

LEGAL NOTES

INFORMATION FOR OUR BUSINESS AND CORPORATE CLIENTS

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YOUR REAL ESTATE: BUYING, SELLING, LEASING, FINANCING

Real estate is often the most valuable and important asset we deal with in our lifetime. Whether it is our home, our place of business, or an investment property, it is probably a crucial part of our personal, business or financial condition. You may not realize it, but the usual transactions involving our real estate – buying, selling, leasing and financing – are often the most complicated and significant legal situations we ever experience.



While these transactions usually involve your most valuable asset, they also involve very complex and significant legal issues, such as the following:

- **Agreements of Sale** – liens and encumbrances, title insurance, easements, deed restrictions, due diligence, property inspections, environmental hazards, mortgage contingency clause, risk of loss, insurance, “as-is” clause, warranties, zoning, deposit escrow, tax assessment, taxability of gain or profit, default clause, building code violations, certificate of occupancy.
- **Leasing** – lien waiver, repair obligations, subordination, termination and renewal terms, default clause, purchase option, right of first refusal, lease-purchase transaction, use clause, pass-through expenses, rent terms, common area maintenance, insurance requirements.
- **Mortgage Financing** – interest rate calculation and adjustments, length of term, amortization, maintenance obligations, insurance obligations, due on sale clause, recourse or non-recourse loan, lender consents, guaranties, escrow account, appraisal, refinancing, interest deductibility.

Whether you are the buyer or seller, landlord or tenant, lender or borrower, or just an

owner, you will surely encounter some of these legal issues.

You should never enter into any legal transaction concerning real estate without first obtaining proper legal advice. Even a simple “letter of intent” or “offer to purchase” can sometimes be interpreted to constitute a legally binding contract under certain circumstances. Such a document does not always even have to be signed by all the parties. An oral agreement can also sometimes be legally binding, although difficult to prove. A written contract should not be signed until all its terms and provisions are thoroughly understood.

Some of the most important terms of an agreement of sale, lease or mortgage relate to the default provisions. Make sure you know what your liability exposure or legal remedy is in the event you or the other party fails or refuses to perform the required responsibilities under the contract. You should always understand your rights and obligations in a real estate transaction. To do otherwise might jeopardize your ability to enter into an agreement which protects one of your most valuable assets.

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EMPLOYEE HANDBOOKS PROTECT EVERYONE

A properly drafted handbook can be a useful tool to inform employees of company policies, benefits and procedures. For this reason, many employers create employee handbooks for distribution to newly hired employees. Unintended consequences can result if proper care is not given to the handbook's contents. Experienced employment law counsel can advise you on what the handbook should contain and what language is most likely to convey the desired information.

EMPLOYEE-AT-WILL: SPELL IT OUT

First and foremost, any employee handbook should prominently state that the employee handbook does not alter or modify the underlying "employee-at-will" relationship between the employer and the employee. In the absence of an employment contract, most states treat the employer-employee relationship as one of "at-will" employment. This means that the employer, or for that matter the employee, can terminate the employment at any time, without notice or for any reason, provided the reason is not otherwise legally prohibited.

If you want to make sure that your handbook does not inadvertently change the "at-will" nature of the employment, the handbook should con-

tain a clear, prominently and conspicuously displayed disclaimer.

What can happen if your handbook does not contain such a disclaimer? You may find that courts will treat your handbook's contents as a contract between you and your employee. You may be surprised to find out that your handbook makes it difficult to fire someone. For example, if the handbook sets forth a progressive disciplinary procedure which appears to provide that the employee is entitled to warnings, or which sets forth specific grounds for termination of employment, a court may hold that the relationship is no longer "at-will." This may give the employee the right to sue for wrongful termination of employment, a right the employee would probably not otherwise have if the relationship were deemed "at-will."

Similarly, in a recent Pennsylvania case, an appellate court found that an employee was entitled to full-time wages, health insurance and other benefits as set forth in the employee handbook, even though the employee was only hired to work part time. The handbook contained language that permitted any employee scheduled to work at least 36 hours per week for 90 consecutive days "to be treated as a full time

employee." The court focused on the words "treated as" and found that the individual was entitled to benefits of full-time employment that the employer never intended to provide. A careful review of your handbook by employment law counsel can help you avoid a similar outcome.

FOLLOW YOUR OWN POLICIES

The handbook can create other problems as well if careful consideration is not given to the choice of its contents. For example, many employers choose to use handbooks to set forth company policies relating to leave, vacation days and sick days. It may sound obvious, but a handbook should only contain those company policies that you are prepared to follow. If these policies are properly drafted and, most importantly, properly enforced, the handbook can help avoid unfounded claims for overtime, extra vacation pay, carry-over of vacation days, and similar disputes.

On the other hand, if the handbook contains policies that are not uniformly enforced, an employer can face charges of discrimination. Employees frequently claim in discrimination lawsuits that they were treated differently because of their age, race, or otherwise. Plaintiff's

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GIFT GIVING IS STILL A GOOD IDEA

Despite changes based on the recent Tax Reform Act, gift giving as an estate planning tool is still a good idea. Substantial tax benefits are still available to individuals to reduce their estates for estate and inheritance tax purposes, with proper planning.

Taxpayer reluctance to make gifts is fueled by two factors. The first factor is that the federal estate tax has been repealed effective January 1, 2010, although it will be reinstated on January 1, 2011, subject to new tax acts being passed in the interim. Accordingly, taxpayers may be hesitant to make gifts in order to protect against an estate tax that may not exist. The second factor is the slump and down-turn in the stock market over the last two years. Many taxpayers are fearful that they will not have sufficient savings for a comfortable retirement or for other needs.

It is the uncertainty of this period that argues in favor of gift giving. If assets have depreciated, but will hopefully

regain their previous values, the opportunity exists to shift appreciation to the next generation. If the estate tax is not repealed, the failure to make gifts may mean that an opportunity for substantial future estate tax savings has been lost. Gift giving using grantor retained annuity trusts, family limited partnerships and other vehicles in which a taxpayer can leverage the amount of the gift is still an especially valuable estate tax saving technique. Further, the use of 529 Plans, Coverdell Accounts and other college savings vehicles to fund the increasing cost of a college education for a child or grandchild are other significant gift-giving opportunities.

The concern of taxpayers to not make

gifts in an uncertain economic climate is understandable. However, a properly structured gift can achieve estate tax reduction, allow the taxpayer to avoid paying gift taxes and retain economic security.



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ANNUAL RETIREMENT PLAN CHECKUP

At the beginning of a new year, we thought it worthwhile to share with you a list of retirement plan tasks that should be accomplished as soon as possible. This checklist will help you identify some issues that could lead to problems if not addressed early in 2002.

✓ **Salary Reduction Election.** Participants in 401(k) plans can defer \$11,000 in 2002. Plans may be amended to permit participants who have attained age 50 to make “catch-up contributions” Employers should review participant’s contribution levels to insure that no one is contributing too much to the plan.

✓ **Beneficiary Designation.** Beneficiary designations should be reviewed for completeness to avoid confusion about the proper beneficiary. A notary seal or plan representative’s witness must attest to all required spousal consent signatures. Participants whose marital status changed during the year should be reminded to review existing designations.

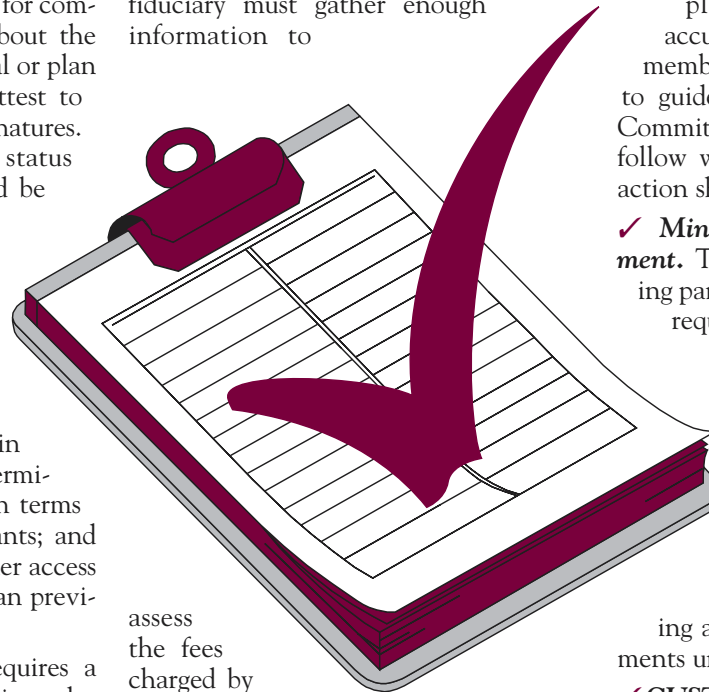
✓ **Claims Procedure.** All retirement plans are subject to new claims procedures as of January 1, 2002. These rules require retirement plans, to, among other things: have in place safeguards that claim determinations are consistent with plan terms and consistent among participants; and give all participants much broader access to documents during appeals than previously required.

✓ **Fidelity Bond.** The law requires a fidelity bond for every plan fiduciary who handles funds or other property of the plan. The amount of the bond must be at least 10% of the funds handled with the minimum coverage amount being \$1,000 and the maximum amount being \$500,000. Employers should confirm that fidelity bonds are up to date.

✓ **Accountant’s Opinion.** Generally, the sponsor of a qualified retirement plan must hire an independent qualified public accountant to audit the financial statements of the plan. The auditor’s report must be attached to the annual Form 5500. Historically, small plans (those covering fewer than 100 participants) have been exempt from this audit requirement. Now, however, for plan years beginning after April 17, 2001, the audit exemption for small plans applies only if the plan satisfies

(1) enhanced disclosure rules and (2) new bonding requirements if more than 5% of plan assets are not held by a bank, insurer or similar financial institution.

✓ **Vendor Selection.** The Department of Labor views the selection of a vendor for an employee benefit plan as a fiduciary act. To comply with the law, a fiduciary must gather enough information to



assess the fees charged by providers as well as their qualifications and quality of services. DOL says the lowest bidder need not always be selected. Key quality factors to consider include scope of choices, qualifications of providers and specialists, and participation satisfaction statistics.

✓ **Investment Monitoring and Rebalancing.** Falling stock prices had an impact on all types of retirement plans. Employers may feel the impact of higher contribution requirements for Defined Benefit plans. A modification of the investment policy statement may be in order. Similarly, participants in 401(k) plans may be frustrated as they watch their account dwindle. To give participants options for productive investment of their plan accounts and to ensure plan fiduciaries are fulfilling their responsibilities,

participants should be given the maximum opportunity for diversification and growth of their accounts. Employers should evaluate the performance of existing investment alternatives and consider modification.

✓ **Plan Committee.** Employers should review the structure of committees used to administer their retirement plans. Documentation should accurately reflect current committee membership and the procedures used to guide the decision making process. Committees should meet regularly and follow written procedures. Committee action should be documented.

✓ **Minimum Distribution Requirement.** Terminated employees and working participants who are 5% owners are required to take annual plan distributions once they attain age 70 1/2. However, the distribution requirement no longer applies to actively working participants who are not 5% owners. Employers may permit participants who are not 5% owners but who had begun to receive benefits while still working after age 70 1/2 to stop future payments until actual retirement.

✓ **GUST Remedial Amendment Period.** Plan amendments addressing GUST must generally have been adopted or submitted to the IRS by February 28, 2002, or if later, the last day of the 2001 plan year (i.e., plan year beginning in 2001). Employers that adopted or certified their intent to adopt volume submitter or master and prototype plans before this deadline have until at least December 31, 2002, to comply with GUST changes.

Plan sponsors need to constantly monitor retirement plans in order to insure that the plan is in compliance with the law and operating in the best interests of plan participants.

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EMPLOYEE HANDBOOKS PROTECT EVERYONE

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counsel will examine the handbook to determine if the company failed to enforce a certain policy. That failure could be used as evidence of a discriminatory intent.

If you cannot be certain that you will be able to enforce any provision in your handbook, it should not be included. Don't make promises you can't keep. For this reason, it is important to review all policies and make sure they will be regularly enforced. If you feel that you may have to exercise individual discretion in certain circumstances, this procedure should be carefully spelled out.

THE FMLA AND YOU - TRAPS FOR THE UNWARY

Finally, some employers may be sub-

ject to technical requirements in the content of their handbooks. Some statutes require that a handbook contain information concerning certain entitlements and employee obligations. For example, if you are subject to the Family and Medical Leave Act, and if you distribute written materials to your employees concerning benefits or leaves of absence, the written materials MUST include information regarding FMLA entitlements.

The FMLA contains other technical provisions that you should review with your legal counsel at the time your handbook is prepared or updated. Under the Act, employers can select the 12-month period on which your FMLA plan is to be administered. You can

specify one of several alternatives, including, for example, the calendar year or a year starting on the employee's anniversary date. Once you decide which method is best for your company, your handbook can provide this information to your employees.

A well-written and complete employee handbook can be a useful shield in protecting employers from unfounded wrongful termination and discrimination claims. Consult with an experienced employment attorney to make sure that your handbook does not turn into a weapon against you.

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