// BUSINESS BRIEFS
Legal Developments Affecting Business

Saalfeld Griggs PC
Sound counsel. Smart business.

FALL 2013

REAL LIFE BLOOPERS
By Robert J. Saalfeld

Sometimes things just don't go right. One thing you want to work correctly is your estate plan. Consider the following common mishaps, and be sure to avoid them.

1. A man owned life insurance on his daughter's life. He died before his daughter. Since he had failed to name a contingent owner, his heirs had to do a court probate to transfer ownership of the policy. If you own insurance on another's life, be sure to name a contingent owner and contingent beneficiary.

2. A man inherited some assets at his mother's death. The inheritance came in just the man's name. Since the man neglected to retitle the assets to his living trust, his heirs had to do a court probate to transfer the assets at the man's later death. If you acquire new assets, be sure to title them on your living trust.

3. Parents made a cash gift to one child to help the child buy a house. The other child found out and complained, and there were hard feelings. If you make gifts to children, be careful. Math may not have been a child's best subject, but a child will have a keen sense of what is not equal. If you do make unequal gifts, consider an advancement clause in your will or trust.

4. Sometimes equality isn't always the answer. For example, in one case parents transferred their farm to an LLC, and then made gifts to their son and daughter of LLC membership interests. The son lived and worked on the farm, but the daughter didn't. After the dad died, the son and daughter told mom they definitely did not want to own property together. Everybody got separate lawyers and fought over how to divide things up so the children could own things separately. Be wary of children continuing to co-own the same asset. If they didn't share the same toy in the sandbox, they probably won't share a farm, a business, or other property later.

5. A woman named her grandchildren as beneficiaries of her IRA. The problem was that the grandchildren were still minors when the woman died. A court conservatorship had to be opened for the grandchildren.

6. A man willed everything to his wife. At the wife's subsequent death, everything was included in the wife's estate, and the children had to pay Oregon death taxes. This could have been avoided if the man had provided for a Bypass-type trust for his wife. With a Bypass-type trust, the man's assets, up to the $1 million Oregon death tax exclusion, could have passed to the wife in trust for life, thereby excluding these assets from her estate for death taxes.

7. A couple set up a custodial account for their child when the child was young. The account grew to a substantial amount. When the child reached age 21, the account was supposed to end and be distributed to the child outright. Since the child had some problems, however, the parents didn't want to release the account to the child as required by law. Be careful of the amount you gift to a child, or use vehicles that can go beyond age 21 if needed.

In This Issue

8. A man made a loan to a child and the child signed a note. The child never paid. When the man died years later, the note was discovered by the other child who was the personal representative. The personal representative child then sought to enforce the note, the balance of which by then was several times higher than the original loan amount due to interest build up. Everybody got lawyers. The case was eventually settled, but the children don't talk to each other. Be careful with loans to children, especially ones that never get paid and the other children don't know about.

9. Parents willed their business to the child who was working in the business, and they willed the land that was leased to the business to their daughter. When the lease ran out, the children fought over what was fair rent for the business to pay. To avoid such problems, the lease could have had options for the business to renew, a provision for an independent determination of what is fair rent and perhaps an option to purchase.

10. A husband, who handled all the finances and ran the business, died. His wife was left not knowing who to trust or what to do. The obvious lesson here is the importance of communicating key information to your spouse so that the survivor can have an easier time when you aren't there to handle things.

Hopefully we can learn from other's bloopers so we can avoid the same mistakes, save money and time, and our families can be happier. If you would like assistance in avoiding these bloopers in your estate plan, contact us at 503-399-1070.

2013 Legislation Affecting Oregon Business: Benefit Companies

By Caleb Williams

In 2013, Oregon has become the most recent state in a wave of states to create a legal framework for a "benefit company." As of this writing, 19 states and the District of Columbia have adopted similar legislation. Oregon is relatively unique, in that it is one of just a few states that allow both corporations and LLCs to organize as a "benefit company."

A benefit company is a corporation or LLC whose purpose is to provide "general public benefit" in addition to the usual business purpose of maximizing profits for the benefit of shareholders or members. Under the Act, "general public benefit" means "a material positive impact on society and the environment, taken as a whole, from the business and operations of the benefit company." Benefit companies are not non-profit entities, but for-profit business entities intended to promote societal and environmental good in addition to a return of profit to the owners. Oregon's law is based on a model act promoted by the non-profit organization B Lab (www.bcorporation.net). B Lab encourages states to adopt legislation that allows for-profit companies to organize for purposes other than profit, and also certifies companies that meet B Lab's benefit company standards.

The movement by state legislatures to adopt benefit company legislation is motivated by an increasing desire for investors and operators to promote social good. It helps that the legislation is relatively uncontroversial. Electing to be subject to the benefit company statute merely results from the agreement of the business owners.

Structurally, in order for a corporation or an LLC to be governed by the benefit company statute, a statement to that effect must be included in the initial articles of organization or through an amendment to the articles of incorporation. A company may further specify a public benefit that the company wishes to pursue by identifying that specific benefit in the articles.

The Act requires the benefit company to appoint a board of governors, which in turn designates one member to act as a "benefit governor." The benefit governor then oversees the actions of the company in accomplishing public benefit and reports to the board of governors how the company performs. A board of governors is a new concept under Oregon law, but in practice operates like a committee of the board of directors. Presumably, smaller companies will have their existing board of directors act as the board of governors and appoint a benefit governor from among their members.

A unique feature of the legislation is that the law requires a benefit company to prepare an annual benefit report describing the extent to which the benefit company provided a general public benefit and the actions and methods that benefit company used to provide the general public benefit. The report also must describe how the benefit company's efforts measured against a third party standard (selected by the company) in meeting the public benefit. This report must be provided to each owner and be posted on the benefit company's website for review by the public.

Proponents of the Benefit Company Act believe such legislation is necessary because the current legal framework for for-profit entities promotes and supports the primary purpose of maximizing the return of profit to the owners. The Benefit Company Act establishes a legal basis for the entity to promote a non-owner's interest. Non-owner interests specifically identified in the act include:

- The employees and work force of the benefit company;
- The benefit company's customers;
- The communities that the benefit company's activities affect; and
- The local and global environment.

By creating a statutory framework for benefit companies, the Oregon legislature has created a basis for shareholders or members of a corporation or LLC, respectively, that have elected to be a benefit company to bring an action to insure that the company, its governors, officers, directors, members or managers pursue general public benefit or a specifically identified benefit for the benefit company. In addition, the Act provides liability protection to officers, directors and managers that are pursuing public benefit interests in the activities of the corporation or LLC rather than primarily seeking to increase the return of profit to the owners.

EXACTIONS AFTER *KOONTZ V. ST. JOHN'S RIVER WMD*

By Alan Sorem

Oregon land use laws have a substantial effect on all Oregon business and individuals. As members of the public, we benefit from living in a well-planned state and city. As taxpayers, we have an interest in seeing property developments pay their fair share of the costs of necessary public streets, utilities, and parks. However, as property owners applying for development entitlements, one quickly realizes that the concept of paying a "fair share" is subjective, and can be contentious.

One issue that arises with such developments relates to exactions. Exactions occur when you, your business, or your charitable or religious organization apply for a development permit and the local jurisdiction conditions the approval of the new building upon the payment of a fee, construction of a public improvement, or dedication of real property. Required public improvements often include the construction of traffic improvements such as street modifications or signalization, extending or enlarging existing utility lines, and can even include the construction of improvements that serve large portions of a community, such as the construction of public parks, water reservoirs and main sewer trunk lines.

The requirements of exactions were recently addressed in the United States Supreme Court. On June 25, 2013, the United States Supreme Court's decision in Koontz v. St. John's River Water Management District granted property owners new judicial protections from government takings or exactions. The Koontz decision held such exactions must have a "nexus" and be "roughly proportionate" to the effects of the proposed development. For example, if an owner is proposing to develop a property that is served by a busy road, the local jurisdiction might require additional land to be dedicated, for the developer to widen the road and for the developer to pay for all or a portion of a new traffic facility (traffic light).

However, issues arise if the land to be dedicated is not used for vehicular traffic improvements but for some other purpose. Similarly, if the new development is being forced to pay for all or substantial portion of the traffic improvements, the owner might be able to challenge whether the exactions are roughly proportionate to the impact of the new development. These are difficult questions to fully answer and usually require the continued efforts of government officials, engineers, and attorneys.

The *Koontz* decision ensures that all property owners are afforded an opportunity of judicial review of their exactions. However, the proper procedures must be followed in order to preserve these potential claims against wrongful government takings. Failure to raise timely the issue that a condition of approval may be an unlawful exaction or failing to raise the issue with enough specificity will bar a person from recovering his or her damages.

If you are concerned about any exactions imposed as a condition of your development project, please contact our Real Estate and Land Use department. We can help you evaluate the proposed conditions and whether the protections granted in the *Koontz* decision would apply to your development.

2013 Oregon Legislative Session Wrap Up – What's an Employer to Do?

By Jennifer Paul

The close of any legislative session is a great time to dust off your employment manual and review it for legal compliance. This is particularly true following the 2013 Oregon Legislative Session. This year's session adjourned on Monday, July 8, 2013. During the course of the session there were more than 70 employment-related bills introduced, and a number of those bills were signed into law. Below is a summary of significant employment legislation that passed, many of which require policy updates for your business:

Veterans Day Legislation

The Veterans Day bill was signed into law early in the session. The bill is already effective, meaning employers will need to comply with new requirements for this upcoming Veterans Day, November 11, 2013. The law applies to all employers regardless of size, and requires that employers provide Veterans Day off to eligible employees. Eligible employees are generally those who served in active duty with the Armed Forces for at least six months and received an honorable discharge. It is up to the employer to determine whether the time-off for Veterans Day is paid or unpaid. Employees are required to provide proof of eligibility and notice that they wish to receive Veterans Day off at least 21 days prior to Veterans Day. The employee's discharge papers should have the requisite information for the employer to determine proof of eligibility. The employer must let each employee know whether they will be granted the requested time off and whether or not the time off will be paid or unpaid within 14 days of Veterans Day.

The law includes an undue hardship exception, which allows employers to deny requested time off. It is always difficult to predict what will qualify as an "undue hardship," as such a determination depends on many factors. In any event, this will likely apply where the employer has a large percentage of veterans in its workforce and it would be an economic or operational disruption to provide Veterans Day off for all eligible employees. Even in the case of undue hardship, the law requires that employers select a subsequent day off to honor the employee's service in the Armed Forces before the next Veterans Day.

Veterans Day Manual Tip

The Veterans Day bill will impose additional administrative burdens for employers in determining which employees are eligible for time off, providing notice to employees about whether time off will be paid or not paid and providing notice to employees as to when the time off is scheduled to occur. Including a section in the "Holiday" portion of your employment manual, specifically addressing Veterans Day, is the first step to dealing with this new law and educating your workforce about the law. It also may be helpful to assess your workforce now to determine whether you have a significant amount of employees eligible to take Veterans Day off, and whether you may need to invoke the undue hardship protections under the law.

Mandatory Bereavement Leave/OFLA Legislation
A bill requiring mandatory bereavement leave now applies to those employers who are subject to the Oregon Family Leave Act ("OFLA") and those employees eligible to take OFLA leave. Eligible employers are generally those that have 25 or more employees on the payroll. An employee is eligible if he or she has worked 180 days prior to the requested leave and has worked 25 hours per week on average. Eligible employees are entitled to up to two weeks of OFLA leave per each qualifying family member's death, up to a maximum of 12 weeks off in any leave year. Leave can be taken to deal with the death of a family member; attend a funeral or funeral alternative; make arrangements necessitated by the death of a family member; or otherwise grieve the death of a family member. Time taken for bereavement leave, pursuant to this law, is unpaid and can be subtracted from the employees OFLA leave bank of unused leave. Leave must be completed within 60 days of when the employee receives notice of the family member's death. This law becomes effective on January 1, 2014.

Mandatory Bereavement Leave/OFLA Manual Tip
Employers subject to OFLA should review their current bereavement leave policy to make sure it is at least as favorable to employees as the new law. Employers should be mindful that a "family member," for purposes of the law, is defined by OFLA to be the employee's spouse, child, parent, one standing in the place of a parent or child, grandparents, grandchildren, parents-in-law, and same sex domestic partners. Whether or not your business has a bereavement leave policy, you should consider adding a paragraph to the "Family Leave Law" section of your manual addressing mandatory bereavement leave. For employers that are also subject to the Federal Family and Medical Leave Act ("FMLA"), it is important for employers to track bereavement leave separately from FMLA qualifying leave, since bereavement leave will not count against the employees 12 week FMLA allotment.

Direct Deposit
Legislation passed allowing employers to require payment by direct deposit in a financial institution, at its discretion. Previously, employers needed an employee's upfront consent for payment by direct deposit. The new law does, however, require that employers pay wages by check upon written or oral request of the employee. This new law will become effective on January 1, 2014.

Direct Deposit Manual Tip
Direct deposit can save time and money for an employer and its payroll department. Direct deposit also makes delivery of final paychecks more of a sure thing. Employers should decide whether they wish to require direct deposit of wages for its employees, and if so, update the employment manual and payroll practices to reflect this new requirement.

Leave For Victims of Stalking etc. Legislation
Since 2007, Oregon law has provided that eligible victims of domestic violence, sexual assault, harassment, or stalking are entitled to take either accrued paid leave or unpaid leave to deal with law enforcement or seek legal help, counseling, or safe housing. This law applies to employers with 6 or more employees on the payroll for 20 or more work-weeks in a year. The new legislation eliminates the former requirement that to be eligible, under the law, any employee needed to work an average of 25 hours per week for 180 days preceding the leave requested. The new legislation also requires that employers comply with certain posting requirements about leave benefits. Changes to the law take effect on January 1, 2014.

Leave for Victims of Stalking etc. Manual Tip
Generally, employers with 6 or more employees should have a policy addressing leave for victims of stalking, domestic violence, harassment and sexual assault. To the extent you already have such a policy, language related the employee's eligibility requirements should be deleted from the policy. Additionally, employers should take steps to acquire the new posters related to leave for victims of stalking, domestic violence, harassment and sexual assault, which will be available from BOLI.

Saalfeld Griggs can help you review your current employment manual to make sure it is compliant with the above-referenced legislation, in addition to all the new laws that passed in the 2013 Oregon Legislative Session. In light of new court cases and ever-changing employment laws, regular updates to your employment manual are essential.

DOMA Ruling Has Significant Impact on Employee Benefit Plans

By Randy Cook

On June 26, 2013, the U.S. Supreme Court declared Section 3 of the Defense of Marriage Act (DOMA) unconstitutional, thereby opening the door to the federal recognition of same-gender marriages. This ruling left employers with many questions regarding the treatment of employees with same-gender spouses for purposes of federal taxes and benefits.

In recently released regulations, the IRS answered many of those questions and established a uniform policy regarding the recognition of same-gender spouses for federal tax and benefit purposes. The regulations state that a couple's "state of celebration," rather than the state of residence, is the determining factor in whether an employee is married for federal purposes. According to the ruling, employers must treat an employee with a same-gender spouse as married if the marriage took place in a jurisdiction where same-gender marriage is currently legally recognized.

The IRS regulations regarding same-gender spouses are effective as of September 16, 2013. However, affected taxpayers may rely on the ruling retroactively for purposes of filing original returns, adjusted returns, or claiming a credit of an overpayment of tax concerning employment taxes or income taxes with respect to employer-provided health coverage benefits or fringe benefits. This retroactive application does not extend to matters relating to retirement plans. The IRS intends to issue further guidance on the retroactive application of the regulations to retirement plans and other employee benefit issues. The DOL may also provide additional guidance.

The impact of the DOMA ruling on employee benefit plans is very broad, and the Employee Benefits & Executive Compensation team at Saalfeld Griggs is closely following legal developments in this area. Employers may call our team with any questions or concerns that arise regarding same-gender spouse benefit issues.

3.8% Medicare Tax Update

By David Myers

In an article published earlier this year, we discussed the new 3.8% Medicare tax, or Net Investment Income Tax ("NIIT"), and recommended taxpayers evaluate the need to amend lease agreements and make the grouping election under IRC section 469. We have received a number of inquiries regarding this new tax and want to provide an update on this evolving area.

Although the IRS has yet to comment on the issue, the American Institute of Certified Public Accounts (AICPA) has submitted a letter to the IRS requesting additional guidance. The AICPA letter states in relevant part that: "the assumption should be that a rental activity properly grouped with a pass-through non-rental trade or business in which the owner materially participates is not subject to [the Net Investment Income Tax]." The letter goes on to directly request the IRS' position as to this conclusion. Due to the AICPA's confirmation of this interpretation of the statute, some businesses may still want to consider currently amending lease agreements to maximize any potential benefit. However, since this is such a new area of law and the AICPA's direct request for guidance increases the likelihood that the IRS will provide guidance, the most cautious approach would be to wait for additional guidance from the IRS. We will post additional updates as new information becomes available.

Firm Seminars and Announcements

Robert Saalfeld, ***Erich Paetsch***, and ***Shannon Martinez*** were recently selected for inclusion in Super Lawyers 2013, presented by Thomson Reuters. Bob was named to Super Lawyers for his work in Estate Planning & Probate. Both Erich and Shannon were included in the Rising Stars category for their work in Bankruptcy & Creditor Rights and Business Litigation, respectively. Super Lawyers is a rating service from more than 70 practice areas for attorneys who have attained a high degree of peer recognition and professional achievement. The list is published in Super Lawyers Magazine.

Five lawyers at Saalfeld Griggs PC were recently selected by their peers for inclusion in Best Lawyers in America© 2014. ***Bob Saalfeld*** was selected for his work in area of Estate Planning & Probate; ***Jim Griggs*** and ***Doug Alexander*** were selected for their work in Corporate Law; ***Randy Cook*** was selected for his work in Employee Benefits (ERISA); and ***Randy Sutton*** was selected for his work in Employment Law – Management. Because Best Lawyers is based on an exhaustive peer-review survey in which almost 50,000 leading attorneys cast nearly five million votes on the legal abilities of other lawyers in their practice areas, and because lawyers are not required or allowed to pay a fee to be listed, inclusion in Best Lawyers is considered a singular honor. *Corporate Counsel* magazine has called Best Lawyers "the most respected referral list of attorneys in practice."

Caleb Williams, ***Amy Geerhart***, and ***David Myers***, lawyers in the Business & Taxation Group will present to the Mid-Willamette Chapter of the Oregon Association of Tax Consultants on September 12 in Corvallis. The presentation will address stock and asset sales as well as sales tax issues affecting Oregon businesses.

Christine Moehl, an attorney in the Employee Benefits & Executive Compensation Group, will present a seminar entitled "Health Care Reform for Employers: Now What?" to the Rogue Valley affiliate of the Society for Human Resource Management on September 19 in Medford, and for Lorman Education Services on September 25 in Eugene. The topic will cover employer reporting and disclosure requirements, employer shared responsibility penalties, the individual mandate and Oregon's state insurance exchange.

The firm is hosting its ***4th Annual Celebrating Women in Business*** event on ***September 26th*** at 5:30 p.m. at the Roger Yost Gallery. We are pleased to announce that our keynote speaker will be Linda Navarro, President and CEO of the Oregon Bankers Association. Women, come enjoy an evening of mingling, appetizers, drinks and exclusive shopping at some of downtown Salem's best women-owned shops. Bring a colleague to share this fun-filled evening with us! The Roger Yost Gallery is located at 388 State Street, Salem.

Erich Paetsch and ***Shannon Martinez***, lawyers in the Creditors' Rights & Bankruptcy Practice Group, will present a seminar on "e-Discovery of Electronically Stored Information" to the Oregon Banking Association's Compliance Officers Committee on October 1.

We would like to welcome a new attorney to the firm. ***Brienne Carpenter*** has joined us as an associate attorney in the Employee Benefits & Executive Compensation Group. Brienne received a B.A. in Sociology and Anthropology from Lewis and Clark College. She received her J.D. from the Northwestern School of Law at Lewis and Clark College in 2013.