



LAMSON, DUGAN AND MURRAY, LLP  
ATTORNEYS AT LAW

## BUSINESS COUNSELING

# UPDATE

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A N D R E W T . C H A P E A U , E D I T O R

### NEBRASKA'S ESTATE TAX REPEALED

Recently enacted Legislative Bill 367 includes a variety of tax reforms, including the repeal of the Nebraska Estate Tax for all decedents dying on or after January 1, 2007. The Nebraska Department of Revenue will return any filings and remittances for estates that have filed returns for decedents dying on or after January 1, 2007. The Nebraska Estate Tax remains in effect for decedents dying before January 1, 2007. The filing date remains twelve (12) months from the date of death for these estates.

The repeal of the Nebraska Estate Tax will assist small business owners and family farmers in passing their life's work on to their next generation. Additionally, it will serve as a bargaining chip in persuading retirees to remain in Nebraska. The repeal of the estate tax will provide more than \$37 million in tax relief over the next two years.



### NEW RULES ON PAYMENT OF ACCRUED, UNUSED VACATION PAY AT TERMINATION OF EMPLOYMENT

Nebraska Governor Dave Heineman recently signed Legislative Bill 255 into law. It should alleviate concerns that many employers faced in the wake of the Nebraska Supreme Court's decision in *Roseland v. Strategic Staff Management*. *Roseland* held that earned but unused vacation leave was payable as wages upon separation from employment.

Unfortunately, as some employers anticipated, the legislature expressed little interest in reversing *Roseland* on the question of vacation pay but was willing to clarify that earned but unused sick leave is not considered wages for purposes of the Nebraska Wage Payment and Collection Act. Employers who wish to pay earned but unused sick leave upon separation are free to do so, but the payment is not required. Employers are required to pay out accrued, unused vacation pay at termination.

One issue that arose during the course of the debate on the new law was whether forms of personal time off or "paid time off" need to be paid out upon termination. This

issue appears to have been answered in the negative based on specific floor debate by the full legislature on LB 255. Although such legislative history is not controlling, the majority view in the initial stages of this new law is that unless an employer denotes paid leave as strictly "vacation pay," it need not be paid upon termination.

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One widely discussed issue is the potential effect of the new law with regard to “use it or lose it” policies in connection with vacation pay. That issue was not addressed in Roseland or in the new law. We believe, however, that “use it or lose it” policies are lawful so long as employees (1) have clear notice in advance that there is a limit on any accumulation or carryover of vacation time and (2) are given a fair and reasonable opportunity to use accrued vacation time that may be lost before the end of the year or computation period.

*Brian M. McGrath*

#### **INSURER MAY SUE RENTER FOR FIRE DAMAGE**

Unless there is a contract or lease that provides otherwise, a tenant generally is liable to a landlord for negligently damaging the landlord’s property, such as by accidentally starting a fire. But, depending on the language in the landlord’s fire insurance policy, the tenant could end up defending himself against a powerful insurance company rather than the landlord.

Many insurance policies provide for subrogation, meaning that if the insurer pays a claim from the landlord for losses due to a negligently started fire, the rights of the landlord against the wrongdoer are transferred to the insurance company. In effect, the insurance company steps into the shoes of the landlord.

This scenario played out in two recent cases that were consolidated because of their similarity. In one case, a person renting a single-family home caused a fire by leaving a

flammable item unattended on an electric stove. In the other case, an apartment tenant accidentally started a fire with candles left burning in the bedroom. In both instances, the insurers had subrogation clauses in the policies taken out by the landlords.

Without success, the tenants argued that they should be treated as co-insureds, and therefore they should not be subject to a lawsuit by the insurers. The court ruled that tenants may well have an insurable interest in the leased premises, but they are on their own in terms of liability, unless a contract provides otherwise. The court reasoned that allowing an insurance company to sue a tenant avoids a double recovery by the landlord (from the insurer and the tenant), and it prevents culpable tenants from evading responsibility for their conduct.

#### **DOING BUSINESS ON THE WEB—CLICKWRAP AGREEMENTS**

Every day, more and more business transactions are conducted over the Internet. Many of these transactions begin with a “clickwrap agreement.” Clickwrap agreements are variations of “shrinkwrap” agreements, those printed terms and conditions usually found in the packaging for software. Clickwraps basically work the same way, but the user agrees to the terms by clicking a button on his computer, instead of by opening the package and using the product. While clickwrap agreements are still widely associated with software licensing, their use has spread to a wide range of business settings, such as advertising services, telecommunications, and banking,

to name only a few.

Given that clickwraps have become ubiquitous, it is prudent for businesses to consider their advantages and to be informed as to the desirable characteristics that any clickwrap agreement should have. As compared with their paper predecessors, clickwraps are easier and quicker for a customer to accept, and more difficult for the customer to attempt to change. They provide a measure of control that is to the business’s advantage. Depending on the size of the business and its market, clickwraps can be the means by which countless relationships are formed and deals are struck, so it is vital for any business using them to get all of the details correct. To ensure enforceability and to head off later legal problems to the greatest extent possible, companies should seek and use the advice of legal counsel as they create clickwraps tailored to particular businesses.

Once a business decides to use a clickwrap agreement, there are certain traits that should be considered:

- Put the steps in the right order. Before a customer is expected to pay for the product or service, or is allowed to receive it, he should be given the chance to review the entire clickwrap agreement and the option to accept or reject all of its terms and conditions.
- Identify the user. If the party who comes to a company’s clickwrap represents another company, it is especially important to get identifying information that will show that the user is authorized to bind his company to the

agreement. To this end, the clickwrap should have places for the user's name, the company's name, the user's title, and both email and physical addresses. Of course, aside from its value for such verification purposes, the identifying information can be useful in other ways.

- Do not make the user hunt. The clickwrap should be readily apparent to a user, and the "install" or "download" button should appear only after the clickwrap is set out in its entirety. In the same vein, a checkbox indicating that the user has agreed to the terms of the clickwrap makes good sense. The idea is to prevent anyone from claiming in a later dispute that there were parts of the agreement that he could not have easily seen, and to which he did not give his assent. As for any terms that are weighted in favor of the business, making them hard to find is an especially bad idea. On the contrary, these terms should stand out, maybe even with their own "I agree" checkbox.
- Drop the legalese. As is true for any contract, a clickwrap should use clear, plain English. It is well settled in law that a court will construe ambiguous terms against whoever wrote them, that is, the business whose clickwrap is being deciphered.
- Make the clickwrap control. If there are any other dealings with the user, whether oral or written, that conceivably could be said to constitute a separate agreement, they all should explicitly refer to the clickwrap agreement.

Likewise, the clickwrap itself should have language indicating that its terms override any conflicting terms in other agreements relating to the transaction.

- Keep the final word for your business. What if a user navigates successfully and accepts the clickwrap agreement, but your business determines for some reason that it wants no business relationship with that user? The business should provide itself with an escape hatch, with language in the agreement to the effect that the business must confirm the agreement before it becomes enforceable, or that the business can cancel the agreement at will.

Clickwrap agreements have gained acceptance as valid, enforceable contracts, albeit in an unconventional format. This point is illustrated by a recent federal court decision. In a breach of contract dispute between two software companies concerning the use of licensed software, the court hardly paused at the question of whether a clickwrap agreement constituted a valid contract. In answering "yes," the court also relied on an extensive list of prior court decisions that had reached the same conclusion. The clickwrap agreement has become a permanent part of the legal landscape for businesses and individuals alike.



## BEWARE OF FAKE CHECKS

You have responded to a work-at-home offer in which you will be an account manager for a foreign company, depositing checks from its U.S. customers. It seems simple: You deposit the checks, take your pay out of them, and send the remainder to the foreign company. Or... you have reason to believe you have won a sweepstakes or lottery prize. You receive a check for your winnings, with instructions to cash it, then return a portion of the money to cover taxes or other fees. Or... having sold something through a newspaper ad or online, you receive a check for much more than the purchase price. Calling it an accounting error, the buyer apologizes for the mistake and asks that you return the excess amount.

If these scenarios activate your fraud antennae, there is a good reason for that. Each is a typical example of circumstances in which people are victimized by fake checks. This is a growing problem, perhaps because of the ways in which strangers are brought together for transactions by new technologies and the Internet. If there is a single best piece of advice for not becoming a victim, it is to accept no check if it is accompanied by a request that you return some of the money.

Of course, the sting from the scam occurs when the victim deposits the check he receives, then withdraws funds and sends off money or merchandise before his bank discovers that the deposited check is fraudulent. Even when the bank is vigilant, that discovery could take days, or even weeks. Your first

reaction might be to blame the bank, but, generally, the depositor is on the hook, as he is considered to have taken responsibility for the funds spent or sent before the fraud is discovered.

In addition to the big red flag in the form of being asked to return part of the money sent by check to you, here are some more warning signs and protective measures:

- Upon receiving a check from a stranger, explain the situation to your bank manager and ask the manager when the check is likely to be considered “good.” Then wait until you get the go-ahead before using the funds. If, in the meantime, the check writer pesters you about the delay, that may just be one more sign that you were targeted to be a fake check victim.
- Scam artists are often clever and skillful, making it difficult to detect a false check from the check itself. This makes it all the more important to pay attention to, and to be guided by, suspicious circumstances. Some of these include offers that defy common sense (if you really won a prize, wouldn’t they just deduct taxes or fees from the check for your winnings?); being asked to send money outside of the U.S. (thus making it harder to find the culprit and the money); and being warned not to discuss the

transaction with anyone else.

- Consider accepting payment not by personal check, but only in the form of a money order or a cashier’s check drawn on a local bank, so that you can take it there to ensure that it is legitimate. Another option is a money order from the U.S. Postal Service.

#### RENTALS ALLOWED UNDER RESTRICTIVE COVENANT

After a couple bought property in a subdivision, they were surprised to learn that several homes near theirs were going to be offered as vacation rental property. Strangers on vacation were not the neighbors the couple had in mind. All of the properties in the subdivision were subject to a set of restrictive covenants, one of which required that lots be used for “single-family residential purposes only.” The couple sued to get a court to declare that renting a home, even to one family, violated that restriction, but the couple came out on the losing end of the litigation.

In the plaintiffs’ view, to derive rentals from a home was to convert the property from single-family residential use to a prohibited commercial or business use. The court disagreed. Citing statistics showing that in most states over 30% of homes are rented rather than owned by the families living in them, the court reasoned that an owner’s receipt of rental income does

not detract from or change the “residential” use of the property.

The plaintiffs’ position was undercut by a separate covenant that permitted delegation of certain owner rights to “tenants,” thus obviously contemplating the rental of property. The plaintiffs argued that only long-term rentals were allowed, not short-term vacation rentals, but they could point to no language supporting such a distinction.



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