BUSINESS BRIEFS

Legal Developments Affecting Business

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SPRING 2013

My Lease May Keep Me from Selling My Business?

By Doug Alexander & Mark Shipman

Interestingly, many business owners don't consider the importance of their lease or leases of business property when it comes to an eventual sale of the business. We see leases take many forms. They run the gamut from a simple handshake to confirm a verbal agreement to an extensive 50-page contract. At the time that any lease is entered, the business owner has to consider the length of the commitment. Most owners want to balance several key issues, including the following:

1. What is the length of the financial commitment?
2. How long do I want to be tied to this location?
3. If my business grows, is there room for it to grow here, or will I need to move to expand?

These are only a few of the important questions that need to be asked, but they may be particularly relevant to a later sale. Typically, at the beginning of the lease, the issue at the forefront of the business owner's mind is "How long will I be stuck paying rent?" For that reason, emphasis may be focused on entering into a short term lease. One key thing to remember is that the lease is a contract, a commitment of the tenant to pay the landlord for the right to use the space for a specific duration of time. Absent a default by the landlord, the tenant may not just abandon the lease without significant adverse financial consequences. Thus, an owner might think that the best bet is to get a month to month lease so that there is maximum flexibility in being able to leave on only 30 days' notice. However, the problem with this approach is that the Landlord may also choose to end the lease on the same short notice, so the business is not protected. This is not something that the next owner of the business will want, and your sale may fall apart if a more suitable lease cannot be negotiated.

Another consideration is whether this location is just a temporary stopping point along the lifespan of the business, or a long term place to stay and build. Likewise, if you plan on staying put, you have to consider the impact that growth of the business will have on that location. Will there be room to grow? Can you grow your business without a need to expand the space that you rent? Should you rent more than you need now to secure the ability to grow without having to move? All of these things must be considered carefully at the inception of the lease in order to adequately plan and negotiate workable terms. Furthermore, you need to consider what your successor will want down the road when he or she takes over. Your decisions may either add value to your business, or in the worst case make it unsellable.

As a result of these important questions, we often see business owners make several possible mistakes. Sometimes, these mistakes make little difference, but frequently they can and do result in unanticipated problems that prove costly. Consider the following:

The "Standard Form Lease." How often does a landlord present a lease with the words, "This is just our standard form", clearly implying that review is unnecessary and that changes are neither welcome nor possible. If you as the tenant succumb to this ploy and choose to forego review, at a later date you may find that several problems exist. For instance, the lease may not be assignable, and thus if you sell the business, you have no right to transfer the lease to the new owner. This puts the landlord in a position of strength at the time of your sale and may force you to make costly concessions to either the buyer or the landlord in order to get the deal done.

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The "Long Term Lease." Frequently we work on deals where the tenant is taking out a loan to purchase the business. The lender frequently wants some assurance that the new owner will be able to remain at the same location during the term of the loan so as to avoid the high cost of moving. This may push the tenant toward signing a long term lease, but the fact is that the lender may be equally satisfied with a shorter lease with several renewal options. Taking this approach can give the tenant more freedom and flexibility, while satisfying the needs of the lender at the same time. If you anticipate a sale, you want to be sure that your renewal options extend for a period long enough to satisfy potential purchasers.

The "One Party Lease." Landlords want to know who they are dealing with and have some assurance that they will have a say in who their tenants will be. For this reason, they often include provisions which restrict assignment and subleasing. However, this needs to be negotiated. Assignment may even be defined to mean a change of ownership of the entity that is the tenant. Thus, in a sale of the company, even if it is a sale of stock in a corporation or an LLC interest, with such a provision included, the Landlord may create an impediment to the sale. If the sale is of assets rather than the company itself, then you will want the right to assign the lease to the purchaser. Be careful to negotiate reasonable provisions which will permit an assignment of the lease or a sublease so as to enable a future sale. Recently, we have seen cases pop up where tenants have not adequately thought through the question of what the lease should say when they had the chance. In one case, the tenant had a lease with two years left, and an option to extend for only two years more. When he decided to sell, the landlord would not agree to extend the lease because the landlord had expansion plans and needed the space. The tenant quickly found that the business was not marketable because no bank would finance the buyer unless the buyer could demonstrate a right to continue to occupy the space for the 10 year lease term. Ultimately, although we represented the landlord, we were able to suggest an alternative that resulted in a compromise which met the needs of the landlord as well as the bank which permitted the deal to close. Nevertheless, the tenant could have found himself up the proverbial creek without a paddle and forced to relocate the business at a very considerable cost before selling.

Of course this list is not exhaustive and there are many other questions that should be considered when leasing property. This includes negotiating for an option to purchase, rent escalation, payment of maintenance expenses, hazardous materials indemnification, restrictions on similar businesses locating in the same office complex, personal guarantees, etc. There is a reason that leases are often lengthy documents, they govern the relationship of the parties for a lengthy period of time, and they are worthy of careful review and consideration before signing on the dotted line. We can't tell you how many times clients come ask us how they will get out of a lease that they blindly signed because it was just a "standard form" and thought that it would be easy to walk away later.

The lesson here is that when you consider entering into a lease, you need to be aware that it will have implications that extend far beyond the day you move in. It may serve you well, or it may prove to be an impediment to growth and even the sale of your business. In each case, the best choice is to meet with your financial and legal advisors and carefully consider all the consequences of the lease agreement before you jump in and commit. If you would like assistance in reviewing and analyzing these issues, please contact an attorney in our Business and Taxation or Real Estate and Land Use Group at 503-399-1070.

Out With the New and in With the Newer:
An Estate Planner's Take on the 2012 American Taxpayer Relief Act
By Jeff Moore

Like most of you, I too, put all of my New Year's celebrations on hold until I finally heard that Congress passed the 2012 American Taxpayer Relief Act ("ATRA") on January 1, 2013, and saved the nation from the "fiscal cliff." While many would argue that ATRA (we'll call it the "2012 Tax Act") fell well short of solving all our fiscal problems, there was at least a sigh of relief from this estate planner's perspective.

First, we now have some certainty in the estate and gift tax laws. The 2012 Tax Act is a new and permanent law that replaces the "new" 2010 Tax Act. Granted, nothing is permanent when Congress is in session, but at least at this point there are no looming repeals, no sun-setting provisions, no "clawback", and no more guessing games. Since 2001, there has been a great deal of uncertainty as to the estate and gift tax exemptions. Recall that the "2001 Tax Act" raised the estate tax exemption from $600,000 to $675,000 with a phasing increase to $3.5 million, and then ultimately a complete repeal of the estate tax in the year 2010. The gift tax was to remain in existence. But because the repeal itself was deemed to create a deficit in 2011, the law required that the repeal itself had to be repealed effective 2011.

The law was a limbo game for nearly a decade. During that time, nobody really believed that the estate tax would actually be repealed . . . well, at least not until it actually was in 2010, albeit for only one year. So Congress then passed the "new" but temporary "2010 Tax Act", which fixed the exemption for 2011 at $5 million, $5.12 million for 2012 (with the top estate tax rates at 35%), but then BACK to $1 million come 2013 if Congress did nothing else. In addition, the top estate tax rate would raise from 35% to 55%. The limbo guessing game as to what the law would be and when was in full swing.

The passage of the 2012 Tax Act, with its permanent provisions, put an end to the guessing game. It permanently replaces the "new" 2010 Tax Act. Here's a look at some of the key elements of the "newer" law:

Federal Estate Tax Exemption Amount. The new estate tax exemption amount is $5.25 million. In addition, this amount is indexed for inflation so it will presumably rise over future years. This $5.25 million is a significant increase from the potential setback of the potential $1 million exemption amount that would have taken effect without the passage of the new 2012 Tax Act. An estate exceeding this $5.25 exemption amount is subject to the federal estate tax.

Federal Estate Tax Rate. The top estate tax rate on the amount in excess of the federal exemption amount is now 40%. As a practical matter, it is a flat 40%. This is a 5% increase over the 35% flat rate under the 2010 Tax Act, but it is better than the marginal 40% to 55% rate that we were heading towards without the passage of the 2012 Tax Act.

Federal Lifetime Gift Exemption. The federal lifetime gift exemption amount is the same amount as the federal estate tax exemption amount, or $5.25 million. In other words, any aggregate gifts during life that do not exceed the amount of $5.25 million will not trigger any payable gift taxes. Once the lifetime gift exemption is used, however, a gift tax (i.e., 40% of the gifted amount) would be due. In addition, the amount of the gift exemption used during life effectively reduces the donor's estate tax exemption amount available at the time of their death.

Annual Exclusion. The annual exclusion is the gift amount that each person can transfer to an unlimited number of individuals free of gift tax and without using any portion of their lifetime gift exemption. The annual exclusion was $13,000 last year, but it is set at $14,000 for 2013. The annual exclusion is also indexed for inflation—but only in $1,000 increments. Thus, the annual exclusion amount will presumably increase in future years but not until the inflation adjustment brings the annual exclusion to $15,000.

Federal Generation Skipping Transfer Tax. The generation skipping transfer ("GST") tax exemption amount is also set at $5.25 million. A generation skipping transfer is any transfer to a person that is deemed two or more generations below the transferor (i.e., a grandchild or great grandchild, etc.). Any such "generation skipping" transfer that exceeds the $5.25 million aggregate GST exemption amount is subject to a 40% tax in addition to the 40% gift or estate tax. We know you love those grandkids, but be careful of this potential double tax and plan appropriately.

Federal Portability. The 2012 Tax Act also made the unique "exemption portability" idea a permanent part of the estate planning tool chest. If a spouse dies without using all of their federal estate tax exemption, then the surviving spouse can apply the deceased spouse's unused federal exemption amount at their own death—and in addition to their own estate exemption amount. This is called "portability". However, the surviving spouse must make an affirmative election to claim this portability of the decedent spouse's unused exemption. The election is made by simply filing a federal estate tax return on behalf of the decedent spouse—even if no such return would have been required for such spouse (i.e., the decedent spouse's estate was under the $5.25 million filing threshold). But there are several reasons why married couples should still do tax planning wills or living trusts to lock in the use of each spouse's exclusion at the first death. One reason is that portability does not apply for Oregon death tax purposes. This means that if the estate plan doesn't have a bypass type trust to use the decedent spouse's $1 million Oregon estate tax exemption, the surviving spouse can only use their own $1 million Oregon exemption and the decedent spouse's Oregon exemption is lost. In addition, portability only applies for the "last-to-die spouse". For example, say a surviving spouse had a $3 million portability amount from his or her first deceased spouse. The survivor remarried and that spouse also subsequently passed away with only a $250,000 portability amount. The surviving spouse's portability amount changes from $3.5 million to $250,000. In summary, portability is a helpful bonus but not a tool to replace appropriate estate tax planning.

Oregon Estate Tax. The Oregon estate tax exemption is not affected by the 2012 Tax Act. The 2012 Tax Act is a federal law. Thus, the Oregon exemption remains at $1 million. The Oregon estate tax rate for assets exceeding $1 million is a marginal rate of 10% to 16%. Oregon does not have a gift tax or a generation skipping transfer tax, and it does not have portability. That said, it is important to note that making gifts is often a helpful strategy to reduce the Oregon estate tax because such gifts do not reduce the $1 million Oregon estate tax exemption. However, because assets receive an adjusted basis to the date-of-death value upon a decedent's death, some thoughtful analysis should be taken as to which assets to gift during life. It is more tax advantageous to gift cash or high-basis assets because the donor's cost basis of the gift carries over as the donee's basis and the donee may have capital gains tax on the resale of the gifted assets.

So, while the 2012 Tax Act may not be a fix to all our fiscal concerns, at least now we have some permanent laws that provide known parameters for appropriate estate tax planning.

Absenteeism: Troublesome Traps and Tips to Avoid Tribulation

By David Briggs

We regularly hear from employers who want to terminate employees because their employee is frequently late or absent. Employers often become frustrated with an employee's absences because the absences cause a hardship, not only on the company, but also to the employee's coworkers. Employers express concern that the absent employee seems less committed to the organization. Employers believe that this troublesome employee isn't the "right fit" and want to replace that employee with someone who "wants to work".

Replacing the employee would seem to be a simple and common sense solution. Unfortunately, in employment law, nothing is simple, and common sense rarely comes into play. Although a number of laws impact an employer's ability to terminate an employee with attendance problems, there are two laws that give employers the most to worry about.

Family Leave Laws. The Oregon Family Leave Act ("OFLA") applies to most companies that regularly employ at least 25 workers. If you regularly employ 50 or more workers, then the federal Family & Medical Leave Act ("FMLA") may also apply.

The family leave laws require that you give an employee 12 weeks of unpaid leave for a "serious health condition" of the employee or the employee's immediate family member. Under Oregon law, immediate family includes not only parents, spouse and children, but also parents-in-law, grandparents, grandchildren, step-parents, step-children, and domestic partners. The law can give even more time off for parental leave and certain pregnancy conditions. The law even goes so far as to make leave protected when your employee stays home with a child too sick to go to school or daycare.

An employer can violate the law by refusing to give an eligible employee time off, by penalizing the employee for taking family leave, failing to maintain benefits, or refusing to return the employee to work at the end of the leave.

A "serious health condition" need not be life threatening. For example, a person who is admitted as an inpatient in a hospital will be deemed to have a serious health condition. A pregnant woman who goes to the doctor for prenatal visits likewise has a serious health condition. Surprisingly, a "serious health condition" can even include the flu so long as the employee is incapacitated for more than three days, visits the doctor and is treated with prescription medication.

Employees don't need to specifically ask for "family leave." Employers are on the hook once the employee has provided enough information to recognize that the absence could be protected. If an absence is protected, you can get into trouble if you make a termination decision based on that absence.

Although most employers carefully track absences and tardiness, the reason why the employee missed work is often not documented. If you want to terminate an employee with a bad attendance record, it is critical that you are able to prove that none of the absences you are counting are protected by the family leave laws.

Disability Discrimination Laws. When managing absenteeism, don't forget about the Americans with Disabilities Act ("ADA") and its Oregon counterpart. Nearly every Oregon business is covered by one or both of these laws.

Although a permanent impairment such as blindness or being confined to a wheelchair will qualify as a "disability," the law is actually applied far more broadly. If an impairment makes life much more difficult for the employee, and the impairment lasts long enough, it will probably qualify as a disability. Disabilities can be mental or physical and can qualify even if the effects are felt at home and not so much at work. Examples of disabilities can include back injuries, migraines, learning impairments and chronic depression.

If a disability makes it more difficult for an employee to do his or her job, the employer may be required to provide a "reasonable accommodation." With regard to absenteeism, allowing time off, more frequent breaks, reduced hours or a different work schedule are all possible reasonable accommodations. It does not matter whether giving one employee and not others this "special treatment" is bad for morale.

When handling disability-related issues, courts require employers to engage in an "interactive process." To satisfy this requirement, talk with the employee to determine exactly what he or she needs as an accommodation. If the request is something the employer can easily provide, then make the accommodation and document that you did so. If the accommodation is expensive or difficult to provide, further dialog and investigation is needed to determine whether the employee has a "disability" and what accommodation(s) might reasonably allow the employee to perform his or her job.

Best Practices for Avoiding Disability & Family Leave Problems. If absenteeism is a serious problem in your company, there are several steps that can help you legally bring the problem under control:

Call-In Procedures: The procedure for calling-in absences should be consistent. The person taking the call should be trained about how to lawfully determine the reason why the employee is not coming into work. The reasons provided must be documented.

Absence Request Forms: You should know the reason for every absence and whether any absences are protected by law. Get a leave form for every absence. The form should provide family leave definitions and allow the employee to self-identify the nature of the absence.

Consider Requiring Medical Verification for Absences: Requiring a doctor's note or other verification may deter employees who do not have legitimate absences. Documentation can also help confirm whether an absence really is protected. Your documentation requirements must be uniformly applied. Be careful what you ask for, as the laws regulating confidentiality are strict.

Attendance Standards Clearly Stated & Consistently Enforced: Be specific about what is "excessive" tardiness or absenteeism. In doing so, make sure you only count those absences that are not otherwise protected. If the policy is selectively applied and ignored for high performing employees, you are setting yourself up for a discrimination claim.

Require HR Review of Every Termination Decision: It is always critical to have HR review a termination decision before it is finalized. Problematic family leave and disability issues should also have attorney review. Once an employee is terminated, your fate is often sealed as errors in the decision-making process are very difficult to correct.

If you would like assistance in analyzing absenteeism issues in your business, please contact an attorney in our Employment Law Group at 503-399-1070 or email David at dbriggs@sglaw.com.

To Play or Not to Play? That is the Question . . .

By Christine Moehl

Although Health Care Reform was originally effective in 2010, so far employers have experienced relatively minor changes to the rules applicable to their health care plans. The status quo will change drastically in 2014, when the "employer shared responsibility" provisions of Health Care Reform, a.k.a., "Play or Pay" penalties, take effect. These provisions impose penalties on large employers if they either: (1) fail to offer group health coverage to all of their full-time employees (i.e., the "no coverage" penalty), or (2) offer group health care coverage that either does not provide "minimum value" or is not "affordable" (i.e., the "not acceptable coverage" penalty).

Which Employers are Affected? The Play or Pay penalties only apply to "applicable large employers." An applicable large employer is an employer who employed an average of at least 50 "full time equivalent" employees (FTEs) during the preceding calendar year. This means that employers will be looking back to 2013 in order to determine whether they are "applicable large employers" in 2014. In determining whether an employer is an applicable large employer, all members of the employers "controlled group" (i.e., businesses under common ownership) are included in the calculation. IRS Notice 2011-36 outlines a multi-step method for calculating the number of FTEs for purposes of determining whether an employer is an applicable large employer. Those steps are as follows:

Step 1: Calculate the number of full-time employees (i.e., employees who worked on average over 30 hours per week) for each month in the preceding calendar year. Each full-time employee is equal to 1 FTE.

Step 2: Calculate the number of remaining FTEs for each month by dividing the hours of service during the month for each part-time employee by 120 hours.

Step 3: Add the number of FTEs calculated in Step 1 to the number calculated in Step 2. This is the number of FTEs for each month in the preceding calendar year.

Step 4: Average the monthly FTEs over the preceding calendar year. If the number is less than 50, the employer is not an applicable large employer for the current calendar year. If the number is greater than 50, the employer may be an applicable large employer.

Step 5: If an employer has over 50 FTEs, but that number includes seasonal employees, the employer may be able to disregard the seasonal employees if: (1) the workforce exceeded 50 FTEs for 120 or fewer days during the year, and (2) the employees in excess of 50 FTEs were seasonal workers. This makes it possible for many employers with seasonal workforces to escape classification as an applicable large employer for purposes of applying the penalties.

The "No Coverage" Penalty. An applicable large employer may pay a penalty if it fails to offer at least 95% of its full-time employees (and the dependents of those employees) the opportunity to enroll in a group health plan. A full-time employee for this purpose is defined as any employee who is employed an average of at least 30 hours per week. Hours of service includes each hour for which an employee is paid, including paid sick leave and paid vacation time. The determination of who is a full-time employee for purposes of this requirement is calculated on a month-by-month basis. Special rules apply to employees whose hours vary considerably from month to month.

In 2014, the monthly "no coverage" penalty is equal to the number of full-time employees employed by the employer during the month, minus 30 employees, times $167.77. This penalty amount will be adjusted for inflation after 2014.

The "Not Acceptable Coverage" Penalty. Even if an applicable large employer offers group health coverage, it may still face a penalty if the plan fails either the "minimum value" test or the "affordability" test. In order to meet the "minimum value" test, the plan must cover at least 60% of the costs of benefits. The IRS, along with the Department of Health and Human Services, is planning to develop a web-based minimum value calculator to make it easier for employers to determine if their plans satisfy this requirement. In order to pass the "affordability" test, the employee portion of the self-only premium for the lowest cost coverage that meets the minimum value test cannot exceed 9.5% of the employee's W-2 wages. For example, assume an employee makes minimum wage and works 170 hours per month (i.e., $1,657 per month). In order for a health plan to satisfy the "affordability" test with regard to this employee, the employee portion of the self-only premium cannot exceed $157 per month.

In 2014, the monthly "not acceptable coverage" penalty is equal to the lesser of (1) $250 times the number of full-time employees who receive a premium assistance credit (discussed below), or (2) the amount of the "no coverage" penalty.

What Triggers the Penalty? Neither the "no coverage" penalty nor the "not acceptable coverage" penalty is triggered until an employer's full-time employee receives a premium assistance tax credit. This tax credit is available to individuals and families and it is used to help purchase health insurance through the state health insurance exchange. In order to be eligible to receive a premium assistance tax credit, an employee's household income cannot exceed 400% of federal poverty level, and the employee cannot be eligible for group health care coverage that is both "affordable" and provides "minimum value." This includes coverage offered under a spouse's employer-sponsored plan. In addition, an employee who is eligible for Medicare or Medicaid is not eligible to receive a premium assistance tax credit.

Will Employers "Play or Pay"? From the early days of Health Care Reform, some commentators have argued that employers who do not already have qualifying health plans will simply elect to pay the penalties rather than offer coverage. However, the decision of whether to offer qualifying coverage or pay the penalty will be based on many competing considerations. One factor that employers will need to weigh is that the Play or Pay penalties are not tax-deductible to the employer, while the cost of providing employer-sponsored health coverage is tax-deductible. Another factor is whether the state exchanges will work as intended. If the exchanges prove difficult to navigate, employees will be less likely to apply for premium assistance tax credits. Finally, no one is certain how the reforms will affect the cost of providing group health insurance. If the cost to provide coverage increases drastically, most employers will find it cheaper to offer no coverage and pay the penalty. However, if the cost to provide coverage decreases significantly, many employers will find it more cost-effective to avoid the penalties and offer qualifying coverage.

Although employers may not be able to anticipate all of the factors that will go into their decision-making process in 2014, employers should start planning now by working with their advisors to construct a comprehensive "Play or Pay" analysis. If you would like assistance in developing an analysis that is tailored to the specific needs of your business, please contact a member of the Saalfeld Griggs' Employee Benefits & Executive Compensation group at 503-399-1070.

Saalfeld Griggs Website

The firm recently re-vamped and re-launched its website. Check us out at www.sglaw.com. There you will find more articles, seminars, announcements and in-depth information about the firm, its lawyers and its clients.

Firm Seminars and Announcements

Mark Shipman, **Alan Sorem**, and **Nate Boderman** will be presenting four sessions on COMMERCIAL LEASING: LANDLORD BOOT CAMP AND TENANT BOOT CAMP. The two sessions for the Landlord Boot Camp are **May 7** from 7:15 to 8:15 a.m. *or* **May 9** from 5:15 to 6:15 p.m. The two sessions for the Tenant Boot Camp are **May 14** from 7:15 to 8:15 a.m. *or* **May 16** from 5:15 to 6:15 p.m. If you would like to attend a session, please email jmarshall@sglaw.com.

Randy Cook has been invited to speak at the National Institute of Pension Administrators (NIPA) Annual Conference in Las Vegas, Nevada on **May 1, 2013**. The topic of his presentation will be "ADVANCED PLAN DESIGN TECHNIQUES FOR DEFINED CONTRIBUTION PLANS."

The Saalfeld Griggs **Employment Law Team** is tracking employment-related legislation and sending out monthly updates with status reports and analysis of possible impact. If you would like to be included on our email distribution list, please email **Randall Sutton** at rsutton@sglaw.com.

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