



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

### SMALL BUSINESS - MAINTAINING A SAFE WORKPLACE

In theory, and often in practice, the safety of the workplace is a top priority for any business. But while large companies may have personnel devoted exclusively to the subject, safety is but one of many responsibilities for the owners of small businesses. In some cases, the matter of keeping workers safe slips down the list of priorities. There to make sure the issue is not neglected is the federal Occupational Safety and Health Administration (OSHA).

OSHA has written very detailed standards for maintaining workers' safety. It also has an expansive mandate to enforce those standards and the various provisions of the Occupational Safety and Health Act. Removing dangerous conditions is only common sense from any point of view, including employer-employee relations and a calculation based solely on dollars and cents.

The first step for any small employer is to be informed and educated as to workplace dangers, not all of which may be obvious. OSHA maintains an extensive website ([www.osha.gov](http://www.osha.gov))

which includes information that is especially pertinent to small businesses and guidance about specific threats to safety. Insurance companies provide another good source of information, since these companies have a vested interest in enhancing workplace safety, thereby minimizing insurance claims.

While exotic threats such as anthrax or Legionnaires' disease capture headlines, the leading causes of serious workplace injuries are more ordinary. They include overexertion, such as excessive lifting, pushing, pulling, holding, carrying, or throwing of an object; falls on the same level (as distinct from falls from a height); and "bodily reaction," which covers injuries from bending, climbing, slipping, or tripping without falling. Regular inspections and repairs, not to mention a vigilant workforce, can head off many such injuries.

Apart from monetary penalties that may follow an OSHA investigation, many billions of dollars each year are paid by employers in medical costs, wage payments, and insurance claims management as a result of workplace injuries. Small businesses get some breaks from OSHA, in

the form of smaller monetary penalties and some exemptions from recordkeeping requirements for employers with 10 or fewer employees. Still, given their reduced financial reserves, small businesses, in particular, are well advised to live by the truism that an ounce of prevention is worth a pound of cure.

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**DEPARTMENT OF  
HOMELAND SECURITY  
ISSUES NEW I-9 FORM**

On November 7, 2007, the Department of Homeland Security ("DHS") issued a new I-9 form as well as a new Handbook for Employers: Instructions for Completing the Form I-9. The form is available at [www.uscis.gov](http://www.uscis.gov) or by calling 1.800.870.3676.

DHS is recommending that the new form be used immediately but it is not prohibiting the use of the old I-9 until it gives notice through the federal register of the change to the new form. The new I-9 has a modified list of acceptable documents for employment eligibility verification.

The updated I-9 also has a new set of instructions, which employees should be given when completing the I-9 form. These instructions note that an employee need not provide a social security number in the course of completing the I-9 unless the employer is participating in the USCIS E-Verify program. The new I-9 will be used for all new hires as well as all re-verification of I-9s even if the old I-9 was used initially.

*Brian J. McGrath*



**EXCLUDED HEIRS  
MAY STILL INHERIT**

When Elizabeth was born out of wedlock in the 1950s, she was adopted soon afterwards by another family. As a young adult, she located her birth mother and formed a long lasting relationship with her. Elizabeth also discovered that, through her mother, she was related to the beneficiaries of a large fortune. Two multimillion dollar trusts had been established to provide income to Elizabeth's mother during her lifetime. The remaining principal was to go to her "descendants," according to one trust, and to "each then living child of hers," according to the other trust.

Following a long battle, a court has found that Elizabeth is entitled to share in the fortune, notwithstanding the argument by her mother's other heirs that she was not her mother's "child" or "descendant" because she had been adopted out of the family. Looking at the applicable state law when the trusts were created, the court determined that, at such times, nonmarital children could be included as descendants or children of their biological parents for purposes of inheritance. There also was an overarching constitutional issue, as some courts have held that treating children born out of a marriage differently from marital children is a denial of equal protection of the law.

In Elizabeth's case, the issue would have been more clear-cut in her favor had the trust instruments simply included her as a beneficiary, either by more inclusive language or by using her name. Of course, up to a

point, the creator of a trust or will has leeway in deciding which of his or her children to include as beneficiaries. But the law has been known to step in on behalf of children to achieve a measure of justice and fairness.

A case in point, which has yet to play out to a resolution, concerns the estate of Anna Nicole Smith. In her will, Smith left all of her estate, which could be greatly enhanced by many millions of dollars from her late husband's assets, to her son. Only months before both Smith and her son died, she gave birth to a daughter. Whether the omission of any future children from Smith's will was intentional or merely a drafting error, it is probable that Smith's daughter will inherit the estate.

Under the "omitted child" doctrine followed by a majority of courts, when a parent has a will and then has children, those children are treated as if they were born prior to the will, and they are afforded the same treatment as any other siblings. If, for whatever reason, the Smith estate passes outside of the will, the daughter still will likely receive the estate.

**Update Your Estate  
Planning Documents**

Your estate planning documents should be reviewed with a professional on a regular basis and kept current with your life changes. Birth, death, marriage, and divorce are but a few life changes that can significantly affect your estate planning. Don't wait until it's too late to revise your plans to reflect your wishes and circumstances.

### “HOURS OF SERVICE” UNDER THE FMLA

To be eligible for leave under the federal Family and Medical Leave Act (FMLA), an employee must have been employed by the employer for the preceding 12 months, and the employee must have put in at least 1,250 “hours of service” during that time. However, neither the FMLA nor the Fair Labor Standards Act (FLSA) defines “hours of service.”

When a hospital determined that a nurse it employed was about seven hours short of the 1,250 hours threshold, and therefore denied the nurse FMLA leave in connection with her surgery for carpal tunnel syndrome, the circumstances required a federal appellate court to construe the proper meaning of “hours of service.”

Both sides agreed that, in terms of actual hours spent on the job, the nurse came up just short of the FMLA threshold. But the facts were not that cut and dried. Under a “Weekender” compensation program devised by the hospital to provide an incentive for nurses to work undesirable weekend shifts, for every two week period during which the nurse worked 48 weekend hours, she was paid as if she had worked 68 hours instead. If the hospital had calculated the nurse’s hours in her first year using the “bonus hours” in addition to the hours the nurse was at work, she would have been eligible for FMLA leave.

The court upheld the hospital’s decision and declined to find it liable under the FMLA. While the legislation itself provided little guidance for the court, an FMLA regulation on the subject of the

requirement of 1,250 hours does state that “any accurate accounting of actual hours worked under FLSA’s principles may be used.” Another regulation states that “all hours are hours worked which the employee is required to give his employer.” In this case, the court reasoned that the bonus hours for which the nurse received extra compensation could not count as “hours of service” because she was not required to “give” them to her employer, but rather could spend that time for her own purposes.

The nurse argued to no avail that her case should have had the same outcome as another case decided by the same court, in which the court held that an employee’s “hours of service” under the FMLA did include some hours not actually worked. In that case, however, the employee requested FMLA leave after successfully suing for wrongful termination and obtaining a remedy that included full service credit and back pay for the hours she would have worked but for the termination. Thus, the employee could use these hours that would have been worked in calculating FMLA eligibility.

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*“A lie  
can travel  
halfway around  
the world  
while the truth  
is putting on  
its shoes.”*

Mark Twain

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### MISCONCEPTIONS ABOUT FDIC INSURANCE

Misconceptions about the nature and extent of deposit insurance from the Federal Deposit Insurance Corporation (FDIC) can be risky. Especially to be avoided is a depositor’s false impression that all of his funds in a bank are insured when, in fact, some of the money is over the insurance limits, thus exposing it to loss if the bank fails. Here are some of the most prevalent erroneous beliefs about FDIC deposit insurance:

**The most any consumer can have insured is \$100,000.** In fact, accounts at different FDIC-insured institutions are separately insured, so the same consumer may qualify for up to \$100,000 at each institution. Furthermore, the same consumer may qualify for more than \$100,000 in coverage at each bank if accounts are owned in different “ownership categories.”

**The FDIC insures any product sold by a bank.** Dispelling this idea is especially important now that banks, directly or through other companies, have branched out into such financial products as stocks, bonds, mutual funds, annuities, and other insurance products. The FDIC insures the more conventional bank products, such as checking accounts and certificates of deposit.

**Revocable trust accounts are always insured up to \$100,000 for each beneficiary.** Generally, the owner of a revocable trust account is insured up to \$100,000 per beneficiary, but that is only for “qualifying beneficiaries,” meaning the depositor’s spouse, child, grandchild, parent, or sibling.

Portions of the trust payable to any nonqualifying beneficiaries would be insured as the personal funds of the owner, only up to a total of \$100,000, along with any deposit accounts the owner may have alone at the same bank.

**Depositors could have to wait up to 99 years for their money in insured accounts if a bank fails.** The origins of this falsehood are sketchy, but, in any event, federal law requires payment "as soon as possible" after a bank failure. In the past, this has meant no more than a few days.

**Changing the order of names or Social Security numbers can increase coverage for joint accounts.** This practice is of no consequence whatsoever. The FDIC will just add each person's share of all joint accounts at the same institution and insure the total up to \$100,000.

#### VACATION HOME TAX TREATMENT

An owner of a second home that is both rented out and put to personal use at different times in any given year should bear in mind the considerable differences in income tax liability that flow from how the two types of uses are allocated. Each year, for tax purposes, the home will be considered as either a residence or rental property, with important differences in the resulting tax

calculations. The bottom line is that treatment of the home as rental property is advantageous for the owner, and keeping down the personal use of the property allows it to be so characterized.

If personal use of the second home is less than the greater of 14 days or 10% of rental days, the home will be considered rental property. Flowing from this classification is the ability to deduct repairs, maintenance, insurance, and depreciation costs. In addition, if the expenses exceed the income from the property, the taxpayer can deduct the loss, subject to passive loss rules. Generally, passive losses up to \$25,000 may be deducted if the adjusted gross income (AGI) is under \$100,000. The ability to deduct passive losses declines as the AGI increases, eventually phasing out at an AGI of \$150,000.

If the owner exceeds the personal use threshold for treatment as rental property, the home is treated as a "residence." In that case, the owner can deduct expenses only up to the amount of rental income, and no loss deductions are allowed. In addition, before there can be any deduction for operating expenses, the owner must use up the property's share of mortgage interest and property taxes to offset the rental income, which effectively wastes deductions.

In short, if as an owner of a second home, you rent the home for a substantial part of the year, but you also just cannot stay away from the place (that's why it's called a vacation home, isn't it?), enjoy the time away but be prepared for tougher treatment by the IRS.



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