



BUSINESS COUNSELING UPDATE

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MATTHEW J. BOCK, *Editor*

LDM'S BUSINESS DEPARTMENT

Lamson, Dugan & Murray's Business Department provides counsel to clients, both for-profit and not-for-profit, in a wide range of industries, fields and professions, including: mergers and acquisitions, business succession planning, taxation, trusts and estates, real estate, employment law, and commercial law.

Mergers and Acquisitions. The attorneys of Lamson, Dugan & Murray have significant experience in the area of mergers and acquisitions, including the negotiation and closing of asset purchase, stock purchase and tax-free reorganization transactions involving relatively modest amounts, as well as multi-million dollar transactions.

Business Succession Planning. Our business attorneys are well-versed in business succession planning. The Firm's expertise in the area of buy-sell agreements and family business succession planning can assist our closely-held business clients in creating a market for the ownership of their business interests.

Taxation. Tax counseling on complex planning issues, as well as tax litigation, is provided by our business attorneys. In this area, the Firm handles the full spectrum of tax matters, including: planning for corporations, partnerships, limited liability companies and individuals; corporate, partnerships and limited liability formations; mergers, acquisitions, reorganizations and liquidations; compensation planning; defending state and federal audits, civil penalty examinations, administrative appeals, and criminal investigations; defending state and federal tax lien and collection matters; trial and appellate practice.

Trusts and Estates. LDM's trusts and estates practice consists of estate and gift planning, trust and estate

administration, guardianship and conservatorship administration, and the litigation of claims in connection with these matters.

Real Estate. Our attorneys handle all of the legal phases of acquisition, financing, and development of residential, commercial and industrial properties for individuals and business clients.

Commercial Law. LDM's business attorneys have expertise in all areas of commercial law, including commercial and residential lending and matters arising under the UCC, including sales, commercial paper and secured transactions.

Employment. Our attorneys provide employers with advice on a variety of employment matters, including: preparation of employment agreements; employee handbooks and policies; personnel decisions; wage/hour policies; immigration-related employment practices; health and safety regulations; and confidentiality, non-disclosure and covenant-not-to-compete agreements.

Securities. The Firm provides counsel to clients in all areas of private securities matters, including the private placement of securities and the structuring of exempt private offerings under the Securities Act and state "blue sky" laws. Additionally, our attorneys assist clients in complying with investment company rules and regulations, as well as federal and state "blue sky" filings. The Firm's litigation attorneys are also available to assist clients in both prosecuting and defending federal and state securities law claims, as well as securities arbitrations conducted by the National Association of Securities Dealers (NASD) and the American Arbitration Association. ♡



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REVISED UCC ARTICLE 9

In 1998, the National Conference of Commissioners on Uniform State Laws (NCCUSL) and The American Law Institute (ALI) completed their revision of Article 9 of the Uniform Commercial Code (UCC) dealing with Secured Transactions. Revised Article 9 (RA9) was adopted by the Nebraska Unicameral and took effect in Nebraska (as in many other states that have adopted the Revised Article 9) on July 1, 2001.

Significant changes to UCC filings were brought about by RA9. The exact name of the debtor is now required on Financing Statements. Trade names standing alone are no longer adequate. For registered entity debtors such as limited liability companies, corporations and limited partnerships these names should appear exactly as it does on the record of the filing office in which the entity was organized. Super-generic collateral descriptions such as "all assets of the debtor" are also now permitted on financing statements. The borrower's signature is no longer required on a financing statement in order for it to be filed. Additionally, a National Standard Financing Statement (UCC-1) form and a National Standard Amendment (UCC-3) form is now required to be accepted for filing by all states adopting RA9.

"Most filings against a debtor will ordinarily be made where the debtor is located and no longer where the collateral is located."

The location of filings under RA9 has also been impacted. Most filings against a debtor will ordinarily be made where the debtor is located and no longer where the collateral is located. Registered entity debtors are considered located in their state of organization. Individual debtors are considered located in the state where they reside.

RA9 also contains grace periods for currently filed Financing Statements. Currently filed Financing Statements that comply with both prior law and RA9 remain effective after July 1, 2001 without any further action. However, currently filed Financing Statements that contain content deficiencies under RA9 (such as inexact debtor names or improper collateral descriptions) are considered effective for only one year after the effective date of RA9. Additionally, currently filed Financing

Statements that are not filed in the state and filing office required under RA9 are only effective until the lapse date of the Financing Statement or June 30, 2006, whichever date occurs sooner.

The items discussed above represent only a general discussion of some of the major revisions enacted under RA9. A creditor that has a currently filed Financing Statement that fails to meet the requirements of RA9 either in its content or in the location of its filing must correct such deficiencies prior to the expiration of the above grace periods or risk losing its preferred priority position. Users of the UCC Article 9 filing systems in Nebraska and across the United States need to review their files, loan portfolios and documentation practices in response to these changes in the way documents are prepared and filed. We encourage creditors to seek legal advice for further information. ♡

Ryan N. Boe

NEBRASKA COLLEGE SAVINGS PLANS (529 PLAN)

The Nebraska version of this plan became operational January 1, 2001. If you have a child or grandchild who will be attending college in the future, a 529 Plan could be an excellent way to provide for their education, get money

TAX ADVISORY: New Legislation

The Job Creation and Worker Assistance Act of 2002 (HR 3090) was signed by President Bush on March 9, 2002. Part of the Act provides for a bonus depreciation allowance for assets placed in service after September 11, 2001 and before September 10, 2004. Under most circumstances, the bonus depreciation allowance will equal thirty percent (30%) of the cost of new assets placed in service including most equipment, computers, furniture, and fixtures and some leasehold improvements. The bonus depreciation allowance works in conjunction with other depreciation methods, including I.R.C. § 179; immediate expensing of assets.

For example, assume your business purchases \$100,000 of furniture and it places that furniture in service in the year 2002. If you decide to take the maximum deduction of \$24,000 under I.R.C. § 179, you can take an additional bonus depreciation allowance of \$22,800 for a total depreciation deduction for the year 2002 of \$46,800.

The bonus depreciation allowance may also be used in conjunction with MACRS depreciation method and other conventional depreciation methods. The bonus depreciation is subject to recapture as ordinary income under Code Section 1245 if the property is later sold at a gain just like

other depreciation allowances.

Nebraska Add Back. As part of the State's effort to balance the budget, the Legislature enacted LB 1085, part of which contains an add back adjustment for bonus depreciation allowed under the federal Job Creation and Worker Assistance Act of 2002. Pursuant to LB 1085, businesses that enjoy the federal bonus depreciation allowance must add back eighty-five percent (85%) of any amount of bonus depreciation received under the Act and include such amounts as taxable income for Nebraska income tax.

Matthew J. Bock



out of your estate and obtain a tax deduction.

What is the College Savings Plan? It is a qualified state tuition program under Section 529 of the Internal Revenue Code. Nebraska's plan is a savings program. The 529 Plan allows you to save money in an account which will obtain favorable tax treatment for withdrawals for college expenses.

What expenses can the account be used for? The Nebraska plan covers almost all expenses related to college such as tuition, fees, room and board, books, equipment, and supplies. Withdrawals can be used at eligible schools in Nebraska or out-of-state.

“If you have a child or grandchild who will be attending college in the future, a 529 Plan could be an excellent way to provide for their education.”

What are the tax advantages? Money in the account grows exempt from both federal and state taxes. Under current legislation, until 2011, withdrawals for qualified higher education expenses are tax free. Withdrawals for non-qualified expenses may be subject to a penalty. However, exceptions exist due to a beneficiary's disability or death.

Participation in the plan enables you to take a deduction of up to \$1,000 per return (\$500 if married filing separately) on your state taxable income. Money you contribute to a 529 Plan is excluded from your taxable estate. ♡

Angie M. Pelan



GETTING THE MOST OUT OF YOUR ESTATE PLAN- BENEFICIARY DESIGNATIONS

The proper beneficiary designations for various assets can ensure your estate is distributed in the manner you intended and can decrease your estate's tax liability. Beneficiary designations should correspond with your overall estate planning goals. Many life events, particularly, births, deaths, and divorces, require reevaluation of beneficiary designations on various assets.

The beneficiary designation made on an insurance policy or retirement plan will control the disposition of the asset upon death. Your will or trust will only control the disposition of life insurance proceeds or retirement plan assets if the proper beneficiary designation is made on the insurance policy or retirement plan. In some instances, you may want to name the Revocable Trust that will become operative upon your death as beneficiary.

The types of beneficiary designations that can be made in various retirement plans and IRAs differ. To determine what the plan allows, you must read the document. There are important consequences to choosing the beneficiary of a retirement plan.

The beneficiary of your retirement plan will be used to determine the period for payout of distributions from the plan. Naming the proper beneficiary can decrease tax liability.

If you have not checked your beneficiary designations recently, it is worth the time to review them to make sure they reflect your wishes and comply with your overall estate plan. We are available for any questions you may have regarding beneficiary designations. ♡

Angie M. Pelan



ARBITRATION AGREEMENTS ARE OKAY, RIGHT?

Last year, the United States Supreme Court ruled in *Circuit City v. St. Clair Adams* that employers can enforce mandatory arbitration agreements in the workplace. This opinion, in essence, compels employees to arbitrate employment disputes, including discrimination claims against their employers.

“Mandatory arbitration is designed to prevent, manage and resolve employment disputes without resorting to costly and time consuming litigation.”

The Supreme Court did not, however, rule that *Circuit City's* arbitration agreement was valid. Instead, the Court remanded the matter back to the Ninth Circuit Court of Appeals to determine whether the arbitration agreement was valid. The Ninth Circuit recently ruled that the agreement was invalid because it was too one-sided. Specifically, the Court of Appeals found that the arbitration agreement was null and void because:

1. Only the employee was forced to take her claim to arbitration;
2. The agreement limited the types and amount of damages an employee could collect in arbitration;
3. The agreement required the employee to split the arbitrator's fees; and
4. The agreement contained a one-year statute of limitations on all arbitration claims, depriving the employee of the chance to use the "continuing violation" protections offered by a number of state and federal laws.



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Even though the Court of Appeals struck down the *Circuit City* arbitration agreement, arbitration agreements are still a viable option in limiting an employee's access to the courts to sue his or her employer. Mandatory arbitration is designed to prevent, manage and resolve employment disputes without resort to costly and time consuming litigation. One such program that has been extremely successful is a multi-step program in which the employer and employee attempt to resolve employment disputes through meetings, grievance procedures, peer review, mediation, arbitration and other company specific processes.

The Nebraska Arbitration Act specifically allows for arbitration to resolve employment disputes, but contains some specifications that an arbitration agreement must contain in order to be valid. As *Circuit City* learned, it is imperative that any arbitration agreement be reasonable and it may not be too one-sided. ♡

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WHAT TO DO WITH EMPLOYEES ON AND RETURNING FROM MILITARY LEAVE

Chances are that an employee in your ranks will be leaving civilian life to serve in the Armed Forces and a number of them are members of the National Guard and Reserves. These individuals have extensive employment and benefits rights under federal law, which are primarily found in the Uniformed Services Employment and Re-employment Rights Act of 1994, commonly known as "USERRA". These rights include unpaid military leave, COBRA-like coverage while on leave, special treatment in retirement plans, reinstatement upon return and increased or make-up contributions to retirement plans.

The USERRA requires employers to grant unpaid military leave of up to five years, cumulative for all leave taken for military service. There is no length of service requirement, such as that found in the Family Medical Leave Act (FMLA), to be eligible for such leave. Leave may be extended an additional two years for an employee if a number of other factors are met. Moreover, employees on leave must be treated the same as other employees on non-military leaves, and may be required to make co-payments if those on non-military leave are required to do so.

In a related vein, employees on military leave who are participating in a health plan and would otherwise lose coverage are permitted to elect COBRA-like coverage for themselves and their dependants. This right applies even if the plan is not subject to

COBRA (e.g., plans with fewer than 20 employees).

Pension plans may also be impacted by employees on military leave. Under USERRA, returning employees have the opportunity to make contributions they were not able to make while on leave and employers may have to make up contribution allocations.

“Employees on leave must be treated the same as other employees on non-military leaves.”

Depending on the length of service a returning employee may also be entitled to his/her job upon return. It is also significant to note that a re-employed service member may only be fired for cause, again depending on the length of service, for a period of one year if he/she served more than 180 days. This protection is reduced to 180 days if the period of service was for 31 to 180 days, and no protection is provided if the period of service was 30 or fewer days.



Employees are subject to very extensive employment protections after entering military service, and they are generally guaranteed a job and other rights on return. While there are a few exceptions to these protections, employers should use them only when the grounds are certain, because they will undoubtedly be read by most courts to favor the returning service member. ♡

Craig F. Martin



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PROFILE

Matthew J. Bock has joined the Firm as an associate in the Business Department where he is a member of the Business Counseling Group. His principal areas of practice are business and tax planning, mergers, acquisitions and reorganizations, securities law and tax litigation. He has a significant background in accounting and tax. He earned his Bachelor's Degree in business administration in 1991 from the University of Nebraska and he earned his MBA in taxation from Colorado State University in 1992. After earning his MBA he worked as a tax accountant with the CPA Firm of Baird, Kurtz and Dobson. Mr. Bock earned his law degree from the University of Nebraska College of Law, graduating *with distinction* in 1996. After graduating from law school, Mr. Bock gained significant trial and litigation experience as a prosecutor in the Wyandotte County District Attorney's office located in Kansas City, Kansas. Mr. Bock also practiced law with a Kansas City law firm prior to joining Lamson, Dugan & Murray in 2001.



MATTHEW J. BOCK
Business Department

Practice Areas:

- Business and Tax Planning
- Mergers, Acquisitions and Reorganizations
- Securities Law
- Tax Litigation

Ryan N. Boe has joined the Firm as an associate in the Business Department where he is a member of the Business Counseling Group. His principal areas of practice include real estate, finance and lending law. He has significant experience in real estate transactions and both asset-based and tax-exempt lending transactions. He earned his Bachelor's Degree in economics and government/international affairs *magna cum laude* from Augustana College (SD) in 1994. He earned his law degree from the University of South Dakota School of Law in 1997. After graduation, he practiced with a law firm in Aberdeen, South Dakota. Mr. Boe also gained significant lending transaction experience while practicing in the finance department of a national law firm before joining Lamson, Dugan & Murray in 2001.



RYAN N. BOE
Business Department

Practice Areas:

- Real Estate
- Finance
- Lending Law



BRIAN J. BRISLEN
Litigation Department

Practice Areas:

- Civil Litigation
- Workers' Compensation
- Employment Law



Brian J. Brislen has joined the Firm as an associate in the Litigation Department. His areas of practice are civil litigation, workers' compensation and employment law. Mr. Brislen earned his Bachelor's Degree in sociology and communication studies from the University of Nebraska in 1997. He earned his law degree, with concentrations in Dispute Resolution and Criminal Law and Procedure, from Creighton University School of Law, graduating *cum laude* in 2001.

SEAN A. MINAHAN
Litigation Department

Practice Area:

- Litigation



Sean A. Minahan has joined the Firm as an associate in the Litigation Department. His principal area of practice is litigation. He earned his Bachelor's Degree in history from the University of Wyoming in 1998 and graduated from the University of Wyoming Law School in 2001.

ANGELA M. PELAN
Business Department

Practice Areas:

- Estate Planning
- Trusts and Estates
- Business Succession Planning
- Taxation



Angela M. Pelan has joined the Firm as an associate in the Business Department where she is a member of the Business Counseling Group. Her practice focuses on estate planning, business succession planning, taxation, trusts and estates. She received her Bachelor's Degree in political science and business from Washington University in St. Louis in 1996 and graduated from the University of Nebraska College of Law *with distinction* in 2001.

MICHELE E. YOUNG
Litigation Department

Practice Area:

- Litigation



Michele E. Young has joined the Firm as an associate in the Litigation Department. Her principal area of practice is litigation. She earned her Bachelor's Degree in business management from Creighton University in 1991. She earned her law degree at Creighton University School of Law, graduating *cum laude* in 1999. Ms. Young is also an adjunct legal writing instructor at Creighton University School of Law.