BUSINESS BRIEFS

Legal Developments Affecting Business

FALL 2014

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Retirement Plan Committees: *Helping Fiduciaries Sleep Well at Night*

By Christine Moehl

Managing a company's retirement plan is a challenging job, too often delegated to one or two employees within the company who may have neither the time nor the skills for the task. These employees are considered "plan fiduciaries" under the Employee Retirement Income Security Act ("ERISA").

The four duties of a plan fiduciary are: (1) to operate the plan in the best interests of the plan participants and their beneficiaries; (2) to act with the care, skill, prudence and diligence that a knowledgeable person familiar with such matters would use in overseeing the plan; (3) to operate the plan in strict adherence with the plan documents; and, (4) to manage the investment options available under the plan and/or offer the participants a diverse range of proper investment options to choose from. More specific duties spring from these four general duties. To name a few, plan fiduciaries must monitor and oversee the plan's service providers; must make certain that the fees charged to plan participants for investment and administrative services are reasonable; must make sure that the plan documents remain in compliance with changing tax laws; and must respond to participant claims in strict adherence to the plan's claims procedure as mandated under ERISA. All of these duties combine to make the fiduciary standard of care under ERISA one of the highest fiduciary standards in American law.

Because of the high fiduciary standards under ERISA and the potential for personal liability and civil penalties when those standards are not met, more employers are establishing formal retirement plan committees. Establishing a retirement plan committee does not, in itself, relieve a business owner of all liability under ERISA. However, if the committee is well run, it does ensure that the decisions affecting plan administration and plan investments are made in a regulated environment, lessening the risk of a mistake. The following are five important questions that an employer should address when establishing a retirement plan committee:

1. What is the function of the committee?

Designated fiduciaries must oversee the administration and investments of the plan. When a committee is the designated fiduciary, most employers empower the committee to oversee both plan administration and plan investments. However, some employers opt to create two sub-committees: a plan administration committee that monitors how the plan is operated, and a plan investment committee that monitors the plan's investments. Each committee's scope of authority should be outlined in a committee charter. A charter will commonly empower the committee to select and monitor the plan's service providers, select and monitor plan investment options, monitor plan fees, and amend the plan document for required tax law changes.

2. Who should serve on the committee?

The size of the committee often reflects the size of the plan – smaller plans generally have smaller committees and larger plans have larger committees. Most commonly, the members of the committee are employees from the company's human resource, finance, and

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management departments. All committee members are fiduciaries to the plan, so it is important that they are familiar with plan administration and investment issues. Committee members should also be informed of their fiduciary status and, under ERISA, must acknowledge that status in writing by accepting appointment to the committee. In selecting the members of the committee, it is important to avoid conflicts of interest. For example, anyone who is paid a fee from the plan (e.g., an investment advisor or consultant) or who is related to an individual who is paid a fee from the plan should not serve on the committee. The charter should recite the members of the committee, either by name or by title.

3. How often should the committee meet?

Although ERISA does not specifically state how often designated fiduciaries must meet to perform their duties, most retirement plan committees meet quarterly. This is because the U.S. financial industry runs on a quarterly basis and most service providers and financial consultants routinely produce quarterly investment reports. Because review of these investment reports is a core obligation of the committee, quarterly meetings are natural. However, some employers with smaller or less complex plans choose to hold formal committee meetings on a semi-annual or annual basis. Although these committees have formal meetings less frequently, it is important that committee members review the plan's quarterly investment report each quarter. In addition to regularly scheduled meetings, the Chair of the committee should have the authority to call interim meetings. Interim meetings are often necessary in the event of sudden market shifts or company transactions that affect the plan. The committee charter should set the frequency of committee meetings, define a committee quorum, and address meetings by email or teleconference.

4. How should the meetings be documented and structured?

Every committee meeting should be documented with minutes that are reviewed and approved by the committee. These minutes should not be word-for-word transcriptions of the meeting itself, but should instead summarize the topics discussed at the meeting and include the rationale for any decisions that were made. If the plan is audited by the Department of Labor ("DOL"), the DOL will ask for copies of the minutes to determine if the plan fiduciaries have met their fiduciary duties under ERISA. Remember that because committee members have a fiduciary obligation to act in the best interests of the plan participants; committee meeting minutes are not confidential information and can be obtained by plan participants.

Committee meetings typically begin with review and approval of the prior meeting minutes, followed by review of the plan's investment performance, including decisions on any changes to the investment lineup. Next, the committee will typically discuss plan administration issues, such as nondiscrimination testing results, required participant notices or disclosures, and disposition of pending participant claims. Most pension committees invite the plan's legal counsel to attend committee meetings and report on legal and regulatory compliance topics, provide fiduciary guidance, and train new committee members on their fiduciary duties. On at least an annual basis the Committee should undertake a thorough review of plan fees, plan design, and service provider performance.

5. How can the employer protect the committee members from personal liability?

The committee charter will typically include provisions stating that the employer will indemnify and hold harmless all committee members from any claims brought by participants as a result of the committee member's actions or inactions. Including these provisions in the charter encourages employees to agree to accept appointment to the committee. Many charters preclude indemnification when a committee member wilfully engages in misconduct while serving on the committee. In addition, some employers (especially large employers) will purchase fiduciary liability insurance covering both committee members and officers of the company.

If you want to create a retirement plan committee to serve as the designated fiduciary to your plan, or want assistance in drafting a committee charter, please contact our Employee Benefits Group.

Canary in a Coal Mine:
A Real Estate Attorney's Point of View
By Alan Sorem

During the 19th and early 20th centuries, miners would carry caged canaries with them into the mines. The canary's rapid breathing, small size, and high metabolism would cause the bird to suffer the effects of methane, carbon monoxide, and other harmful gasses before those gasses affected the miners. If a canary was noticeably affected, the miners would sound an alarm and attempt to evacuate the mine before it turned deadly.

If real estate attorneys had a mascot, it would be a canary in a coal mine. Friends, colleagues, and acquaintances ask me how the real estate business is doing. Some ask out of genuine interest in how my practice is going; most, however, are really asking, "Is it safe to go into the mine?" For the first time in many years, I think the answer – with a few qualifications – is yes, it's safe to go into the mine.

The seasonally adjusted unemployment numbers in the Salem Metro area have vastly improved. They fell last year from 8.9% to 7.2%, and they are currently holding steady at 7.0%. This is still substantially higher than the 2008 pre-recession seasonally adjusted unemployment rate of 5.2%. However, both the insured unemployed and those unemployed for 26 weeks or less have returned to pre-recession levels. Total unemployment is still higher than pre-recession levels because the number of long-term unemployed (those unemployed 27 weeks or more) remains elevated above 2007 levels. This measured return to employment stability has proven adequate for purposes of sustaining moderate real estate investment over the last two years.

The Willamette Valley Multiple Listing Service data for the average and median sale prices for residential properties provides similar evidence of moderate improvement. In 2007 (which represents the peak in real estate values), the average and median sales prices for a home in the Willamette Valley were $249,203 and $217,000, respectively. In 2011, the average and median sales prices had fallen to $193,821 and $169,000. Those prices have since risen to $220,178 and $194,900, which represents roughly an 89% return to peak values.

These two economic indicators are strong evidence that our local labor force has substantially returned to pre-recession levels and that the capital lost in the real estate market since 2007 has mostly returned. Although these are good signs that it is safe to go back into the mine again, they do not prove that the development business has gone back to what it was in 2007. At the height of the building boom in 2006-07, the City of Salem issued 679 single-family dwelling and duplex permits (SFD/DPLX), along with 309 permits for apartment units (MFX). In 2013-14, the City of Salem issued 302 SFD/DPLX and 239 MFX. These numbers show that while unemployment rates and property values have substantially returned to pre-recession numbers, new residential construction remains substantially lower than pre-recession levels. Moreover, the ratio of new, single-family dwelling units to multi-family units used to be approximately 2 to 1. Now the ratio is approximately 5 to 4.

Homeownership rates have steadily dropped since their peak in 2005. At that time, the national homeownership rate was 69.5% and the rate in Oregon was 70.1%. As of the second quarter in 2014, the national homeownership rate had dropped to 64.7% and the Oregon homeownership rate dropped to 60.8%. Meanwhile, vacancy rates in Oregon have dropped from 7.2% to 3.4% over the same period. The current trend is that communities throughout Oregon are becoming denser, and developers are responding to this market trend. Residential development is occurring again, but it is at a much lower level than pre-recession activity, and is now more evenly allocated between single-family developments and multifamily developments.

In the new commercial and industrial uses arena, construction activity remains severely constrained. At the pre-recession peak, the City of Salem approved permits for $143 million in new commercial and industrial buildings. The following year, that number was cut in half. In 2009-10, construction activity in Salem substantially increased again to $179 million, due in large part to state construction projects. However, by 2012-13, Salem new commercial and industrial activity reached its bottom of just $16 million. Last year, that number increased to $48 million. Development in Salem is on the rise, and the rise is no longer dependent on government spending. These are promising indicators, but they also show there is still substantial room for improvement in our local development economy.

My practice has seen the following phases in the real estate business cycle: the last throes of the real estate boom, the crash, massive influx of real property into creditor control, sale of real property assets to cash investors, and now, the acquisition of real estate for residential multifamily, residential single family, and retail uses. The only constant has been change. Right now, I am down in the mine, breathing easy and heading deeper. Stay tuned for what happens next.

"I Want to Make Things Simple for My Family"

By Freeman Green

"I want to make things simple for my family." This is one of the goals I hear most frequently when a person begins the estate planning process.

Implementing the correct legal documents is critical in achieving this goal, and the legal documents tend to receive the most attention. But the quest for "simple" shouldn't end there. Here is a list of five "simple" things you can do now to simplify the administration of your estate plan in the future.

Consolidate Stocks, Bonds, and Financial Accounts

Consolidating assets is one of the easiest steps. Each separate account, stock and bond you own is an asset that your future trustee/executor will have to wrangle with. While no single account, stock or bond is, in and of itself, difficult to deal with, having to track many different accounts, stocks and bonds is a task that can leave your future trustee/executor's head spinning.

Are any of these assets darkening your financial statement?

- An online brokerage account you dabbled with years ago, but now ignore.
- A checking account opened to obtain a car loan, long since paid off.
- A retirement account from the job you quit ten years ago.
- Any account you haven't used in the past several years.
- Shares of publically-traded stock or savings bonds owned in certificate form and outside of an electronic or brokerage account.

If any of these sound familiar, consider consolidation. While consolidation should never override the overall investment structure and objectives, closing unused accounts and rolling the funds into another existing account, consolidating separate bonds or shares of stock into a single brokerage account, or liquidating and depositing the proceeds into an existing account can certainly simplify administration. Your financial adviser can help you transfer certificate stock directly into a brokerage account without triggering capital gains. He or she can also help you consolidate retirement accounts so as to continue the advantageous tax treatment these accounts enjoy.

Seek Out and Claim "Lost" Property

Most states have an agency that holds lost and unclaimed property, and Oregon is no exception. Go to www.oregon.gov/dsl/up and search to see if any unclaimed property comes up under your name. Claim any unclaimed property you find. It generally takes 4 months or more to process a property claim. Claiming the property now will save your future trustee/executor time and hassle. Follow the same procedure for each state you have lived in. Most states have an online unclaimed property search tool that you can locate with a Google search.

Develop Trusted Relationships with Professionals

Consider hiring a CPA to prepare your annual income tax returns. Your CPA will develop a good sense of your tax and financial situation. Upon your death or incapacity, your CPA will be an invaluable resource to your trustee/executor, greatly reducing both the administrative burden and the chance that important nuances of your tax situation will be overlooked. Similarly, a good relationship with a trusted financial adviser will help ensure that your investments continue to be properly managed in the event of death or incapacity.

Communicate, Communicate, Communicate
Good communication will help prevent future misunderstandings that lead to complication, delay, and litigation. A great deal of estate fights originate from misunderstandings about a decedent's intent. Consider sharing the details of your estate plan with your family. Be sure to express your desires regarding end-of-life medical care. A family meeting in which you and your estate planning attorney explain your estate plan to your future beneficiaries will help ensure an accurate understanding of your wishes.

Give it Away
Lifetime gifting is one of the simplest estate tax savings strategies. Unlike the Federal government, Oregon does not have a gift tax. This means that, under current law, you can completely eliminate the Oregon estate tax by making lifetime gifts that lower the value of your estate to less than $1 million. Consider including provisions in your estate planning documents that allow a trustee or power of attorney agent to make gifts to future beneficiaries in the event of your incapacity.

Example: Jim is retired and has no debt. His pension comfortably covers his day-to-day expenses, but will end at his death. His total assets equal $1.2 million, and include $260,000 of cash. In 2014, he gives $14,000 to each of his three children, and $14,000 to each of his six grandchildren (totaling $126,000). In 2015, he makes the same gifts to the same people, resulting in a total transfer of $252,000 and reducing his total estate to $948,000. Jim dies shortly thereafter. Jim's estate will owe no estate tax and his trustee/executor will not be required to file an estate tax return. If Jim's estate had remained at $1.2 million, his estate would have owed $20,000 in estate tax to the state of Oregon.

Be sure to consult with your CPA and estate planning attorney prior to making large gifts. Gifts to an individual that exceed the annual exclusion (currently $14,000 per recipient) must be reported on a federal gift tax return, and will reduce your federal lifetime exclusion. In addition, gifts of appreciated assets with a low income tax basis could result in a higher overall tax if the asset were later sold by the recipient. Your CPA and attorney can help navigate these twists.

The items listed in this article are relatively easy for you to accomplish—and much more difficult for your future trustee/executor to accomplish. Taking steps to simplify your estate planning situation will save time, hassle, and expense for loved ones.

Harvesting Woes: *The DOL and "Hot Goods"*

By Jennifer Paul

Late summer means harvest time, but it also can mean unwanted visits from the U.S. Department of Labor ("DOL"). In 2012, the DOL found several Marion County farms in violation of wage and other labor violations. Rather than simply initiating legal action against the farms for penalties and back wages, the DOL unfairly turned the heat up on the accused farms by invoking the "hot goods" provision of the Fair Labor Standards Act.

A "hot goods" objection allows the government to prohibit the shipment, offer of shipment, or sale in interstate commerce, of any goods allegedly produced in violation of the minimum wage, overtime pay, or child labor laws. As a practical matter, the delay caused by a "hot goods" objection can put perishable crops at risk, deprive customers of product, and result in lost jobs for the farmer's workers who are waiting on shipment and sale in order to get back to work. Because the hot goods objection can hold things up for a very long time, an action of this nature places the farmer between a rock and a hard place. To save the crop, the farmer may feel compelled to sign a declaration of guilt and pay penalties and back wages, even though the farmer, if given time, could prove that wages are not actually owed.

When the DOL applied the "hot goods" doctrine to berry famers in Marion County, it took the industry by surprise. Up until then, these sorts of objections were typically limited to businesses shipping and selling non-perishable goods. Faced with the potential loss of millions of dollars of fresh perishable blueberries, the Marion County farmers entered a consent judgment with DOL in which they gave up their due process rights and agreed to pay significant back wages, damages, and penalties. Just this year, an Oregon U.S. District Court Magistrate vacated the consent judgments citing the duress caused by interference with the sale of highly perishable crops at peak harvest. This ruling was affirmed by a Federal Judge in April 2014. Rather than let the matter die, DOL is considering its appeal options.

So what can you do to protect yourselves? There are a few steps that farmers can take before a DOL inspection to help protect against the negative outcomes of a "hot goods" objection or other allegations of violations. The following are some of those steps.

In Advance of Inspection:

- The most important step to avoid a surprise problem is to audit your wage and hour and employment policies and practices in advance of any inspection. You want to be confident that your farm complies with the law and that you will be able to prove compliance.
- To deter surprise inspections, post "No Trespassing" signs at all entry points to your property, along open fields, and by public roads. Along with the "No Trespassing" signs, provide directions to the main office for visitor check-in or a phone number for management to be contacted prior to entry.
- Train field supervisors to look for trespassers in the fields. Instruct field supervisors and crew leaders not to give express permission to DOL investigators to inspect fields. Have crew leaders direct all DOL inquiries to designated management or owners.

At the Time of Inspection:

- Contact your legal counsel prior to any inspection and before providing information to the DOL investigator. Have your attorney directly communicate with investigators, and request a 24-hour delay in inspection to consult with counsel, if needed.
- If the DOL arrives unannounced, ask to see a warrant and if one is produced, make a copy. The DOL typically must have a warrant to conduct an inspection. There are some limited exceptions to this rule: when consent is granted, when there is an emergency posing an immediate threat to health or safety, or when the "open fields" doctrine applies (i.e., violations are obvious from visible inspection and no "No Trespass" signs have been erected).
- If a warrant is produced, review the warrant to determine its scope and make certain that the investigator does not exceed that scope.
- Count the number of workers in the field when and where the inspection occurs, count the number of vehicles parked in/around any of the fields, and take photos to document this.
- Do not offer records that are not expressly requested, and do not offer additional information beyond the questions asked by the investigator.

Your attorney can help you determine whether consent to an inspection can be used as leverage to further limit the scope of the inspection. It is important to act in a professional manner while at the same time firmly requiring that the DOL follow procedures. Ultimately, being confident in your policies and practices will help an inspection go as smoothly as possible. Please contact us if you would like assistance in reviewing your policies and practices to ensure that they are compliant with the law.

Health Care Reform Alert:
IRS Bans Pre-Tax Reimbursement of Individual Health Insurance Premiums

Due to skyrocketing cost of group health insurance, many employers have opted to drop group coverage altogether and instead reimburse their employees for all or part of their individual health insurance premiums on a pre-tax basis. Under these arrangements, the employee did not pick up the amount of the reimbursement as taxable income, but the employer did take a tax deduction equal to the reimbursement. Most commonly, employers accomplished this pre-tax reimbursement of individual health insurance premiums through a type of cafeteria plan known as a premium-only plan (POP), a health reimbursement account plan (HRA), or a medical expense reimbursement plan (MERP).

Unfortunately, effective January 1, 2014, pre-tax reimbursement of individual health insurance premiums is banned under Health Care Reform, regardless of whether the reimbursement is made under a POP, an HRA, a MERP, or any other arrangement. In order to put teeth into the ban, on May 13, 2014 the IRS issued FAQs stating that the pre-tax reimbursement arrangements described above would be subject to the Health Care Reform violation excise tax, which is equal to $100 per day per employee. For example, a dentist who reimburses four of her employees on a pre-tax basis for their individual health insurance premiums for all of 2014 would be subject to an excise tax equal to $146,000 for the year ($100 x 4 x 365 = $146,000).

Note that Health Care Reform does not prohibit an employer from increasing an employee's overall cash compensation to take into account the fact that the employer doesn't provide group coverage and the employee has to pay for individual health insurance coverage on their own. In addition, when an employer does offer group coverage, the employer can still deduct the portion of group premiums that the employer pays, and can also allow employees to pay the balance of the premiums on a pre-tax basis. Please contact our Employee Benefits group if you have any questions regarding reimbursing employees for health insurance premiums.

Firm Announcements & Seminars

The firm is hosting its **5th Annual Celebrating Women in Business** event on September 24. Our attorneys are pleased to announce that the keynote speaker will be Monique Hayward, Director of Outbound Marketing, Intel Corporation; President & CEO, Nouveau Connoisseurs Corporation; author of two books, and speaker. We are looking forward to an evening of networking and shopping at a handful of downtown Salem's women-owned shops.

Christine Moehl has been invited to speak at the Oregon State Bar **Health Law Section Annual CLE** on October 25 regarding "Health Care Reform Impacts on Large Employers and Individuals." She will also be speaking on the same topic at the Willamette Valley Estate Planning Council on September 9 and at the Mid-Valley Tax Forum on September 16. This presentation will give an overview of the impact of health care reform on large employers and individuals, including reporting requirements for large employers, employer shared responsibility penalties, and the individual mandate.

Super Lawyers has recognized three of our attorneys for their high degree of peer recognition and professional achievement – **Robert Saalfeld**, **Shannon Raye Martinez** and **Jennifer Paul**.

Robert Saalfeld, Partner, has received the Super Lawyers designation for the ninth consecutive year in the area of Estate Planning. Bob is a fellow of the American College of Trust and Estate Counsel (ACTEC), member of Wealth Counsel, LLC, and member of the Willamette Valley Estate Planning Council. He is also recognized as an AV Preeminent Peer Review Rated attorney, and selected by peers for Best Lawyers in Estate Planning & Probate area of practice.

Litigation attorneys Shannon Raye Martinez, Partner, and Jennifer Paul, Associate, were recognized as Super Lawyers Rising Stars. Martinez is recognized for the fifth year for her work in Bankruptcy & Creditor/Debtor Rights and Business Litigation. Paul is selected for the first time for her work in Employment Law and Litigation.

The firm is proud to support many organizations in the mid-Willamette Valley and their activities.

Salem Chamber of Commerce **McLaran Classic** – Join us on September 22 at Illahe Hills Country Club. Golfers of all skill levels are welcome in this double shotgun tournament. For information, please contact the Chamber of Commerce or visit www.salemchamber.com.