BUSINESS BRIEFS

Legal Developments Affecting Business

SPRING 2010

BUSINESS PLANNING FOR MEASURES 66 AND 67

By Tyler Friesen

With voter approval of Measures 66 and 67, Oregonians increased personal income taxes and instituted a permanent increase in the minimum income tax for C corporations.

Measure 66 increases the marginal tax rate on individual income over $125,000 but less than $250,000 from 9% to 10.8% until 2011, and also increases the marginal tax rate for individuals with income over $250,000 from 9% to 11% until 2011.

Measure 67 permanently increases the minimum income tax rate on C corporations from 6.6% to 7.9% for taxable income in excess of $250,000, and also increases the minimum corporate income tax based on the gross income of a C corporation as follows:

Gross Income	Minimum Tax
Less than $500,000	$150
$500,000 - $1 million	$500
$1 million - $2 million	$1,000
$2 million - $3 million	$1,500
$3 million - $5 million	$2,000
$5 million - $7 million	$4,000
$7 million - $10 million	$7,500
$10 million - $25 million	$15,000
$25 million - $50 million	$30,000
$50 million - $75 million	$50,000
$75 million - $100 million	$75,000
$100 million or more	$100,000

REDUCING THE TAX IMPACT

Both Measures 66 and 67 are retroactive to January 1, 2009. This means that your business and tax planning should begin now, rather than at the end of your tax year. The following is some planning information that you should consider in light of the passage of Measures 66 and 67:

FILING AN S ELECTION

Filing an election to be taxed as an S corporation reduces the Oregon minimum income tax to $150 per year. Calendar year taxpayers can file an S election prior to March 15, 2010 and receive S corporation status retroactive to January 1, 2010.

CAUTION: Filing an S election can result in an additional tax to the corporation on appreciated assets as the assets are sold and an additional tax on accounts receivable as the accounts are collected. A carefully planned S election can save substantial tax dollars, but coordination with your CPA and attorney is necessary. Some planning considerations include salary and bonus payments and accounts receivable management.

Continued on Page 2

In This Issue…

C Corporation Tax Structures

Some corporations prefer to use, or are required to use, a C corporation tax structure. For instance, S corporation shareholders generally are not permitted to participate in certain employer-sponsored health plans. However, a review of your current structure can limit your tax burden. Some options include:

- Consolidation of multiple C corporations or in some cases division of a single C corporation into separate corporations to reduce taxation; and
- Managing increased personal income tax rates through business planning with your C corporation.

Businesses should begin their business planning early this year, as an S election for calendar year businesses must occur before March 15th, and other business planning should be in place as soon as possible.

Please consult one of our business or tax attorneys to review your options.

New DOL Regulations Eliminate Deferral Deposit Uncertainty For 401(k) Plans

By Christine Moehl

In the face of vague regulations and harsh penalties, employers with 401(k) plans have struggled to comply with prior regulations issued by the *U.S. Department of Labor* ("***DOL***") regarding the timely deposit of employee deferrals. Employee deferrals are the amounts that employees elect to have withheld from their wages and contributed to the plan on their behalf. Until recently, DOL regulations stated that such deferrals were to be deposited into the plan no later than: (a) the earliest date on which such contributions "could reasonably be segregated from the employers' general assets" (i.e., the "***Reasonable Segregation Rule***"); or (b) 15 business days following the end of the month in which the amounts deferred would have been paid to the employees in cash (i.e., the "***15-Day Rule***").

Unfortunately, although the 15-Day Rule gives employers a clear, absolute deadline, the DOL has not provided further guidance on what the Reasonable Segregation Rule means in operation. Does it mean as soon as payroll taxes are transmitted? Does it mean within a few days of issuing payroll? Does it mean when the employer funds its employer matching contribution? To make matters worse, whenever the DOL appeared at national conferences, it emphasized that the 15-Day Rule was actually just a "drop dead date" that should be relied on only in unusual circumstances (such as when an employer changes payroll systems). According to DOL, the vast majority of employers are to be held to the earlier deadline imposed under the Reasonable Segregation Rule.

The ambiguity of the Reasonable Segregation Rule caused significant trepidation among employers because of the high cost of noncompliance. When employee deferrals are not deposited into a 401(k) plan as soon as required under the DOL regulation noted above, the employer is considered to have broken two rules. First, it has breached its fiduciary duty to the plan's participants by robbing them of the investment earnings that they might have realized had the deferrals not been transmitted late. Second, it has engaged in a prohibited transaction because the employer is considered to have used plan assets (i.e., the deferrals sitting in its general fund) for its own benefit. In an audit setting, this translates into employer liability for lost earnings on participants' accounts, DOL penalties, and IRS excise taxes.

Seven-Day Safe Harbor for Small Plans

In its recently-finalized regulations, the DOL provided long-awaited guidance for employers with "small" 401(k) plans. The DOL defined small plans as those with fewer than 100 participants as of the first day of the plan year. The new regulations provide that employers who sponsor such plans will be considered to have complied with the Reasonable Segregation Rule discussed above as long as the deferrals are deposited into the plan no later than the seventh business day following the date that the amounts deferred would have been paid to the employees in cash (i.e., the "**7-Day Rule**"). Importantly, this new rule protects the employer even if it would have been reasonable for the employer to have deposited the deferrals earlier than seven business days following payday.

The Reasonable Segregation Rule Remains in Force

Employers with small plans should strive to take advantage of the 7-Day Rule in order to remove any doubt as to whether their payroll practices comply with fiduciary standards or run afoul of the prohibited transaction rules. However, inevitably some employers will take longer than seven days to deposit employee deferrals into their plans. Such employers remain subject to the old Reasonable Segregation Rule, as discussed above. Upon audit, these employers must be able to prove to the DOL that the date of actual deposit was the earliest date that the employer could have segregated the employee deferrals from their general assets. Furthermore, employers with large plans (those with 100 or more participants on the first day of the plan year) also remain subject to the Reasonable Segregation Rule.

Participant Loan Repayments

Many 401(k) plans allow employees to take loans from their accounts. The employer then withholds payments on the loan from the employee's paycheck and transmits this amount to the plan. The final regulations provide that participant loan repayments qualify for the new 7-Day Rule, as if those loan repayments were employee deferrals. Interestingly, this relief also applies to large plans.

Deposits to SIMPLE IRAs

Like 401(k) plans, employers who sponsor SIMPLE IRA plans are also required to deposit employee deferrals into the employees' IRAs in accordance with the Reasonable Segregation Rule. However, unlike 401(k) plans, the "drop dead date" applicable to SIMPLE plans is the 30th calendar day following the month in which the employee would have received the amount in cash. Regardless of this distinction, the new 7-Day Rule extends its protection to the deposit of deferrals under SIMPLE IRAs.

If you have any questions about how these new regulations may affect the operation of your retirement plan, please contact a member of our Employee Benefits Group.

Obtaining a "Favorable Determination Letter" for Your Retirement Plan

By Steve Hitchcock

We've described to you in prior issues of *Business Briefs* the process of amending qualified retirement plans as a result of the *Economic Growth & Tax Relief Reconciliation Act* ("***EGTRRA***"). Except in unusual cases, employers are generally required to incorporate all legislative changes into their retirement plan document once every six years. With regard to the legislative changes brought about by EGTRRA, this amendment process, which is known as the "EGTRRA restatement," must be completed by April 30, 2010. As your plan is being restated for EGTRRA, you may also want to consider whether you should be obtaining a favorable determination letter from the IRS.

A favorable determination letter ("***FDL***") is a letter issued by the IRS indicating that, in the opinion of the IRS, the terms of a retirement plan document conform to all of the requirements of the Internal Revenue Code. The effect of receiving an FDL from the IRS is that the IRS cannot later challenge the document's wording during an audit of the plan. Without an FDL, the IRS can, under some circumstances, challenge plan terms that it feels do not comply with the law. If the challenge is successful, then the IRS can impose significant penalties and/or disqualify the plan on a retroactive basis.

Not all employers who sponsor retirement plans need to obtain an FDL that is specific to their plan. Rather, some employers are allowed to rely on the favorable determination letter that the IRS issues to the person or organization that prepares the plan. When your plan document is prepared by an attorney, for example, the document usually takes the form of a "volume submitter" plan. A volume submitter plan is an individually-designed plan that is based upon a specimen document drafted by the attorney. The specimen document itself may have hundreds of options or variations drafted within it. After designing the specimen document, the attorney submits that document, along with all of its options and variations, to the IRS for pre-approval. If the IRS approves the specimen document and all of the options and variations contained within it, then the IRS will issue a favorable "advisory letter" to the attorney. Generally, the effect of the advisory letter is to guarantee that any employer who adopts some version of the attorney's specimen plan can rely on the advisory letter as if it were an FDL issued to the employer itself. This guarantee only applies if the employer's version of the plan is a word-for-word adoption of specific provisions, options and variations contained within the attorney's specimen plan.

There are some situations where an employer who sponsors a volume submitter plan may want to obtain its own FDL, rather than rely solely on the attorney's advisory letter. First, as noted above, an employer can rely on an advisory letter only if the employer's version of the plan is a word-for-word adoption of the specimen plan. In some cases, the employer may have asked the attorney to include plan features that deviate from the exact wording of the specimen document. Although these deviations don't necessarily mean that the document is not qualified under IRS rules, it does mean that the employer can no longer rely on the advisory letter issued to the attorney, which in turn means that the plan document itself may be challenged during an audit of the plan.

Obtaining an FDL may also be advisable if either the employer who sponsors the plan or the participants who accrue benefits under the plan are concerned about creditors reaching the plan's assets. As a general rule, assets held within a qualified plan cannot be reached by creditors of either the employer sponsoring the plan or the plan participants. Under federal bankruptcy law, a plan's assets are automatically exempt from the bankruptcy estate if the plan has obtained its own FDL.

As indicated above, the deadline for completing EGTRRA restatements is April 30, 2010. This is also the deadline for submitting plans to the IRS for issuance of an FDL. Please contact our office if you would like more information about FDLs, or if you would like assistance in preparing an FDL application.

Legal Alert

Federal Estate Tax

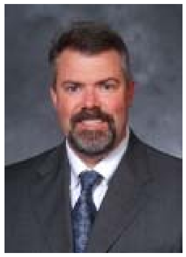
By Jeff Moore

If you are confused about the federal estate tax, you are not alone. Trying to figure out the federal estate tax is like playing a bad Monopoly game. If a person died in 2009, they landed on a square that said: Pay federal estate tax on everything above $3.5 million. But if a person dies in 2010, they will land on a square that says: Get out of jail free — *no* federal estate tax for you! (Remember: Oregon still applies an estate tax on estates exceeding $1 million.) Finally, if a person dies in 2011, they will land on a square that says: Pay federal estate tax on everything above $1 million.

But, before you book that skydiving trip for 2010, please take note that a member of the U.S. House of Representatives recently stated that Congress will act to fix this game retroactive to January 1, 2010. Nobody knows for certain, but you probably shouldn't count on that "Get out of jail free" card. In fact, President Obama's latest budget proposal, with some significant exceptions, proposed permanently setting the federal estate tax exemption at $3.5 million.

So what should you do now? The Estate Planning Practice Group recently mailed a letter to its clients outlining the current state of the federal estate tax and how it might affect your estate plan. You can find a copy of that letter on our website at **www.sglaw.com**. Please contact our Estate Planning Practice Group if you have any questions.

COMMENTARY



BALLOT MEASURE 24-292: A FLAWED PROPOSAL

By Mark Shipman

In May of 2010, Marion County voters will either approve or deny Ballot Measure 24-292 ("***Measure 24-292***"). The petitioners of Measure 24-292 seek to substantially change the governance structure of Marion County from a "general law" system to a "home rule charter" system. Over the last 140 years, Marion County has worked and grown effectively under its current general law system. In fact, the majority of counties in Oregon (27 out of 36) are general law counties.

Recently, there has been a small push for the county to adopt a home rule charter. In certain situations, home rule charters can be crafted to account for specific and unique features of a particular jurisdiction. However, the proposed home rule charter in Measure 24-292 is poorly crafted and flawed. If the measure is approved by voters it will hurt businesses in Marion County. It is important for Marion County citizens and business owners to understand how the county currently operates and how the system will be changed if Measure 24-292 is approved.

SO, WHAT SHOULD YOU KNOW ABOUT MEASURE 24-292?

1. **INCREASES GOVERNMENT SPENDING**

   Measure 24-292 petitioners claim that the measure is cost neutral. However, the proposed charter would increase the *Marion County Board of Commissioners* (the "***Board***") from three members to five. This will result in additional salaries, benefits, equipment, office space, and overhead. Two more senior policy advisors will also be added, along with their salaries and benefits. These changes alone will constitute an initial and ongoing increase of more than $400,000 to Marion County's annual budget.

   In addition to these costs, there are other costs both known and hidden associated with Measure 24-292. For example, charters can only be adopted, amended, or repealed through an election process. If the election is not held during a general election, any change to the charter will require a special election that will cost the county an additional $100,000 to $250,000. Additionally, if Measure 24-292 passes, Marion County will need to hold a special election immediately thereafter to elect two new commissioners at a cost of $100,000 to $250,000.

   Another cost relates to the elimination of the office of Marion County Treasurer. The charter proposes that this position will be incorporated into the finance department. On its face, this change may seem cost neutral. However, in order to hire the same level of professional manager at the finance department, the current level of the treasurer's salary and benefits will need to be increased significantly.

2. **WEAKENS PUBLIC REPRESENTATION AND PUBLIC ACCOUNTABILITY**

   Presently, Board members are elected "at large," which means they serve all of the residents of Marion County. Under the proposed charter each Board member would be elected by one of five districts. Under this approach, Marion County residents will have reduced access to their local elected officials because they will only have access to the commissioner in their own district, not to the entire Board.

   Under the current Board structure, the three members hold public meetings whenever they conduct county business. This is the most transparent form of government in Oregon. However, under the proposed charter, the Board could avoid the state's "Sunshine Laws" by holding private conversations between two, and two, and two commissioners, without the requirement of a public hearing. Key decisions could be made in a secretive manner without the public's knowledge and even without the involvement of all of the county commissioners.

Currently there are several checks and balances between the County Treasurer's office and the finance department with respect to county finances. If the finance department absorbs the duties of the treasurer, the checks and balances provided by the treasurer's office will be lost. The proposed charter also gives the county clerk increased duties and powers. The clerk would be empowered to appoint the compensation board for the county, set elections, and immediately redistrict the seats for the entire Board after each year's census.

3. Increases Bureaucracy and Special Interests

Increasing the number of commissioners will slow the county's operations and increase red tape. Commissioners will be less likely to vote for what is best for the county as a whole because they will be elected to individual districts within the county. Although the intent of the charter is to make the Board more non-partisan, the practical result will be that the districts will be pitted against each other for funds, projects, and the like.

More importantly, Measure 24-292 is being promoted by a small special interest group, The Friends of Marion County. This group is primarily concerned with controlling and prohibiting new growth in the county by stopping the expansion of urban growth boundaries.

4. Violates Constitution and Will Create Litigation

Numerous provisions of the proposed charter violate the Oregon Constitution. For example, the charter proposes that justices of the peace are to be appointed by the Board. However, the Oregon Revised Statutes and the Oregon Constitution require that justices of the peace be elected. The charter also prohibits county employees from running for public office which is in violation of the Oregon Constitution.

Additionally, there are multiple ambiguities in the proposed charter that will lead to unnecessary litigation. The charter is unclear as to whether the five members will share or split the salaries of the three current members, or whether the new members will receive additional salaries. The election dates for the new commissioners are also unclear and may occur as early as September 2010 or as late as January 2011. Furthermore, the requirements for the county assessor position in the proposed charter differ from the current statutory requirements. In addition to these ambiguities, the proposed charter is poorly written causing legitimate concern as to whether the petitioners realized when they drafted the proposal the effect that certain provisions in the charter will have.

So, Why Should You Care About Measure 24-292?

If Measure 24-292 passes, you will not see new growth in Marion County for some time. Urban growth boundaries will not be expanded which will create a false scarcity of developable land in our cities and harm our competitive advantage in recruiting new businesses to the mid-Willamette Valley. In addition, it will be more difficult for existing businesses to grow and flourish. While you may not work directly with Marion County or with the Board, the passage of Measure 24-292 will significantly affect all of Marion County's residents, and the businesses that they depend on, well into the future.

Measure 24-292 is a flawed proposal. Marion County's current general law system allows it to make necessary changes to its structure and function, without wholesale changes to its governance system. If there is a problem with the structure or function of the county's system, the county administrator and Board will act in the best interests of the county as a whole to fix the problem. This will not happen if Board members are elected to contrived districts and subject to the influence of a few special interest groups. Please vote NO on Measure 24-292.

Mark Shipman serves as the leader of the Real Estate and Land Use Practice Group at Saalfeld Griggs PC. He is also an active member of the Bigger Government? No Way! Campaign Committee.

FIRM SEMINARS AND ANNOUNCEMENTS

Jim Griggs received the Marion County Bar Association's Professionalism Award at the annual awards dinner held on January 21st. Each year, the Professionalism Award is presented to an attorney or judge who exemplifies and promotes professionalism in the legal community. This award honors professionals who, by outstanding example and through teaching and mentoring, promote the Oregon State Bar's definition of professionalism. The Bar's definition of professionalism reads as follows: "Professionalism includes integrity, courtesy, honesty, and willing compliance with the highest ethical standards. Professionalism goes beyond observing the legal profession's ethical rules; professionalism sensitively and fairly serves the best interests of clients and the public. Professionalism fosters respect and trust among lawyers and between lawyers and the public, promotes the efficient resolution of disputes, simplifies transactions, and makes the practice of law more enjoyable and satisfying." Congratulations, Jim!

Doug Alexander was recently appointed to serve on the Advisory Board of LEGUS. Saalfeld Griggs is the only Oregon member of LEGUS, a worldwide association of prestigious medium-sized, independent law firms. Our lawyers have found the ability to collaborate with LEGUS colleagues in other jurisdictions is a significant benefit to our clients whose business interests take them beyond the borders of Oregon.

This year ***Caleb Williams*** is serving as President of the Board of the Willamette Chapter of the American Red Cross. We thank our local community for their continued support of this valuable organization. In December, the chapter responded to fifteen separate emergencies, mainly house fires, and spent 37% of their annual disaster budget in that month alone. The chapter recently held its seventh annual Red and White Dinner Auction and netted over $19,000 in funds for local relief. Saalfeld Griggs was honored to be a sponsor of this fund raising event and is proud of the work the Willamette Chapter has accomplished in our community.

Hunter Emerick and ***Shannon Raye Martinez*** presented on construction liens at the Home Builders Association of Marion & Polk Counties Lunch and Learn held on February 24, 2010. They spoke about construction liens in general, as well as how to protect one's self with a construction lien. If you would like more information about construction liens, or would like to be included on our mailing list for construction law updates, please give Natasha Bachelu in our office a call.

At this time we do not have any seminars scheduled. Please continue to check our website for new announcements and upcoming seminars.