BUSINESS BRIEFS

Legal Developments Affecting Business

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SELF-AUDITING YOUR RETIREMENT PLAN: HOW TO FIX THOSE MISTAKES *BEFORE* UNCLE SAM FINDS THEM

By Randy Cook

Qualified retirement plans are wonderful business tools for attracting and retaining employees, maximizing tax savings, and planning for retirement. For many businesses, the company-sponsored retirement plan is one of the most valuable assets associated with the business. As such, the prospect of an audit by the IRS or the U.S. DOL can strike fear into the heart of any employer who sponsors such a plan.

When IRS or DOL auditors discover that a retirement program is operating out of compliance, the consequences can be severe. The employer may lose past deductions, face monetary sanctions, or even suffer the ultimate penalty – plan disqualification. Plan fiduciaries may be held personally liable for civil or criminal penalties if breaches of fiduciary duty are found. As a result, audits by the IRS and DOL are often unpleasant wakeup calls for employers who have placed retirement plan issues on the backburner. To make matters worse, the number of retirement plan audits initiated by the IRS and DOL in recent years has significantly increased.

While an employer cannot prevent an audit by the IRS or DOL, the employer can take steps to be better prepared for the eventual audit. This preparation can reduce the cost (and fear) associated with a plan audit. One way to prepare is to utilize the services of the professionals who assist you with your retirement program and perform a "self-audit" of your plan. A self-audit can identify potential plan operation failures and ensure continued compliance with applicable rules and regulations. In order to be effective, the self-audit should cover a variety of areas:

- Plan Documentation. Employers should verify that their plan document has been amended for the most recent tax law changes. The Summary Plan Description (SPD) should also be updated for plan changes and distributed to participants. IRS Form 5500s, summary annual reports, and financial statements should be retained for at least three years.
- Plan Operations. Employers should verify that the plan is being operated according to its terms and applicable regulations. They should also sample eligibility calculations, vesting calculations, distribution procedures, loan procedures, and plan contributions to test for compliance.
- Plan Compliance Testing. Employers should ensure all applicable annual testing is being performed with respect to the plan. Employers should consult with their ERISA attorneys if they are unsure what tests are required or who is performing such tests.

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- Annual Reports/Forms. Employers should verify that the annual IRS Form 5500 is being filed and applicable 1099R forms are completed.

By reviewing these items with the assistance of ERISA counsel, an employer can identify potential issues and develop methods to increase efficiency and maintain compliance. If issues are identified, the employer should explore opportunities to correct those issues through the IRS and DOL voluntary correction programs.

The IRS correction program is known as the Employee Plans Compliance Resolution System (EPCRS). Once a failure is identified, an employer can use one of the compliance programs under EPCRS to correct that failure. For some failures, the Self-Correction Program (SCP) may be utilized to correct the violations pursuant to correction methods and principles set forth by the IRS. The ERISA attorney working with the employer can assist in determining the appropriate course of correction. As part of the SCP, an employer is expected to establish procedures for ongoing compliance. The SCP does not require the employer to seek IRS approval of the correction. While the SCP is not a guarantee against the issue being raised in an audit, documentation of self-correction of plan failures may significantly reduce or even eliminate sanctions for noncompliance.

For more serious failures, the Voluntary Correction Program (VCP) under EPCRS may be utilized to seek correction with IRS approval. The VCP requires that a submission be made to the IRS, along with payment of a "compliance fee." Again, ERISA counsel can prepare the requisite submission materials. Approval of the correction by the IRS ensures employers that sanctions will not be applied for the compliance failure in a subsequent audit. Both SCP and VCP require that specific procedures be followed and that the correction be clearly documented. Voluntary correction of plan qualification defects is almost always less costly than correction (and payment of sanctions) as part of an IRS or DOL audit.

If a serious plan failure is discovered during an IRS audit, the plan sponsor will likely find itself in the IRS Closing Agreement Program ("CAP"). Under CAP, a penalty is negotiated between the IRS and the plan sponsor. The maximum amount of the penalty is the amount that the IRS could recover if the plan was disqualified, all assets were distributed, and all prior deductions disallowed. During CAP the IRS will look at mitigating factors such as the plan sponsor's ignorance of the failures and its good faith attempts to operate the plan properly. Although plan disqualification is not the norm, severe monetary sanctions are often imposed.

Given the serious consequences of violating retirement plan rules, most employers establish a retirement plan committee to monitor plan issues. Retirement plan committees are often comprised of individuals in ownership, management, or human resource positions. In addition to monitoring plan administration issues, these committees also typically review the performance of plan investments in order to insure compliance with fiduciary duties imposed by ERISA. Most retirement plan committees meet quarterly and include their professional advisors to the plan, such as ERISA attorneys, investment advisors, and third-party administrators.

Although IRS and DOL audits cannot be entirely avoided, the cost, work, and worry associated with IRS and DOL scrutiny can be diminished by the techniques described above. The key is to establish procedures to ensure compliance on a prospective basis. Continued review is critical to ensuring those procedures remain effective. When issues do arise, employers should address the issues immediately and take advantage of the voluntary compliance programs. Professional assistance from retirement plan advisors is available for all of these techniques.

Common Misconceptions about Litigation in Oregon

By Shannon Raye Martinez

If you have been involved in business as an owner, entrepreneur or employee, you may have heard stories from others about their experiences with lawyers and how they conduct their business based on what lawyers told them. Or, you have gotten advice from a lawyer on one case, and thought what is true in one case should apply to everything. Unfortunately, that is not the case. Oregon has some unique rules that greatly affect how lawsuits are handled. This article provides examples of some common misconceptions and unique rules in Oregon that greatly affect how a business litigation case is handled.

Misconception #1: Arbitration is always better than going to trial.

Arbitration is usually preferred over a trial for three main reasons. First, usually arbitration is quicker, less formal, and therefore less costly. Second, arbitration allows you to have a person decide your case who has a lot of experience in that particular area of law. Third, you can avoid a jury trial.

In reality, however, you need to consider the circumstances and facts relating to the contract to decide whether you should have an arbitration provision, and what the arbitration provision should say. The language used in the arbitration clause will dictate how the arbitration is conducted, and greatly affect whether the arbitration process will provide a more beneficial and cheaper result than trial.

Arbitration is not always quicker, cheaper and less formal. The price of arbitration will depend on the arbitration service used and the type of case. For example, the American Arbitration Association charges a fee to file the arbitration which fluctuates depending on the amount of the claim. If the amount at issue in the case is $100,000, the filing fee is $1,850. If you were to file the same claim in state court, the filing fee would be $531. Also, in some cases, the amount of attorney fees spent to prepare for arbitration is the same as those to prepare for trial.

In state court, judges are usually assigned to cases at random. It is common that the judge may not have background or experience in the law that applies to your case. If you use an arbitration service, there may be arbitrators available that have an expertise in a specific area. However, this type of expertise usually comes with a higher fee, and is not always necessary. A specialized arbitrator is usually only necessary in complex cases or certain specialized industries. In addition, if the other side disagrees with you on the appointment of the arbitrator, it is likely that you will instead have a panel of three arbitrators – one chosen by you, one chosen by the other side, and a neutral arbitrator chosen at random. It is important to consider these issues and clearly set forth what procedure you would like in your contract.

Lastly, it is true that you avoid a jury trial if you have an arbitration provision, and jury trials are certainly more expensive than arbitration or a trial decided by a judge. However, you can reach the same result by having a provision in your agreement waiving each party's right to a trial by jury. So, this should not dictate whether you have an arbitration clause. Whether arbitration is preferred over trial will likely depend on the type of contract, the issues involved, and the amount of potential liability.

Misconception #2: If I sue to collect a debt owed to my business, the other side pays my attorney fees right?

Not always. In Oregon, to recover attorney fees for any claim for breach of a contract or collection of a debt, you must have a right to the attorney fees. This right may come from a specific Oregon law, or an attorney fee provision in a contract. There is no law in Oregon allowing you to recover your attorney fees for common business debt or a breach of a contract. In order to recover your attorney fees, you must have a provision in a written agreement with the opposing party that allows you to recover your fees from the opposing party. Also, attorney fees in Oregon are reciprocal, meaning if there is a right to recover fees, the prevailing party will get their attorney fees paid by the losing party. So, if there is the ability to recover attorney fees for the winning party, this often greatly affects how the case is litigated, and whether you can reach a settlement.

MISCONCEPTION #3: If I get sued, I won't need to produce confidential business documents to the other side.

There is no general rule protecting all internal corporate documents or business records that may be considered confidential, such as minutes of shareholder meetings or information relating to your customers. In order for the opposing party to obtain documents from you, the documents must be relevant. If they are relevant, the judge will then look to whether they are confidential and proprietary. The judge has discretion in this regard, and will weigh how important the documents are to the case, and the risk imposed to your business if they are disclosed. Even if the documents are considered confidential or proprietary to your business, it is likely that the judge will require that the documents be produced, but they must be protected from disclosure by the other side. The opposing party who receives the documents is typically required to keep them confidential and only disclose them to those designated by the court, which is often the party to the case, his or her attorneys and their experts. In addition, depending on the confidential nature of the documents, the opposing party may be required to file the documents "under seal" if they are filed with the court, meaning that the documents will not be part of the public record, and the judge may be the only party besides the attorneys that are allowed to see the documents.

MISCONCEPTION #4: If I get a judgment against someone, I have won the lawsuit and the lawsuit is over.

Yes, usually you are right to think that you have "won" the case if you have a judgment. However, the victory may be short lived. If you have a judgment, this means that the trial court found in your favor or the other party did not appear and you received your judgment "by default" and without litigating the case. However, in Oregon, the losing party may appeal that judgment within thirty days of the judgment. If appealed, and the opposing party wins on appeal, the judgment may be set aside or voided, or the appellate court may decide to send the case back down to the trial court to start over and conduct a new trial.

Unfortunately, too often people become familiar with the rules explained above after a bad experience in a lawsuit. As a business owner, it is important to consider these issues when you are preparing your contracts and creating internal policies to better position yourself if you are sued, or it is necessary for you to file a lawsuit.

SELECTING A STRONG TRADEMARK: WHEN BEING FANCIFUL AND ARBITRARY IS GOOD FOR BUSINESS

By Amy Geerhart

Pat owns and operates a successful bakery with a popular retail store. Her Bakery sells an array of baked goodies, including cookies, cupcakes, scones, etc. The Bakery's most popular item is a bite-sized cake that is attached to a popsicle stick. She coined the new product "Cake on a Stick". Especially during the holidays, the Bakery sells baskets full of these cakes at their retail store and online throughout the country. Pat spent years promoting her product and considerable resources promoting the name and developing the Bakery's online presence.

With her newfound national success, Pat decided to file a trademark application with the US Trademark Office to register her mark "Cake on a Stick". Unfortunately, her trademark application was rejected and she did not get the benefits of trademark registration, which would include a legal presumption of her ownership of the name and her exclusive right to use the name nationwide on the baked goods. The Trademark Office refused registration on the basis that the name, Cake on a Stick, was merely descriptive of the product, and therefore not registrable. Pat could have avoided this situation if she first evaluated the strength of the mark before thoroughly investing in and promoting it. The stronger a trademark, the easier it is to register the mark with the Trademark Office and to protect it from infringing users. A mark's strength is based on its distinctiveness in relation to the goods or services it is used with. Distinctiveness is categorized along a continuum, ranging from weak marks that are generic for the goods and services to strong or highly distinctive marks that seem to have no connection to the goods and services. Each category is described below.

MERELY DESCRIPTIVE MARKS

The Trademark Office will not register a merely descriptive mark on the principal register, which provides full trademark protection. A merely descriptive mark describes an ingredient, quality, characteristic, function, feature, purpose, or use of the specified goods or services. A mark is also merely descriptive if it immediately conveys knowledge of a quality, feature, function, or characteristic of an applicant's goods or services. For example, the mark "Cake on a Stick" merely describes the characteristics of the product. Cake on a Stick immediately conveys what the product is to a consumer.

Additionally, the foreign equivalent (direct translation) of a merely descriptive English word is still merely descriptive and thus cannot be registered. For example, the Trademark Office concluded that AYUMI, a Japanese word which roughly translated means "walking", was merely descriptive of footwear and could not be registered. The Trademark Office also concluded that SAPORITO, which is an Italian word meaning "tasty", was also merely descriptive of the applicant's food product.

Although it may be tempting to use a mark that easily identifies your goods or services, you may spend a lot of time and resources investing in a weak mark that can't be protected. Instead, try to identify a mark that requires your potential customers to use some imagination. Not only will the mark be easier to protect as a trademark, it will stand out more to your customers.

SUGGESTIVE MARKS

Suggestive marks are moderately strong marks that can be registered with the Trademark Office. Suggestive marks require imagination, thought, or perception to reach a conclusion about the goods or services. For example, the Trademark Office found that SPEEDI BAKE for frozen dough was suggestive because it only vaguely suggested a preferred characteristic that it would bake quickly. Pat would have fared better with a more imaginative mark, one that offered a hint as to the product, but did not directly describe its characteristics. Perhaps, Pat could have tried a name that played on the portable nature of the product or suggested its shape or describe how it is prepared.

The line between a descriptive mark and a suggestive mark is sometimes hard to distinguish. While suggestive marks are stronger than descriptive marks, in the end they may not be adequate because there are likely to be similarly named products that cause confusion to consumers. If Pat wanted the strongest mark possible for her product, then she should find a trademark that has little to no connection to the characteristics of the product, but instead is fanciful or arbitrary.

Fanciful or Arbitrary Marks

Fanciful marks are made of terms that were invented for the sole purpose of functioning as a trademark. Fanciful marks are either words that are made up or are or are completely out of common usage. Pepsi, Kodak and Exxon are all examples of fanciful marks.

Arbitrary marks include common words that do not suggest or describe an ingredient, quality, or characteristic of the goods or services. For example, APPLE is an arbitrary mark for computers because, while it is a common word, it has no evident connection to computers.

Fanciful and arbitrary marks are the strongest types of marks because they stand out the most to consumers. They are also generally easier to register with the Trademark Office. While using a fanciful or arbitrary mark may require some more investment in the short term, and take time to create in a consumer's mind the connection between the mark and the owner's goods or services, these trademarks create a much stronger impression to consumers and may cost less to protect in the long run.

Before you pour time and money into trademarks that identify your products or services, consider the strength of the mark and how easy it may be to register with the Trademark Office.

Draft Federal Legislation May Accelerate Payment of Tax for Some Businesses

By David Myers

The House Ways and Means Committee is currently considering a proposal that would significantly reduce the number of businesses eligible to use the cash method of accounting. Under current law, certain pass-through entities (i.e. partnerships and S corporations), farmers, and personal service corporations are permitted to use the cash basis method of accounting, regardless of their gross receipts, unless they have inventory. The proposal eliminates the availability of the cash-method for these businesses if they have average annual gross receipts over a three year period in excess of $10 million. This proposal would force many business owners to pay tax before they have the cash to pay it, and it would add additional complexity and compliance costs. The proposal is currently open for comment in the House Ways and Means Committee, on which Committee Oregon Representative Earl Blumenauer is a member.

The IRS announced on October 31, 2013 cost-of-living adjustments applicable to dollar limitations for retirement plans for 2014.

IRAs	
IRA Contribution Limit	$5,500
IRA Catch-Up Contributions	$1,000
SEPs	
SEP Minimum Compensation	$550
SEP Maximum Contribution	$52,000
SEP Maximum Compensation	$260,000
SIMPLE Plans	
SIMPLE Maximum Contributions	$12,000
SIMPLE Catch-up Contributions	$2,500
401(k), 403(b), Profit-Sharing Plans, etc.	
Annual Compensation	$260,000
Elective Deferrals	$17,500
Catch-up Contributions	$5,500
Defined Contribution Limits	$52,000
Other	
HCE Threshold	$115,000
457 Elective Deferrals	$17,500
Taxable Wage Base	$117,000

FIRM SEMINARS AND ANNOUNCEMENTS

Saalfeld Griggs has been named a **"Tier 1 Law Firm" for Employee Benefits (ERISA)** Law by *U.S. News – Best Lawyers*® 2014 "Best Law Firms". ***Randy Cook*** is the practice group leader for the firm's Employee Benefits & Executive Compensation group. Firms included in the 2014 "Best Law Firms" list are recognized for professional excellence with persistently impressive ratings from clients and peers. Achieving a tiered ranking signals a unique combination of quality law practice and breadth of legal expertise. To be eligible for a ranking, a firm must have a lawyer listed in The Best Lawyers in America©, which recognizes the top 4 percent of practicing attorneys in the US.

We would like to welcome two new associates to the firm:

Trevor Findley recently joined the Litigation Group focusing on Creditors' Rights & Bankruptcy. He graduated cum laude from Willamette University College of Law, with a Certificate in Business Law and Certificate in International Law. Trevor was a clerk at the Marion County District Attorney's office, and was active as Note & Comment Editor of Willamette Law Review, and a competitor on the Jessup International Law Moot Court. Trevor enjoys lacrosse, world affairs, hiking, skiing, and officiating youth football.

Kelley Washburn is a welcome addition to the Estate Planning & Administration Group. She graduated cum laude from Willamette University College of Law, with a Certificate in Business Law. During law school, Kelley was a clerk for the Oregon Department of Justice in the Financial Fraud and Consumer Protection, Note & Comment Editor of Willamette Law Review, and associate editor for the Sports Law Journal. In her "off" time, Kelley enjoys hiking, fishing, hunting, and rafting, as well as playing, coaching and watching all sports.

David Myers will be speaking at the Portland Tax Forum on December 5 at the Multnomah Athletic Club in Portland. He will be speaking on "Evaluating S Elections in Light of Rate Differentials".

Congratulations to our attorneys for their selection to leadership positions in these organizations:

- ***Erich Paetsch*** been appointed to the Oregon State Bar (OSB) Debtor-Creditor Sections' Legislative Affairs Committee for 2014.
- ***Alan Sorem*** is the Chair of the OSB's Land Use Legislative Committee and member of the Executive Committee, and is on the Advisory Board for Mid-Valley Women's Crisis Service.
- ***Jennifer Paul*** has been appointed to the Marion County Circuit Court Dispute Resolution Committee, Defense Bar, and also to Blanchet Catholic School's Policy Committee.

The firm is proud to support many not-for-profit organizations in the mid-Willamette Valley and their activities during the year. We hope to see you at these upcoming events:

- **Courthouse Connection Toy Drive** – Our staff is joining with the Marion County Bar Association and Mary Leonard Law Society to collect toys for "Santa Central." Donated, unwrapped gifts will be delivered to foster children at the annual Courthouse Connections Holiday Social on December 5.
- **Gala of Trees** – Each year the fabulously decorated trees amaze us. Join in the wonder while supporting the Boys & Girls Aid Society on December 7.
- **Salem Pops Orchestra**, including our very own employment law attorney and flutist, ***Jennifer Paul***, presents a holiday concert entitled "A White Christmas" with two performances on December 7.
- **SAIF Agri-Business Banquet** – In 2014, the firm will help sponsor this Chamber of Commerce event on January 24, which cultivates relationships between people who work in agriculture.