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SPRING 2016

ESTATE PLANNING UPDATES YOU NEED TO KNOW FOR 2016

JAIME J. HUNSICKER

Now that the holidays are behind us and we have settled into the New Year, it is a great time to dust off your estate planning documents and make sure you are updated on some changes to the law that may impact your overall estate plan.

ESTATE TAX

The estate tax exemption levels continue to rise on both the federal and state level, allowing individuals to pass more wealth at their death without incurring estate tax. As of January 1, 2016 the federal estate tax exemption for estates of decedents who die during 2016 increased to $5,450,000. For couples, the 2016 federal estate tax exemption is $10,900,000. On the state level, as of April 1, 2016 the New York estate tax exemption for estates of decedents who die between April 1, 2016 and March 31, 2017 will rise to $4,187,500, up from $3,125,000 for the period April 1, 2015 to March 31, 2016. The annual exclusion for gifts remains at $14,000 for 2016 at the federal level. Notably, there remains no gift tax in New York.

BASIS REPORTING

On July 31, 2015, President Obama signed a new law that included several changes to the Internal Revenue Code, including a new requirement to report the income tax basis of property acquired from a decedent. The basis in property must be determined so that when the property is sold, any capital gains tax will be calculated using the sale price minus the basis in the property. Executors and/or beneficiaries of a decedent's estate are now required to file an informational form with the Internal Revenue Service, and to provide each affected beneficiary with a copy, identifying the basis in any property acquired from a decedent. The purpose of the new regulation is to ensure consistent basis reporting between the decedent's estate and the person acquiring the property. Further direction and regulations relating to this filing requirement will be forthcoming.

ABLE ACT

The Achieving a Better Life Experience (ABLE) Act of 2013 amended the Internal Revenue Code to allow individuals with disabilities to create tax-free savings accounts that will supplement but not supplant benefits the individual may be receiving through government programs such as Medicaid and Supplemental Security Income (SSI). Following the passage of the ABLE Act at the federal level, the New York Achieving a Better Life Experience (NY ABLE) Savings Account Act was signed by Governor Cuomo on December 22, 2015.

Through these acts, for the first time, both the federal and state governments recognize the significant expenses of living with a disability, including the costs of accessible housing and transportation, personal assistance services and assistive technology, which are not covered by Medicaid.

An ABLE account can be set up for an individual who was blind or disabled by a condition that began prior to the individual's 26th birthday. An ABLE account with up to $100,000 in assets will be excluded from the disabled individual's resources for the purpose of qualifying for government benefits. Upon the death of the disabled individual, any funds remaining in an ABLE account will be used to reimburse the State for Medicaid benefits paid on behalf of the individual.

More information about how to establish an ABLE account in New York will be forthcoming. We anticipate that these accounts may be a potential alternative to creating a supplemental needs trust for a disabled person, depending on individual circumstances.

As laws relating to estate planning and asset preservation planning continue to change, we encourage you to contact our office to discuss how these new laws may impact your current plan.

If you have any questions about these estate planning issues, please contact Jaime Hunsicker at jhunsicker@hancocklaw.com.

FORMAL DISSOLUTION PROCEDURES SHOULD BE UNDERTAKEN WHEN A BUSINESS IS BEING WOUND DOWN


MANUEL A. ARROYO

When I was a child, my mother would tell me to pick up my toys when I was done playing with them. I now find myself giving somewhat analogous advice to business owners—when you wind up a business entity as a going concern, formally dissolve it. Doing so may save you from certain individual exposure moving forward.

While business owners are well-advised to wind up entities as soon as practicable when they cease doing business, heeding such advice may still not completely foreclose a principal's lingering risk.

Courts have held that because corporate law is "overwhelmingly the province of the states," and "how long and upon what terms a state-created corporation may continue to exist is a matter exclusively of state power." *Marsh v Rosenbloom*, 499 F3d 165, 176-77 (2d Cir 2007).

Under this principle, state law will determine whether a dissolved entity, or its individual former principals, may or may not be sued.

In one instructive example, the Second Circuit Court of Appeals held that individual former shareholders of a dissolved Delaware corporation doing business in New York could not be held liable for an environmental cleanup of a site where the contamination may have been contributed to by the corporation during its legal existence. *Marsh*, 499 F3d at 184. The corporation had formally dissolved under Delaware law more than three years prior to the claim being filed.

The court reasoned that because the corporation had been formally dissolved under Delaware's dissolution statute, which provided for a three-year statute of limitations on claims against a corporation from the time of dissolution, any claim was time-barred.

The court held that it was powerless to resurrect a corporation that the state had "put out of existence for all purposes" including for the purpose of holding the entity or its individual former shareholders liable for environmental claims. *Marsh*, 499 F3d at 177.

New York's corollary to the Delaware statute of limitations is not so simple. Under New York's statutory scheme, shareholders have the option to give public notice of a corporation's dissolution to creditors. NY BCL §1007. Shareholders who take the opportunity to publicly notify creditors of the corporation's dissolution may benefit from a six-month window on such claims, unless "for good cause" a court permits them to be brought. Shareholders who undertake to dissolve a corporation, without providing such public notice, do so at their peril. They may subject themselves individually to actions governed by the statute of limitations related to particular claims and will not benefit from the certainty provided under the public notice option.

In addition, formal dissolution under New York law will terminate the obligation to file tax returns and pay franchise taxes unless there is some separate obligation to file a return after dissolution, in which case an officer, employee, or agent of the dissolved corporation may be criminally liable for such a failure. *People v Brigham,* 261 AD2d 43 (3d Dept 1999).

While Delaware's statutory scheme for dissolution of corporations provides greater certainty to shareholders, principals are nevertheless advised, whether they are dissolving a New York or Delaware entity, to start formal dissolution procedures promptly upon wind-up. In either case, acting promptly may curtail the individual exposure of former shareholders.

If you have any questions about these business dissolution issues, please contact Manny Arroyo at marroyo@hancocklaw.com.

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FIVE COMMON EMPLOYER MISCONCEPTIONS


ROBERT J. THORPE

We all know that there is no surefire way for employers to completely avoid being subjected to employment-related claims and lawsuits. There are, however, some common mistakes employers make that increase the odds of landing in troubled waters, all of which are easily avoidable. Here are a handful of the most common myths and misconceptions in need of debunking:

1. **Salaried Employee = Exempt Employee.** Many employers mistakenly believe that any employee paid on a salary basis, as opposed to an hourly basis, is "exempt" for purposes of minimum wage and overtime laws. To be properly classified as exempt under federal and state wage and hour laws, employees must meet weekly salary thresholds and must also satisfy certain tests regarding their job duties.

2. **An employee is not entitled to additional leave once his or her FMLA leave expires.** While this may be true in some circumstances, employers should be aware that continued leave (i.e., additional leave provided after FMLA leave has expired) is commonly recognized by the courts to be a required form of reasonable accommodation under both the Americans with Disabilities Act and the New York State Human Rights Law. Note, however, that an employer is not required to provide indefinite leave as an accommodation.

3. **A worker who agrees in writing to independent contractor status is, in fact, an independent contractor under the law.** The State of New York is on a mission to combat the problem of worker misclassification, which generally occurs when employees are incorrectly labeled as independent contractors. This denies the government substantial tax revenues, and denies the misclassified workers the benefits and protections of various federal and state labor and employment laws.

While an agreement designating a worker as an independent contractor may be helpful, it is by no means dispositive of the analysis. Courts and administrative agencies will look to several other factors to determine whether or not an employment relationship exists, most of which focus on the level of control the business exercises over the worker.

4. **Employers must provide employees with rest or coffee breaks.** Neither state nor federal law requires employers to provide employees with rest periods. If, however, an employer chooses to offer its employees a rest break lasting between five and 20 minutes, it must be treated as compensable work time. Also note that state law requires meal breaks under certain circumstances.

5. **Employees are not entitled to pay for checking or responding to e-mails, text messages, or phone calls during non-working hours.** New technologies continue to blur the work-life boundaries, creating more avenues for employees to assert unpaid wage claims. Under federal and state wage and hour laws, non-exempt employees must be compensated for all time they are "suffered or permitted to work."

The key test on this issue is whether the employer knew, or through reasonable diligence should have known, that the employee was performing the work. The problem generally arises when an employee fails to document incremental time spent engaging in work-related communications while off duty.

If feasible, employers should develop and implement a strict timekeeping policy that prohibits off-the-clock work and requires employees to record all time worked. Employees who engage in unauthorized work-related communications off-the-clock, as well as supervisors who explicitly or implicitly condone off-the-clock work, may be disciplined for violating company policy.

If you have any questions about these labor and employment issues, please contact Rob Thorpe at rthorpe@hancocklaw.com.

INTRODUCING OUR NEWEST ATTORNEYS

MANUEL A. ARROYO is a member of our Corporate Practice and is also our firm's Diversity Officer. He represents clients in matters involving business formations, mergers and acquisitions, contract negotiations, commercial transactions and commercial litigation. Mr. Arroyo has founded and operated several businesses through which he gained extensive experience in both corporate and real estate transactions. Prior to joining Hancock Estabrook, he was a commercial litigator at the New Jersey firm of ShapiroCroland. Mr. Arroyo received a B.A. from the University of Massachusetts at Amherst, an Ed.M. from Harvard University and a J.D. from Rutgers University. He is admitted in New York and New Jersey.

WHITNEY M. KUMMEROW is a member of our Labor & Employment Practice. She is a 2010 *magna cum laude* graduate of the Earle Mack School of Law at Drexel University and received her B.S. from Syracuse University's Newhouse School of Public Communications in 2004. Ms. Kummerow previously clerked for the United States Department of Labor's Office of Administrative Law Judges and also served as a judicial intern for the Honorable Jean K. FitzSimon of the U.S. Bankruptcy Court for the Eastern District of Pennsylvania. Prior to joining the firm, Ms. Kummerow practiced labor and employment law for several years at Sobol & Sobol, P.C. in Philadelphia, Pennsylvania. She is currently admitted to practice in New Jersey and Pennsylvania only.

RYAN M. POPLAWSKI is our newest Hancock Estabrook associate and was recently admitted to practice in New York. Mr. Poplawski is a member of our Litigation Practice. He is a graduate of Siena College and the University of Buffalo Law School. Mr. Poplawski was a member of our 2014 Summer Associate Class.

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