal representative knows the location of all of the important papers relating to the estate.

A testator should not forget an even more elementary first step: asking for the consent of the prospective personal representative, no matter how close a relationship between the individuals. For the benefit of all concerned, the personal representative must be willing, not just able, to carry out the important responsibilities that come with this job.

TAX CREDITS FOR HISTORIC PRESERVATION

For over 30 years, the federal government has been using tax incentives to help preserve historic buildings. Federal law originally allowed accelerated depreciation on rehabilitated buildings, but subsequent changes have made preservation and revitalization efforts even more attractive to taxpayers.

Today there is a general business credit equal to 20% of qualified rehabilitation expenses for a certified historic structure and a 10% tax credit for the qualified rehabilitation of nonhistoric, nonresidential buildings first placed into service before 1936. Eligibility for the tax incentives is determined by the National Park Service.

Tax credits are more beneficial to taxpayers than deductions since every dollar of a tax credit reduces the amount of income tax owed by one dollar.

The 20% credit for the rehabilitation of a certified historic structure applies to commercial, industrial, agricultural, rental or residential properties, but not to properties used exclusively as the owner's private residence. A certified historic structure must be a building as opposed to another type of structure. To have the required historic status, the building must be either listed individually in the National Register of Historic Places or located in a registered historic district and certified as being of historic significance to the district.

Eligibility for the 20% credit also depends on meeting some additional requirements. For example, the building must be depreciable - that is, used in a trade or business or held to produce income. The rehabilitation must be substantial, generally defined as entailing expenditures exceeding the adjusted basis of the building and its structural components. Generally, this requirement must be met within two years or within five years for a project completed in multiple phases.

Qualified rehabilitation expenses include such items as architectural and engineering fees, site survey and development fees, legal expenses and other construction related costs, so long as they are added to the basis of the property, and are related to services performed.

The owner of the rehabilitated building must hold it for five years after completion of the rehabilitation or else pay back all or part of the 20% credit. A sale in the first year means that the entire credit is recaptured. The recapture amount is reduced by

20% per year for properties held between one and five years.

The 10% credit for nonhistoric buildings constructed before 1936 shares some of the requirements for the 20% credit, including the requirements that the rehabilitation be substantial and the property be depreciable. However, only buildings rehabilitated for nonresidential uses qualify for the 10% credit. In addition, so that the identity of the original building is not lost in the process, projects undertaken for the 10% credit must meet specific tests based on retention of minimum percentages of the building's walls and internal structural framework.

**LAWYER'S APPROVAL
FOR ACCEPTANCE OF
OFFER**

When the owners of a party store received an offer to purchase the business's liquor license and fixtures, they accepted the offer, but on the condition that their attorney approve the deal. Before the attorney's review of the first offer, the owners received a better offer from another potential buyer, this time for the entire property, including the license, the fixtures, the real property, and the business itself.

The second offer was for about five times as much money as the first offer. The owners also accepted this offer, but again conditioned acceptance on approval by their

attorney. The owners' attorney then reviewed both offers at the same time and, not surprisingly, approved the second, more favorable one.

The disappointed party that had made the first offer sued the owners to enforce what it regarded as a completed contract for the sale of the license and fixtures. It contended that the sellers had waived the requirement of attorney approval by their bad faith in simultaneously submitting to the attorney two competing purchase agreements, both of which conditioned acceptance on approval by the attorney. The disappointed party further argued that, by procuring the second offer and prospective agreement, the sellers had wrongly hindered the fulfillment of the only condition remaining to be fulfilled on the first agreement—attorney approval.

A court disagreed that there was any bad faith and upheld the contract formed when the second offer was accepted and approved by the sellers' attorney. While the plaintiff had been the first to make an offer of any kind, nothing in its potential contract prohibited the sellers from considering other offers. Nor were the sellers obliged to take the property off the market pending review of the first offer by legal counsel. Consideration and eventual full acceptance of the second offer was not legally impermissible where

the first offer had been only conditionally accepted.

There was no limit on what aspects of the first agreement were subject to the attorney's approval. He was free to disapprove it, as he did, simply because there had been a better competing offer made by a competing prospective buyer. Moreover, the sellers had not interfered with their attorney's review of each agreement, such as, by instructing him to disapprove the first offer. In short, the sellers had not acted in bad faith. They were guilty of nothing more than shrewd business moves during what the court described as a period of "dickering" that preceded the formation of an enforceable contract.

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