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**SALARY DOCKING FOR
WEATHER-RELATED
ABSENCES**

In a pair of opinion letters issued in late October 2005, the United States Department of Labor ("DOL") held that employers may make full-day deductions from an exempt employee's salary if the workplace remains open during adverse weather emergencies and the employee chooses not to report to work. Further, the employer can require exempt employees to use accrued leave even if the office is closed due to inclement weather or other disasters.

The first letter responded to a request for an opinion concerning the "salary basis" requirements for exempt status under the Fair Labor Standards Act ("FLSA"). In this case, the employer's absence policies provided that, if employees do not report to work due to adverse weather conditions (and have not been advised not to report to work), employees are docked a full day of pay and are not permitted to use their vacation or personal (leave) bank for the absence.

The DOL found that an employer that remains open for business during adverse weather conditions may make deductions, for full-day absences only, from the pay of an otherwise exempt

employee who chooses not to report to work. Moreover, the agency noted that the employer may treat any such full-day absence as being for "personal reasons" under the applicable regulations. According to the DOL, "[s]uch a deduction does not violate the salary basis rule or otherwise affect the employee's exempt status." The agency warned, however, that deductions from salary for less than a full-day's absence are not permitted for such reasons under the regulations.

The DOL further clarified that if the employer closes its operations due to a weather-related emergency or other disaster for less than a full workweek, an exempt employee must be paid "the full salary for any week in which the employee performs any work without regard to the number of days or hours worked." In researching this conclusion, the agency noted that the regulation prohibits deduction "for time when work is not available."

The second letter expands on this issue, noting that employers who close their offices due to inclement weather or other disasters for less than a full workweek may direct exempt employees to take vacation or make deductions from a personal leave bank. However, the DOL wrote, "The

employer must pay the employee's full salary even if: 1) the employer does not have a bona fide benefits plan; 2) the employee has no accrued benefits in the leave bank; 3) the employee has limited accrued leave benefits and reducing that accrued leave will result in a negative balance; or 4) the employee already has a negative balance in the accrued leave bank.

Brian J. McGrath

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SMALL BUSINESS PROVISIONS OF THE NEW BANKRUPTCY LAW

As discussed in our last two issues, Congress passed and Mr. Bush signed into law the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005 on April 20, 2005. A specific subtitle of the new law is called the "Small Business Bankruptcy Provisions" and is intended to increase efficiency and reduce costs for small business debtors. The following are some high points:

- ✦ Under prior law, an entity which met the eligibility requirements to be a "small business" (e.g., total debt of less than \$2 million as of the time of filing) had the option to elect small business treatment under the Bankruptcy Code. Under the new law, such treatment is no longer elective.
- ✦ Under the new law, the Judicial Conference of the United States is required to design and promulgate simple official standard form disclosure statements and plans for small business debtors in the hope that this will significantly streamline the process.

The Small Business Bankruptcy Provisions are intended to increase efficiency and reduce costs for small business debtors.

- ✦ Under the new law, a small business debtor generally must file a plan within 300 days after the filing of the case, much longer than the 160-day deadline applicable under the old law.
- ✦ New section 308 greatly increases the financial reporting requirements for small business debtors, including periodic reports concerning the

debtor's profitability, projected cash receipts and cash disbursements over a reasonable period, comparisons of actual cash receipts and disbursements with projections in prior reports, information concerning timely filing of tax returns, and other matters.

- ✦ New section 1116 requires a small business debtor to attach to its bankruptcy petition its most recent balance sheet, statement of operations, cash flow statement, and federal income tax return, or a statement under perjury that no such documents exist or have been filed, and also requires that its senior management personnel and counsel attend meetings scheduled by the court or the United States Trustee, including initial debtor interviews, scheduling conferences, and first meetings with creditors, unless the court waives those requirements.
- ✦ The new law denies the protection of the automatic stay to a small business debtor which has previously filed a Chapter 11 case which resulted in a confirmed plan or a dismissal within certain time periods. The small business debtor filing the second case is entitled to make a showing to the court that it should have the benefit of the automatic stay.

Needless to say, the points discussed here are intended only as an overview of some of the more interesting provisions affecting small business debtors under the new law, and anyone contemplating the filing of a bankruptcy under any of the chapters, or who has an interest as a creditor or otherwise in a bankruptcy matter, should consult counsel to discuss specifically what rights and remedies may be available under the Bankruptcy Code or otherwise.

Frank M. Schepers

VETERAN'S EMPLOYMENT AND TRAINING SERVICE POSTER

On December 19, 2005, the U.S. Department of Labor issued the final regulations regarding employers' requirement to post a notice of the rights and benefits and obligations to employees under the Uniformed Services Employment and Reemployment Rights Act ("USERRA"). USERRA provides employment and reemployment rights for members of the uniformed services, including veterans and members of the Reserve units and National Guard. USERRA applies to all employers, regardless of size.

USERRA provides employment and reemployment rights for members of the uniformed services, including veterans and members of the Reserve units and National Guard.

As with other laws enforced by the Department of Labor, employers are required to post this information in the workplace. The wording of the final version of the USERRA poster differs somewhat from the earlier version which employers were required to use effective March 10, 2005. Employers should post the new Notice as soon as possible in the same area where other notices for employees are posted. A copy of the new Notice can be obtained from the following Web site: www.dol.gov/vets/programs/userra/poster.htm.

Brian J. McGrath

CHARITABLE TRUSTS – HELPING OTHERS AND YOUR POCKETBOOK

A properly managed charitable trust will benefit not only those in need, but your pocketbook as well. There are three basic kinds of charitable trusts: charitable lead trusts, charitable remainder trusts and pooled income trusts. The principal difference is who receives the income during the term of the trust and who receives the remainder interest upon the trust's termination.

A charitable lead trust is a trust in which lead interest is paid to one or more charitable beneficiaries during the term of the trust. Upon the termination of the trust, the remainder interest either reverts to the grantor or is paid to one or more noncharitable beneficiaries. The lead interest must either be in the form of a "guaranteed annuity interest" or a "unitrust interest" payable at least annually. Upon the funding of a charitable lead trust, the grantor is entitled to an income tax or estate tax charitable deduction for the present value of the lead interest. As neither the grantor nor the noncharitable beneficiaries will receive any distributions from the trust prior to its termination, charitable lead trusts are typically recommended only for those individuals who will not require such income during the trust's term.

A charitable remainder trust is a trust in which interest income is paid to the grantor or one or more noncharitable beneficiaries. Upon the trust's termination, the remainder interest is paid to one or more charitable beneficiaries. The interest income must either be in the form of a

"guaranteed annuity interest" or "unitrust interest" payable at least annually. Upon funding of the trust, the grantor is entitled to an income tax or estate tax charitable deduction equal to the present value of the remainder interest. Charitable remainder trusts are recommended for those who wish to create a charitable trust, but who would like monthly or yearly interest payments to continue so they can maintain their current lifestyle.

Charitable trusts are a great way to benefit those in need while benefiting yourself with tax deductions.

A pooled income trust is similar to a charitable remainder trust, but with less hassle. The charity sets up a trust, and a series of donors simply transfer assets to the trust. Upon such transfer, the donor is entitled to an income tax or estate tax charitable deduction equal to the present value of the remainder interest of the assets transferred by the donor. The trust pays interest income annually to the donors for life. Upon a donor's death, the charity gets the donor's share of contributed assets from the pooled fund.

Charitable trusts are a great way to benefit those in need while benefiting yourself with tax deductions. However, before investing in a charitable trust, it is important to carefully evaluate your estate and the amount of income you will require during the term of the trust. Otherwise, the detriment to your current and future lifestyle could outweigh any benefit provided by the trust.

Andrew T. Chapeau

REGULATIONS ISSUED ON NONQUALIFIED DEFERRED COMPENSATION PLANS

On September 29, 2005, the Internal Revenue Service ("IRS") issued regulations regarding the application of Internal Revenue Code Section 409A to nonqualified deferred compensation plans and arrangements ("nonqualified plans"). Under Section 409A, which generally is effective for amounts deferred on and after January 1, 2005, all amounts deferred under a nonqualified plan are subject to current income tax unless the plan complies with the election, distribution and acceleration requirements of Section 409A.

If a nonqualified plan fails to comply with these requirements at any time during a year, all amounts deferred under the plan (for that year and all preceding years) by any participant to whom the failure relates are included in the participant's gross income to the extent vested and not previously included in income. Further, such amounts are subject to an additional 20% penalty (plus interest) on the tax underpayments.

For assistance with a review of the key issues addressed in the regulations and their potential impact on your deferred compensation arrangements (including severance pay matters), please contact a Lamson, Dugan and Murray employee benefits attorney.

Brian J. McGrath



**LIFE INSURANCE TRUSTS
ARE EFFECTIVE TAX
SAVINGS TOOLS**

It is a common misconception that life insurance proceeds are not subject to federal estate tax. To the contrary, life insurance proceeds are generally subject to estate tax if the decedent was the "owner" of the policy. Only life insurance proceeds which are not owned by or payable to the insured are excluded from the taxable estate of the insured. This is especially troubling for individuals whose estates, including life insurance proceeds, exceed the federal estate tax exemption (\$2,000,000 in 2006).

One vehicle which allows life insurance proceeds to pass outside of the decedent's taxable estate is the irrevocable life insurance trust ("ILIT"). An ILIT is a trust which owns the decedent's life insurance policy (or policies). Existing policies can be transferred into the ILIT, or the ILIT can purchase a new policy for the benefit of the surviving spouse, children and/or grandchildren. The ILIT pays premiums to keep the insurance policy in force, collects the death benefits upon the decedent's death and distributes the money according to the terms of the ILIT. In order to

fund the premiums, the donor makes periodic cash contributions to the ILIT. Although these contributions constitute a gift, the gift can be shielded from tax through the use of the annual gift tax exclusion with proper planning.

As the name implies, an ILIT is irrevocable. Accordingly, after the ILIT has been established, the terms cannot be changed, and the policies cannot be "retrieved" from the trust. All the donor can do is stop making premium gifts so that the insurance policy will lapse.

***Life insurance
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An ILIT is an effective tool to ensure that your life insurance proceeds do not push the value of your estate above the federal estate tax exemption. If the value of your estate is teetering dangerously close to the exemption amount, it is worth the time to explore the benefit that an ILIT may reap for your estate.

Andrew T. Chapeau



BUSINESS DEPARTMENT

Frank J. Barrett
Matthew J. Bock
Thomas R. Burke
Andrew T. Chapeau
Donald L. Erftmier, Jr.
Lawrence F. Harr
C.E. Heaney, Jr.
Brian J. McGrath
Robert J. Murray
Angie M. Pelan
Jon S. Reid
Frank M. Schepers
R.A. Skochdopole

Sara B. Christianson, Paralegal
Anna C. Palmer, Paralegal



LAMSON, DUGAN AND MURRAY, LLP
ATTORNEYS AT LAW

LAMSON, DUGAN AND MURRAY BUILDING
10306 REGENCY PARKWAY DRIVE
OMAHA, NEBRASKA, USA 68114-3743

402-397-7300 FAX 402-397-7824 WWW.LDMLAW.COM