



LAMSON, DUGAN AND MURRAY, LLP
ATTORNEYS AT LAW

BUSINESS COUNSELING

UPDATE

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BENEFITS ALERT: DEADLINE FOR QUALIFIED PLANS SEEKING IRS DETERMINATION LETTER

The Internal Revenue Service (IRS) recently changed its procedures for seeking favorable determination letters for qualified retirement plans. For individually-designed plans, the IRS has created staggered five-year "cycles" for seeking favorable determination letters. Employers will only need to submit their plans once for a determination letter that rules on all amendments adopted and made effective within the applicable amendment cycle.

The beginning and ending dates of a plan's cycle depend on the plan sponsor's employer identification number (EIN). For plans that have an EIN number that ends with a "1" or a "6", the deadline for seeking a favorable determination is January 31, 2007.

If you sponsor a qualified retirement plan, you are not required to seek a favorable determination letter. However, obtaining a favorable determination letter from the IRS is strongly recommended for the following reasons: (i) it provides

assurance that your qualified plan complies with the requirements of the Internal Revenue Code and is "tax-qualified;" (ii) it provides an opportunity to retroactively correct any document issues that exist without incurring sanctions; and (iii) perhaps most importantly, it permits you to use the IRS's voluntary compliance program to correct significant operational errors involving the plan, without a formal application to the IRS.

If you sponsor an individually-designed qualified retirement plan, Lamson, Dugan and Murray strongly recommends that you seek a determination letter by the deadline that applies to your company.

Brian J. McGrath

PROTECTING CORPORATE DATA FROM DISGRUNTLED EMPLOYEES

A recent case from the Seventh Circuit has important implications for business owners and procedures that should be considered to protect a company's data against disgruntled employees. In *International Airport Centers L.L.C. v. Citrin*, the defendant, Jacob Citrin, was employed by the plaintiff,

IAC, a company engaged in the real estate business, to identify properties that IAC might want to acquire, and to assist in any ensuing acquisition. IAC loaned Citrin a laptop to record data that he collected in the course of his work in identifying potential acquisition targets.

Citrin decided to quit IAC and go into business for himself, in breach of his employment contract. Before

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returning the laptop to IAC, he deleted all the data in it, including some data that would have revealed improper conduct in which he had engaged prior to leaving.

IAC argued that this violated the provision of the Computer Fraud and Abuse Act which prohibits the knowing transmission of a program which causes damage to a computer. In passing the Act, Congress was concerned with not only viral attacks on computers, but also those by disgruntled programmers who decide to harm the employer's data system. The court explained that Citrin's authorization to access the laptop terminated when, having already engaged in misconduct and quitting IAC in violation of his employment contract, he destroyed the files that incriminated himself and other files that were the property of his employer. Despite the fact that Citrin's employment contract authorized him to destroy data in the laptop when his employment ceased, the court found that such destruction was in violation of the duty of loyalty that is imposed on an employee.

Attacks by former employees on a company's computer are clearly prohibited by the Act. While *International Airport Centers* allows for suits to be brought against disgruntled employees who have transmitted a program damaging a computer, if the data has already been destroyed, such a lawsuit may be an exercise in futility. Rather, employers should consider implementing measures to safeguard against such an attack.

John M. Walker

FEDERAL IMMIGRATION OFFICIALS TARGET EMPLOYERS

While Congress debates immigration reform, there is one certainty: Federal officials are targeting more employers with tougher enforcement mechanisms than what have been seen in the past, when the rare visit by federal officials may have resulted in a civil fine. Today, federal officials are not limiting their penalties to monetary fines and are devising novel ways to penalize employers, including the use of criminal violations. Management employees, beginning with front-line managers, may face serious criminal charges and jail time for violating immigration regulations.

One step that employers can take immediately to protect themselves is to develop an I-9 compliance program, or to review existing programs. The I-9 form is one of the first documents federal officials will request when they audit a business. While relatively easy to complete, it is often left blank, incomplete or completed with documents that have not been verified. If your organization has neglected to maintain accurate I-9 forms, you should address the problem immediately.

Brian J. McGrath



PROPERTY TRANSFERS AND MEDICAID ELIGIBILITY

An applicant for Medicaid may have eligibility for benefits delayed if he or she has recently transferred real property to an individual for less than the fair market value of the property. A penalty period is imposed if the transfer took place during a span of time known as the "look-back" period. This provision is meant to prevent duplicitous gaming of the Medicaid system, but, as one court recently noted, the provision does not justify viewing every property transfer with skepticism and disapproval merely because it precedes Medicaid eligibility.

In a recent case, a 67-year-old who suffered from Alzheimer's disease and other ailments applied for Medicaid assistance. The state agency that oversaw Medicaid rejected the application on the grounds that the applicant had transferred real property for less than its value within the look-back period. The applicant, in fact, had conveyed the home where she lived to her three children as a gift, and the deed to the property was recorded shortly before she applied for Medicaid.

Nonetheless, the court overturned the agency decision because the agency had not properly pegged the point in time when the property transfer became effective as a matter of law. For various reasons, there had been a lengthy delay in getting the executed deed recorded, but the deed had been executed and delivered to the children well before the look-back period began.

The court favored a “benevolent” interpretation of the family’s well-intentioned but haphazard attempts to follow up more promptly with recording the deed, rather than seeing it as part of a scheme to delay the transfer until it was apparent that the mother needed nursing home care and Medicaid money to pay for it.

It is a well-settled principle of property law that a transfer of real property is complete upon the execution and delivery of a deed and its acceptance by the recipient of the property, and nothing in the Medicaid regulations contradicts that principle. In the case at hand, there was no reason to suspect that the mother did not mean to convey the property as soon as the deed was executed and delivered. Since the transfer of the property was effective when the deed was transferred, the transfer occurred outside the look-back period and the applicant was eligible for Medicaid assistance.

SOCIAL SECURITY NUMBER VERIFICATION FOR EMPLOYERS

The Social Security Number Verification Service (SSNVS), set up by the Social Security Administration (SSA), allows employers to use the Internet to match their records of employee names and Social Security numbers with those of the Government’s before preparing and submitting W-2 forms. You can access the SSNVS at www.socialsecurity.gov/bso/bsowelcome.htm. This is a faster and easier method to use than submitting requests to the SSA by other

means, including the telephone verification option.

Verification of data is important for both the employer and its employees. Correct names and numbers are critical to successful processing of wage reports, and unmatched records can cause additional processing costs for the employer. From the employees’ standpoint, verified names and numbers allow the Government to properly credit employees’ earnings records. Any uncredited earnings can adversely affect future eligibility for Social Security’s retirement, disability, and survivors programs.

AEDS HELP TREAT HEART ATTACKS . . .BUT CAN CAUSE LEGAL HEADACHES

An automated external defibrillator (AED) is used to treat people suffering sudden cardiac arrest whose hearts have an irregular heartbeat. Since September of 2004, when the Federal Food and Drug Administration approved over-the-counter sales of AEDs, it has been possible for individuals and businesses to have AEDs on hand, instead of waiting for them to be brought by emergency medical personnel.

The greater availability of AEDs has been a mixed blessing from a legal standpoint. Businesses most likely to put an AED to use (and what business cannot foresee that a customer might have a heart attack on its premises?) are now in the position of having to decide whether they should have AEDs at their facilities. If they do not, there is a

risk that a customer who needed an AED could cite the failure as negligence in a lawsuit. That is the “damned if you don’t” part, but the rest of the saying may apply as well.

If a business—for example, a fitness center—decides that it would be prudent to have its own AED, it may be commended for preparing for an emergency, but it also may have created a legal headache. Under the right set of facts, the business could be liable for a range of acts or omissions, such as not training its personnel to properly use the AED, or even something as simple as not keeping fresh batteries in the AED. There are already lawsuits in which such allegations have been made, and court cases from the period before over-the-counter sales began suggesting that businesses can be held liable if the AED is not kept in good working order or if the use (or non-use) of the AED is especially negligent.

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Businesses with AEDs on premises should think in terms of having a comprehensive AED program, not just the piece of equipment. With a view toward quick and effective use of the AED, the program should include: good means of communication about emergencies requiring an AED; training of workers in the use of the AED; procedures for regular checking

and maintenance of the AED, and; storage of the AED in an accessible location, identified by clear signs.

NEW 401(K) INVESTMENT OPTION

As of January 1, 2006, employers are able to offer a new retirement savings option, the Roth 401(k). The new account allows the features of a Roth IRA to be incorporated into the setting of a 401(k) account, but without the income restrictions that limit a Roth IRA. Contributions will be made with after-tax dollars, but the account will grow tax-free, and withdrawals taken in retirement will also be tax-free, assuming an individual is at least 59-1/2 years old and has held the account for at least 5 years.

Roth 401(k) accounts will be subject to the same contribution

limits as regular 401(k)s. In 2006, this means a contribution limit of \$15,000, or \$20,000 for individuals 50 and over. The contribution limits apply to regular and Roth 401(k) plans combined, so, for example, an individual could not put \$15,000 in a regular 401(k) and \$15,000 in a Roth 401(k). Still, the opportunity to put more money into a retirement account that will have tax-free withdrawals will be enhanced, given that in 2006 the contribution limits for a regular Roth IRA will be \$4,000, or \$5,000 for those 50 or older. If an employer matches the employee's contributions to a Roth 401(k), the matches will be made with pre-tax dollars in a regular 401(k) account that will be taxed as ordinary income at withdrawal.

Although it is only now becoming available, the Roth 401(k) originated

in a big piece of tax legislation that was enacted in 2001, with a sunset provision to take effect in 2010. Thus, it remains to be seen whether over the long run the Roth 401(k) will be seen as an option that was available in a small window of time, or a permanent fixture in retirement planning.

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PROFILE

Mr. Carmody has joined the Firm as counsel with over 20 years of experience in the insurance industry. He concentrates his practice on insurance regulatory, reinsurance, and legislative lobbying issues.

Prior to joining Lamson, Dugan and Murray, he was Vice President and Director for Insurance Department Services for Mutual of Omaha Insurance Company. In that capacity, he directed all company contact with the state insurance departments and was responsible for all market conduct issues and the drafting, filing and approval of all contracts of insurance sold by Mutual of Omaha. He also held the position of Assistant General Counsel at Mutual of Omaha.

Mr. Carmody has served on reinsurance and high risk health insurance pool boards in 19 states, including Texas, Oregon, Washington, New Jersey, Iowa and Nebraska.

He currently serves as President of the Iowa Comprehensive Health Insurance Pool. He served on the Executive Committee of the Board of Directors of the National Association of Health Insurance Pools from 2002 to 2005.

Mr. Carmody is admitted to practice law in Nebraska and Indiana. He holds a B.S. in History from the University of Nebraska at Omaha and a J.D. from Creighton University School of Law.



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- ◆ Insurance Regulatory
- ◆ Reinsurance Matters
- ◆ Legislative Lobbying



MOLLY C. MORAN
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- ◆ Litigation

Ms. Moran has joined the Firm as an associate in the Litigation Department. She graduated from Creighton University with degrees in History and Theology. She received her law degree from the University of Iowa School of Law in 2005. While attending the University of Iowa School of Law, Ms. Moran was active in the Organization of Women Law Students and Staff and served as a prosecuting intern.



ANNE MARIE O'BRIEN
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- ◆ Transportation Defense
- ◆ FELA
- ◆ Insurance Coverage Disputes
- ◆ Product Liability
- ◆ Grade Crossing Defense
- ◆ Contracts and Negotiation

Ms. O'Brien has joined the Firm as an associate in the Litigation Department. Her practice involves business, insurance, railroad and transportation clients. She has experience in personal injury defense, FELA, products liability litigation, grade crossing, insurance coverage and subrogation litigation, transportation defense work, and contract negotiation, including general civil litigation. Ms. O'Brien has lectured and advised on insurance and subrogation issues to both defense and plaintiff's bar associations.

JOHN M. WALKER
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Practice Area:

- ◆ Litigation



Mr. Walker has joined the Firm as an associate in the Litigation Department. He graduated from Creighton University in 2002 with a degree in History and Theology. He also received his law degree from Creighton University, graduating magna cum laude in 2005.

While attending Creighton, Mr. Walker was a member of the *Creighton Law Review*, the International Moot Court Board, and Law Ambassadors. Mr. Walker also participated in the Saul Lefkowitz Trademarks Competition, the Client Counseling Competition, the ATLA trial competition, and the International Moot Court Competition, in which he advanced to the final round. In the spring of 2002, Mr. Walker was a member of the Supreme Court Seminar, co-taught by Justice Clarence Thomas, United States Supreme Court.

MICHAEL J. WEAVER, JR.
Business Department

Practice Areas:

- ◆ Federal Income
- ◆ Estate and Gift Taxation
- ◆ Business and Tax Planning
- ◆ Corporate
- ◆ Partnership and LLC Law
- ◆ Mergers
- ◆ Acquisitions and Reorganizations
- ◆ Estate and Gift Tax Planning
- ◆ General Corporate Business Planning



Mr. Weaver has joined the firm as a partner in the Business Counseling Practice Group. His practice is concentrated around business, financial and estate planning, including sophisticated tax planning for corporations, partnerships, estates, and individuals. His practice also involves sophisticated estate and gift tax planning, administration of estates and trusts, general corporate planning and counseling, as well as mergers, acquisitions and divestitures.

Mr. Weaver received his bachelor's degree from Creighton University in 1987, with degrees in Accounting and Finance. He received a Nebraska certified public accounting certificate in 1987. Mr. Weaver received his law degree from Creighton University School of Law in 1990, graduating summa cum laude and second in his class. He was a member of the *Creighton Law Review* and served on the Law Review Editorial Board.

Mr. Weaver practiced for fifteen years, working as an attorney and shareholder in a large Omaha law firm, where his practice focused on corporate and individual taxation and planning, sophisticated estate planning, and trust and estate administration. In 2004, he joined a national biometric security company headquartered in Omaha as its Chief Legal Officer and Chief Financial Officer. Mr. Weaver is a frequent lecturer for continuing education seminars on federal income tax and estate planning matters.



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