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Employment Law Update

On March 18, 2010, President Obama signed the Hiring Incentives to Restore Employment ("HIRE") Act into law, which provides certain tax benefits to qualified employers. These benefits are intended to help employers create new positions that will allow them to hire and retain unemployed individuals.

Among its benefits, HIRE includes a general business credit of up to $1,000 for each new worker retained for at least one year. Employers who hire unemployed workers after February 3, 2010 and before January 1, 2011 may also qualify for a 6.2 percent payroll tax incentive, thus exempting employers from paying the employer's share of Social Security taxes on wages paid after March 18, 2010 through the end of the year. Employers would still be required to withhold all payroll taxes as the tax benefits would be claimed on the employer's federal employment tax return that is usually filed on a quarterly basis.

An eligible employee must provide a written statement certifying, under penalties of perjury, that he or she has not been employed for more than 40 hours during the 60-day period ending on the employee's start date, or worked fewer than a total of 40 hours for someone else during such period. The employee, furthermore, cannot be employed to replace another employee unless the other employee separated from employment voluntarily, for cause, or for other approved circumstances.

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Legal Perspectives

from Abrahams Kaslow & Cassman LLP

Email Privacy: There's a Price for Prying

by Valerie S. Retelsdorf and Harvey B. Cooper

Introduction

Generally, it is understood that employers own and control the contents of work completed on office computers, including email. Thus, employees typically have no right to privacy regarding emails sent or received through an employer's system. However, because internet access is exceedingly common in the workplace, many employees are now permitted to check their personal email accounts (Gmail, Hotmail, Yahoo, AOL, etc.) from work. Many employers assume, incorrectly, that they have the same right to monitor and access employees' personal email accounts as they do employer provided email accounts.

When a company computer is used by an employee to access a web-based account, such as an e-mail account, instant messaging, or a social networking website, the information viewed or created may be accessible to the employer by reviewing temporary internet files, which could reveal an employee's password to a personal web-based account. The employer arguably has the authority to review the information found in the temporary internet files because it is stored on the company computer. But, information in an employee's web-based account that was not viewed or created from a company computer is typically only accessible to an employer by actually logging into the employee's account. Employers who log into their employees' personal web-based accounts expose themselves to severe criminal and civil liability.

Liability Under the Stored Communications Act

The Federal Stored Communications Act (SCA) was passed in 1986 as part of the Electronic Communications Privacy Act. The SCA creates liability for anyone who "intentionally accesses without authorization a facility through which an electronic communication service is provided" or "intentionally exceeds an authorization to access that facility." In simple terms, the SCA allows employees to attack employers who pry into their personal web-based accounts.

Specifically, the SCA creates a criminal offense and civil liability for anyone who exceeds their authorized access to another's email account. A first time offender can receive a fine and/or up to five years in prison, while repeat offenders can receive a fine and/or up to ten years in

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Fluctuations In The Federal Estate Tax Laws: *What You Need To Know*

by James A.Tews & Nathaniel J. Warnock

A hot topic right now in the estate planning community is the current status of the federal estate tax regime. Understanding the intricacies can be challenging enough, but with Congress leaving so much uncertainty about what changes to the laws will be made, if any, clients and attorneys alike are experiencing a very difficult time in developing estate plans.

Generally speaking, an individual can die leaving wealth to family and friends free of federal estate tax so long as the aggregate value of the wealth does not exceed a limit, referred to in this article as the "Exempt Amount". The value of wealth exceeding the Exempt Amount is subject to the federal estate tax (in recent years, the maximum tax rate has been in the range of 45%). Note that assets passing to a surviving spouse generally do not result in federal estate tax being owed, regardless of value.

Our estate tax roller coaster ride began when President Bush signed the Economic Growth and Tax Relief Reconciliation Act of 2001 ("2001 Act"). This law included a provision that changed the Exempt Amount for the ten years following enactment; it gradually increased from $1,000,000 in 2002 to $3,500,000 in 2009. The federal estate tax is repealed for this year only (2010), and, thanks to a "sunset" provision in the 2001 Act, beginning in 2011, the Exempt Amount will permanently return to $1,000,000 and estate tax rates will increase until Congress again changes the law. It appears that President Bush and Congress did not expect that the temporary repeal of the federal estate tax would actually occur in 2010 but instead considered the 2001 Act as a temporary fix until Congress could make permanent changes to the federal estate tax laws shortly after enactment of the 2001 Act.

The 2001 Act is now of significant concern for several reasons. First, the $1,000,000 Exempt Amount that applies beginning in 2011 could negatively affect many more taxpayers at death. As a simple example, assume unmarried Richey Rich owns assets worth $2,000,000 when he dies sometime after 2010. Unless Congress changes the law before Mr. Rich's death, the beneficiaries of Mr. Rich's estate could be responsible for payment of approximately $435,000 in federal estate tax. No federal estate tax would have resulted if Mr. Rich had died in 2009 when the Exempt Amount was $3,500,000 and may not have resulted if he died this year when the federal estate tax is temporarily repealed (unless Congress seeks to restore the tax retroactively).

Another concern relates to the income tax basis of assets inherited in 2010. Prior to 2010, the income tax basis of an inherited asset became the fair market value of such asset on the date of the decedent's death. However, the repeal of the federal estate tax in 2010 is accompanied by a repeal of this basis rule. As a result, the basis of an asset inherited in 2010 will remain the decedent's basis at the time of his or her death. This could result in significantly higher capital gains taxes to beneficiaries when they later sell inherited assets. Unless legislative changes are made, the pre-2010 basis rule will again apply with respect to assets inherited from a decedent who dies after 2010.

The 2001 Act contains a few provisions to temper the effects of the 2010 income tax basis rule. First, each estate is allowed a basis step-up of $1,300,000, which can be allocated to individual assets in order to bring their basis up to (but not to exceed) their fair market value on the date of the decedent's death. Second, an additional step-up of $3,000,000 can be allocated to assets inherited by the decedent's spouse. The basis rule applicable during 2010 could cause frustration for a decedent's family by requiring the family to determine the decedent's basis in assets, which could involve searching through decades of documents for receipts and other evidence that may no longer exist.

The 2001 Act also includes a repeal of the Generation Skipping Tax ("GST") for 2010. This temporary repeal of the GST seems to provide a short window during which individuals could make large gifts to their grandchildren without any GST exposure. However, these individuals need to consider the possibility that Congress could still enact legislation in 2010 which reintroduces the GST, retroactive to January 1, 2010. This risk presents a significant problem for individuals who may have already made large gifts to grandchildren, i.e. such gifts could be subject to the GST retroactively despite the fact that there was no GST when the gift was made. Some experts question the constitutionality of applying tax laws retroactively; however, there is legal support for retroactive application of

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Fluctuations In The Federal Estate Tax Laws: *What You Need To Know*

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such laws. Even if Congress attempted to apply federal estate tax and GST legislation retroactively, such legislation could face years of litigation before a definitive ruling is issued, leaving affected individuals in limbo as to their potential tax liability.

An obvious concern with the current status of the federal estate and generation skipping transfer taxes is that no one knows what legislative action Congress will take, if any, during 2010. Some believe Congress will enact legislation that applies retroactively to January 1, 2010, in an effort to collect 2010 estate and generation skipping transfer tax revenue. Others believe Congress will permit the temporary repeal and make no changes in the law, realizing that a return to the much lower Exempt Amount of $1,000,000 and to higher tax rates will result in significantly higher tax revenue starting in 2011.

Despite the current uncertainty in the federal death tax laws, it may be advisable to discuss your estate planning circumstances with your attorney. Recent changes to these laws under the 2001 Act may cause significant unintended tax consequences for an individual who dies during 2010.

Please call one of our estate planning attorneys at 402-392-1250 if you have questions or need assistance with your estate planning.

Email Privacy: There's a Price for Prying

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prison. A person whose rights have been violated under the SCA may also file a civil action and recover actual damages, statutory damages in the amount of $1,000 per violation, punitive damages if the violation was malicious or intentional, litigation costs, and attorney's fees. In addition to the SCA, the Nebraska Computer Crimes Act (NCCA) also prohibits the intentional access of computer information in excess of one's authorization. Under the NCCA, a first time offense is a Class V misdemeanor and all subsequent offenses are Class II misdemeanors.

Earlier this year, a Federal Circuit Court considered a case in which a plaintiff sued her former employer for sexual harassment. The plaintiff's former employer then sued the plaintiff in a separate action for several business torts. As the case progressed, the plaintiff became suspicious that e-mails produced by her former employer were from her personal AOL e-mail account, which the plaintiff had used, in addition to her company account, to conduct business during her employment. Upon questioning, the plaintiff's former employer admitted that he had logged into the plaintiff's personal AOL account numerous times from work, home, and while traveling.The jury awarded the plaintiff more than $400,000 in damages and costs. Although a portion of the award was struck down on appeal, the plaintiff ultimately recovered $235,723.56.

Employee Privacy Expectations

An employee's expectation of privacy and any authorization for the employer to invade that privacy are generally defined by the employer's electronic communications policy. In a recent New Jersey case, the court held that the question of whether an employee has a reasonable expectation of privacy in a communication made on a company computer is based on the degree of notice the employer has provided to its employees regarding their right to privacy in electronic communications. Thus, a well drafted electronic communications policy and signed acknowledgements from employees that they have reviewed the policy may help protect employers from liability under the SCA.

Conclusion

Accessing the personal email accounts of employees during an internal investigation or for any other purpose exposes employers to both civil and criminal liability under the SCA and the NCCA. Thus, employers should decline to use recovered login information to access employees' personal email accounts for any reason. Even if an employer has an electronic communications policy that allows for the use of login information, the employer should seek legal advice before accessing an employee's personal web-based account.

The attorneys at Abrahams Kaslow & Cassman LLP can answer any questions that may arise regarding an employer's right to access the web-based accounts of its employees.