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FINEMAN KREKSTEIN & HARRIS, P.C.

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LEGAL NOTES

INFORMATION FOR OUR BUSINESS AND CORPORATE CLIENTS

IN THIS ISSUE

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RECOVERING DRUG OR ALCOHOL ADDICT MAY BE CONSIDERED A DISABLED PERSON UNDER THE FEDERAL ADA LAW

Employers may be surprised that, under certain circumstances, a drug or alcohol addiction is a "disability" that is protected under the federal ADA (Americans with Disabilities Act) law.

The ADA allows employers to refuse to hire someone because of current alcohol or drug use. In fact, an employer may even require that all job applicants undergo drug or alcohol testing. However, an employer cannot refuse to hire someone who is a recovered or recovering addict. To avoid triggering claims, an employer should avoid interview questions designed to elicit information about a applicant's history of substance abuse and/or addiction. For example, the Equal Employment Opportunity Commission advises that employers refrain from asking applicants questions like: "How often did you use illegal drugs in the past?"; "Have you ever been addicted to drugs?"; "Have you ever been treated for drug addiction?" or "Have you ever been treated for drug abuse?"

While the ADA protects recovered or recovering addicts, it is important to note, an employer's obligation to an alcoholic or a recovering drug addict in his employ differs from its obligation to other "disabled" workers. Under the ADA, an employer " 'may hold an employee who engages in the illegal use of drugs or who is an alcoholic to the same qualification standards for employment or job performance and behavior' that the employer 'holds other employees. If that employee's job performance is unsatisfactory, that employee can be disciplined like any other employee even if the unsatisfactory performance or behavior is related to the drug use or alcoholism' of the disabled employee." While this "disabled" worker may be protected under the ADA, he is not protected from the consequences of his acts; his employer is not required to tolerate misconduct related to or brought on by his addiction. On the contrary, if the employer terminates the worker, as long as the alcoholic or addict was discharged as a result of conduct for which any person would have been disciplined, the fact that his alcoholism or drug addiction may have caused the conduct does not lead to an ADA violation.

Able Bodied Individuals Can Enjoy Protections Under the ADA in Certain Situations

In our article from a past issue of LEGAL NOTES entitled "Employers: Avoid Litigation and Know Pre-Employment And Employment Guidelines," we dealt with the whole issue of ADA. We advised you that the ADA prohibits pre-employment medical examinations and inquiries designed to reveal information about disabilities unless such exams or inquiries are designed to reveal an applicant's ability to perform the essential functions of the job. We noted that the ADA permits employers to conduct medical examinations or inquire as to whether the

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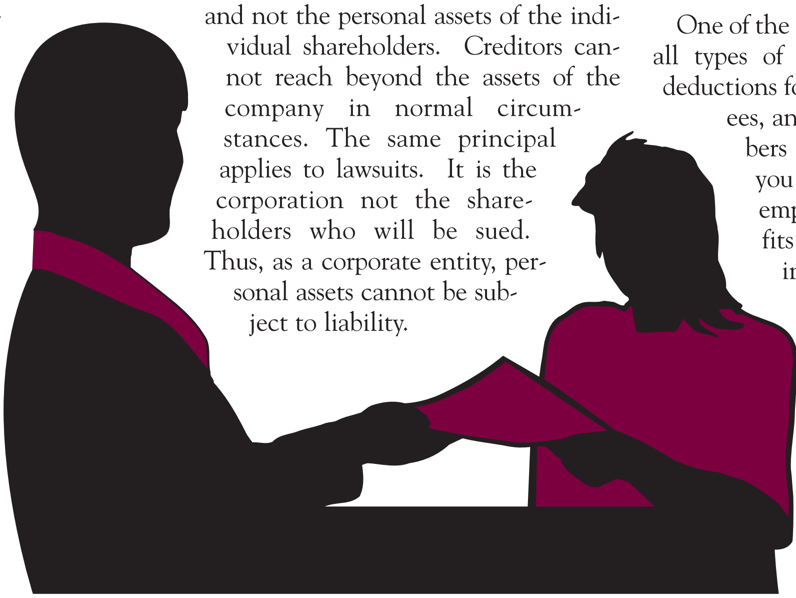
WHY YOU SHOULD INCORPORATE YOUR BUSINESS

If you are about to start a business, you should carefully consider the different options available in setting up the legal structure for your business. There are many advantages in incorporating a business, and there are different ways of forming a company.

The current proliferation of the number of business forms has become a source of increasing confusion. For-profit organizations can be categorized as follows: (1) sole proprietor; (2) corporations, including general corporations (C-corporation), subchapter S-corporations, closed corporations, professional service corporations, and cooperatives; (3) partnerships, including general partnerships, limited liability partnerships, limited partnerships, and limited liability companies. Each has different and important implications for liability and taxation.



Avoiding Personal Liability

The main reasons to set up a corporation or limited liability company (LLC) is to avoid personal liability for the debts and obligations of the business. Incorporating helps separate your personal assets from that of the business. A corporation is a legal entity that exists separately from its owners or shareholders. As a separate legal entity, a corporation or LLC is responsible for its own debts. Shareholders, directors, and officers are not liable for the debts and obligations of the corporation, or from any litigation in which the corporation is the defendant, unless a shareholder, director, or officer gives his/her personal guarantee.

In a general partnership or sole proprietorship, the creditors can pursue the owner's personal assets if the company assets are not sufficient to satisfy a claim. What this means is that if the general partnership or sole proprietorship incurs any debts or obligations, such as lease obligations, payments to vendors or the like, you can be held personally liable to pay for those debts. If a corporate entity is set up and properly maintained, when the corporation enters into a transaction, it is the corporation and not the shareholders which is responsible. If the corporation suffers losses, the corporation itself must bear those losses to the extent of its own resources, and not the personal assets of the individual shareholders. Creditors cannot reach beyond the assets of the company in normal circumstances. The same principal applies to lawsuits. It is the corporation not the shareholders who will be sued. Thus, as a corporate entity, personal assets cannot be subject to liability.

Tax Considerations

One major benefit of a sole proprietorship or a partnership is the flexibility in tax reporting of business income and expenses. Business profits and losses are passed through to the owners/partners who are then taxed at their individual income tax rates.

On the other hand, the C-corporation gives the limited liability protection to its owners, but it does not have the tax flexibility like a sole proprietorship or a partnership. The C-corporation is considered a separate entity from its stockholders and is taxed on its profits. When these profits are distributed to the shareholders as dividends, they are taxed again, on the personal level. However, the double tax can be eliminated by forming a subchapter S-corporation. Like the C-corporation, a subchapter S-corporation provides liability protection, but unlike a C-corporation, avoids double taxation.

One of the most important tax benefits of all types of incorporation is greater tax deductions for your business, your employees, and potentially for family members of business owners. Even if you are the only shareholder and employee of your business, benefits such as health insurance, life insurance, travel and entertainment expenses may be deductible. Incorporating may also eliminate self-employment taxes and lower social security tax and Medicare tax payments. Your individual tax liability may also be reduced, as you will become an employee of the corporation. Corporations may also be taxed at a lower rate than unincorporated entities. Additionally, corporations often provide an increased tax shelter for qualified pension plans or retirement plans (e.g. 401Ks). Favorable tax treatment for fringe benefits can also be a compelling reason to incorporate your business.

LLC and Subchapter S-Corporations Combine Tax and Liability Benefits

If you are looking for both the personal liability and a single level of tax, organizing as an LLC or subchapter S-corporation is the way to go. LLCs and subchapter S-corporations combine the best aspects of part-

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RECOVERING DRUG OR ALCOHOL ADDICT MAY BE CONSIDERED A DISABLED PERSON

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applicant is "an individual with a disability" if: (i) the offer of the job has already been made; (ii) all entering employees are subject to the same examination; and (iii) the information secured is kept in a separate medical file and is "treated as confidential". Also, we noted that the examination or inquiry must be job-related and consistent with business necessity.

Employers may be surprised to learn that several courts have held that a complainant need not be "disabled" to assert a violation of the ADA stemming from an employer mandated improper or unauthorized medical inquiry. Upon analyzing the various sections of the ADA that refer to medical examinations and inquiries, these courts have determined that the complainant must be disabled only if he maintains that the medical inquiry is discriminatory. If the employee maintains that the inquiry is otherwise illegal and/or improper, he may, nevertheless, have an ADA claim.

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nerships and corporations; the owners receive the tax advantages of a partnership and also enjoy, like a corporation, the limited liability protection of its owners. However, the ownership of a subchapter S-corporation is restricted, while a limited liability company does not possess the same limitations. For example, an LLC can have an unlimited number of members (owners) while a subchapter S-Corporation is restricted to no more than 100 shareholders; and non-U.S. residents can be members of an LLC while an subchapter S-corporation may not have non-U.S. residents as shareholders.

In conclusion, incorporation can be a complicated process. Consultation with an attorney for the incorporation process is important, and consideration of the advantages and disadvantages discussed here should be taken into account before embarking on incorporating a business.

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LOWER INTEREST RATES CAN GIVE ESTATE PLANS A BOOST

There are so many benefits of today's bargain-basement interest rates you should consider – before it's too late. Everyone knows that it's a great time to refinance your mortgage, get an auto loan, or use one of those 0% teasers to pay down credit-card debt, especially as it appears interest rates are rising and will continue to rise. But if you're reviewing your estate plan, low interest rates can have an even more profound impact.

Several techniques to cut gift- and estate-tax liability depend on interest rates published by the Internal Revenue Service - and those rates, like others, were recently near record lows, but are now beginning to rise. Hitching one or more of these vehicles to your estate plan, or revisiting plans put into effect when rates were higher, could deliver major benefits.

Loan to family

Each month, the IRS publishes short, mid, and long term applicable federal rates (AFRs). These interest rates serve as a hurdle for investments to beat.

With mid-term AFR at about 5%, suppose that in October 2005 you loaned your daughter a sum of cash for nine years. She gives you a promissory note and pays interest at the IRS rate. If your daughter invests the borrowed money in a portfolio that returns 7% - a hypothetical return used for illustration purposes only - that 2% difference over the AFR will go into her estate, not yours. Because your estate is smaller than it would have been if you hadn't made the loan, your heirs will pay less in estate taxes.

Now, of course, you run the risk of getting a return lower than the 5% AFR, which would make this strategy a loser. But with long-term government bonds yielding slightly more than that, beating the 5% AFR with a diversified portfolio may seem like a low-risk way to play rates while lowering your estate taxes.

Sale to an intentionally defective grantor trust

This accomplishes many of the same goals as a loan to family and benefits from low interest rates in the same way. In addition, because you, rather than the trust, pay income tax on earnings from the trust assets, your estate is further reduced, while the trust assets grow unencumbered by taxes. If you sold property to a defective trust some time ago and received a note, you may be able to refinance at today's lower AFR.

Transfer to a Grantor Retained Annuity Trust (GRAT)

GRATs are designed to remove assets from your estate with minimal gift-tax consequences. You transfer income-producing property to an irrevocable trust, which pays you an annuity. Whatever remains in the trust at the end of its term goes to the beneficiaries you've chosen.

Because you've made a gift of assets to the trust, and ultimately, to your beneficiaries, gift tax may apply. But rather than basing the tax on the actual value of the assets transferred when the trust expires, the IRS uses the present value of the transferred asset minus the present value of the annual payments you will receive over the life of the trust. That formula basically discounts the value of your gift to your advantage.

To come out ahead using this technique, you do have to outlive the trust term, and the trust assets must yield more than the AFR. If you don't outlive the trust term, the assets go back into your estate.

If you want to make a gift to your children or other loved ones but don't want to use your lifetime gift-tax exemption of $1 million, or if you have already used it up, a GRAT is most effective, partly because of a U.S. Tax Court decision late in 2002. The decision makes it possible to "zero out" the value of your gift, so you use none of your gift-tax exemption. This protects against the risk that you will use up your gift-tax exemption on assets that later drop sharply in value - a waste of the exemption.

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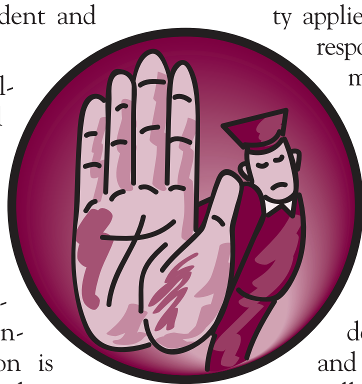
UNCERTAINTY IN THE LAW MAKES IT MORE IMPORTANT FOR YOU TO BE LISTED AS A NAMED INSURED

If you are doing business in Pennsylvania, the current uncertainty in law makes it more important than ever that you be listed as a named insured under the insurance policies of all independent and sub contractors.

In response to a challenge, on technical grounds, the Commonwealth Court of Pennsylvania recently overturned Pennsylvania's strict restrictions on joint and several liability. The Commonwealth Court's decision is stayed and the challenged statute remains in effect pending appeal to the Pennsylvania Supreme Court.



Under the challenged law, joint and several liability only applies when a defendant is found to be at least 60 percent responsible for causing an injury. If joint and several liability applies, then the defendant would be responsible to pay the entire judgment. Where a defendant is found less than 60 percent responsible, it would be responsible to pay only its proportionate share of any award.

The statute certainly addresses the unfair and all too common scenario where a defendant with "deep pockets" and only limited liability could be compelled to pay the entire judgment regardless of its level of fault. Under the old statute, a defendant which was found only one per cent liable could be responsible to pay the entire judgment. Under the Fair Share Act, the new and challenged statute, joint and several liability would not "kick in" and make that defendant potentially responsible for the entire judgment unless it was found at least sixty percent responsible.

This Pennsylvania statute is one of the strictest restrictions on joint and several liability in the United States. The current challenge makes the law uncertain and should serve as a reminder that you must be listed as a named insured under the insurance policies of all independent and sub contractors.

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WIN FOR TAXPAYERS IN REDUCING ESTATE TAXES

In a recent case, the Tax Court allowed a discount when it valued the limited partnership interest (LPI) of a decedent. The decedent owned close to 95% of the assets held in a family limited partnership (FLP), but in the form of a LPI. Because the decedent had a LPI, he could not sell his LPI nor did he control how the partnership assets were invested or when income was distributed from the partnership. Because of these restrictions, the Tax Court awarded a 32% discount in the value of his interest, despite the fact that the FLP owned only cash and certificates of deposit.

The taxpayers had originally claimed a 53.5% discount , but the IRS had argued for only a 25.2% combined discount.

In this case, the decedent and his daughter and son-in-law formed the FLP in 1999, with each contributing cash or certificates of deposit in exchange for limited partnership interests. The decedent died a few months after formation of the FLP without transferring any of his LPI

This is a big win for taxpayers and for family limited partnerships as vehicles to reduce the value of one's estate and thus the taxes incurred on one's estate at his or her death. The IRS has attacked FLPs for years, but it has now suffered a significant defeat.

For additional information call
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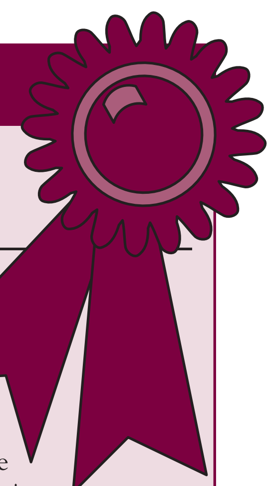
RECENT FIRM ACCOMPLISHMENT



FIRM LITIGATION GROUP HELPS CLIENT TO SIGNIFICANTLY LESSEN COST OF LITIGATION

What is a business owner to do when faced with a huge judgment and seemingly little hope of decreasing the amount of that judgment?

That was the exact predicament of a major real estate client when it came to Fineman Krekstein & Harris a few years back for counsel.

The client had suffered the entry of a nearly $4 million judgment, with limited legal options. The firm was engaged to try to negotiate a settlement and then to pursue litigation against the client's insurance and other professional providers to make recovery against those settlement funds. After negotiating a settlement at a fraction of that original judgment, the firm then brought claims against the client's providers. These claims were subsequently resolved and resulted in recovery of slightly less than the amount of the settlement that the firm originally achieved.

After two years of intensive legal actions balanced with skilled negotiations, the client walked away from a seemingly inescapable, staggering, judgment with a payout that became a manageable cost of doing business.

Firm partners David Fineman and Lee Applebaum acted as counselors and legal advocates in providing a full range of legal services in this business dispute. The firm's goal, as always, was to provide top-notch legal analysis and negotiating skills along with practical business acumen.

For more information about our firm's litigation services, please contact our Commercial Litigation Group at 215-893-9300 or email us at lawyers@finemanlawfirm.com.