Seminars

May 18, 2007

Sandy Maass will present a workshop on "Staffing the New Workplace" at the Strategic Air and Space Museum, by Mahoney State Park. Register online at www.shrm-ne.org or call Debbie Watson at 392-1250.

June 19, 2007

Roseland Update presented by Tyler McLeod. This seminar will update you on the new legislation regarding vacation pay-outs.

August 22, 2007

Discrimination, Harassment, and Retaliation Update 2007 presented by Tyler McLeod & Sandy Maass

September 20, 2007

Evictions: Commercial and Residential
Aaron Weiner will present Landlord Remedies and David Nelson will present a session on Reporting Real Estate Transactions to the IRS.

Watch the newsletters for more details on these seminars or call Debbie Watson at 392-1250 or email dwatson@akclaw.com.

Attorney Spotlight

Tyler P. McLeod has been selected to the Leadership Institute for Meritas. This program identifies ways to draw on people's inherent strengths, skills and interests to create more positive and productive working environments.

Meritas is a global alliance of business law firms that deliver localized legal services. Meritas membership has over 170 firms located in more than 60 countries and encompassing 5,700 lawyers. Membership in Meritas is by invitation only. AK&C is the only Nebraska law firm selected to be in Meritas.

Sandy Maass has been elected Vice President of the Board for the Women's Care Center of the Heartland.

AK&C
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ATTORNEYS AT LAW
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Omaha, Nebraska 68114

Second Quarter 2007

AK&C Legal Perspectives

from Abrahams Kaslow & Cassman LLP

Medicaid Planning After The Deficit Reduction Act of 2005

by Christian R. Blunk

Prior to February 8, 2006 and the passing of the Deficit Reduction Act ("DRA"), Congress had last addressed Medicaid eligibility in 1993. Many tried and true planning techniques have been altered. The DRA's passage was designed to severely restrict Medicaid eligibility for the elderly and individuals with disabilities.

The two most significant changes are:

1. Property Transfers Look-Back Period. Before the DRA, there were two look-back periods - five years for property transfers to a trust and three years for all other property transfers. Under the DRA, any transfer within the five-year period before Medicaid application may offset eligibility.

The practical effect is that families must be more proactive in planning for the elderly or minor children with special needs. Ownership of assets and gifting strategies must be rethought. If a prospective Medicaid applicant has more than $4,150 in non-exempt assets, the excess must be spent down prior to application.

Thus, the elderly will have to fully budget their expenses for five years before gifting their assets to family or charities. Families with special needs children will have to make sure no gifts end up in those childrens' names. Outright gifts or transfers under the Uniform Gift to Minors Act are not a viable means of gifting by grandparents or aunts and uncles to special needs children. Upon reaching the age of majority, the monies would disqualify the special needs child from receiving medicaid benefits and have to be spent down prior to application.

Uniform coordination of estate plans by the grandparents, parents and grandchildren is a must. Otherwise, monies gifted to enhance a special needs child's life will evaporate without providing the intended effect. Tools, such as long term care insurance and special needs trust provisions, are some of the many options available to address the look-back period disclosure requirements.

2. Home Equity Cap. Prior to the DRA, exempt assets included the applicant's home. There was no limit to the value of the home. Thus, major non-exempt assets were often combined to purchase a home for the individual, thereby exempting the vast majority of the individual's estate.

Under the DRA, the exempt value of a home is capped at $500,000 for an individual. If there is a spouse, minor under 21, or a blind or disabled child at home with the individual, there is no cap. If the home exceeds $500,000, the excess must be spent down via a home equity loan on the individual's long term care needs. To address the home equity cap, options such as actuarially sound reverse mortgages or land contracts with family members are available.

Whether you are elderly and concerned about rising nursing home costs or your family has a minor with special needs, the DRA has changed the estate planning landscape. The key to effective estate planning is to clearly define the goals and objectives of each unique family.

Pitfalls such as forced spend downs and Medicaid penalty periods can be avoided with proper planning. The key is a coordinated plan between the various generations regarding an elderly individual or special needs child.

There are several other changes within the DRA regarding asset and income treatments. The best way to address planning issues after DRA is to seek an attorney who is knowledgeable in this field. Our firm has several attorneys who can assist you with any questions you may have regarding the DRA.

IMPORTANT LAW UPDATE: Nebraska Wage Payment Act Amended to Address Recent Court Cases

Governor Heineman signed LB 255 as an emergency measure that became effective on April 3, 2007 to address issues involving the payment of wages to terminated employees that were raised in two recent Nebraska appellate court cases construing the Nebraska Wage Payment Act ("Wage Act").

In the first case, *Sanford v Clear Channel Broadcasting*, the employee sued her former employer to collect unpaid commissions she claimed were due for advertising spots she sold and were on file but which did not air until after she was terminated. The employer's written policy provided that a salesperson would not be paid a commission on advertising sold unless the salesperson was employed at the time the advertising aired. The Court of Appeals found this policy regarding payment of commissions was contrary to the Wage Act, which required that employers pay commissions on all orders on file at the time of termination of employment.

In the second case, which we discussed in our last newsletter, *Roseland v. Strategic Staff Management, Inc.*, the Nebraska Supreme Court held that "accrued vacation time, which is part of an employment agreement, is due and payable as wages upon termination of employment." The Court found that the definition of fringe benefits under the Wage Act included vacation leave, which was to be paid upon termination of employment. Thus, the Court determined that the employer's policy, which provided for no payout of accrued but unused vacation time upon termination, was contrary to the Wage Act.

Payment of Leave Upon Termination of Employment. The definition of "wages" under the Wage Act includes the payment of "fringe benefits" when previously agreed to and the conditions stipulated have been met by the employee. "Fringe benefits" have included

(continued on page 3)

David C. Nelson Joins the Firm

David C. Nelson

We are pleased to welcome David C. Nelson to the firm. David joins the firm as counsel and will focus his practice on corporate law, commercial transactions and real estate law.

In his corporate and commercial transactions practice David counsels clients on the purchase and sale of business assets, financing and related agreements. He also advises clients on entity selection and formation.

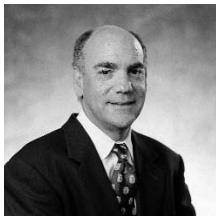
David has extensive experience in real estate law. He handles commercial and residential real estate transactions, title insurance, surveys, appraisals, construction contracts and drafts and negotiates easements, listing agreements and residential, retail, warehouse and other commercial leases. He also represents clients in zoning matters.

David received his Bachelor of Science in Business Administration with Majors in Accounting and Finance from the University of Nebraska at Kearney in 1985. He received his Juris Doctor, magna cum laude, from Creighton University School of Law in 1988. While in law school, he was a member of the Law Review.

Prior to joining the firm, Mr. Nelson was corporate counsel for United Agri Products, Inc. He is a member of the Omaha and Nebraska State Bar Associations and serves on the Board of Directors of Gladiator's Athletic Association, Inc.

Meet Our Litigation Team

Frank F. Pospishil



Harvey B. Cooper

Sandra L. Maass

Aaron D. Weiner

Jeffrey J. Blumel

Tyler P. McLeod

Nicholas T. Dafney

Laurie E. Hellbusch

Our firm is proud of the extensive experience and diverse talents of our litigation department. Our attorneys are practical, results-oriented lawyers experienced in handling disputes involving most industries.

In our increasingly litigious society, we strive to obtain a careful understanding of the issues and then provide a desirable solution as quickly and economically as possible. We handle a broad range of litigation matters including complex corporate transactions, personal injury litigation, employment disputes, intellectual property disputes, contesting of wills and professional negligence cases. Our attorneys have appeared in state and federal courts and before administrative agencies representing clients from pre-litigation through the appeals process. In addition, we frequently advise clients on ways to avoid litigation. As unique issues arise, we have the ability to draw upon the talents of the other attorneys in the firm to draft contractual safeguards, develop policies and procedures and negotiate and settle specific disputes before litigation arises. We also have a well-respected Alternative Dispute Resolution practice. We encourage the use of mediation and other out of court settlements to resolve disputes without traditional litigation whenever it is appropriate.

Below are the types of litigation matters we handle for our clients. If you are ever in need of a litigation attorney, please call our office at 402-392-1250.

Bankruptcy and Creditors' Rights
Business and Commercial Disputes
Collections
Construction
Contract Disputes
Employment
EPA Litigation
Environmental and Natural Resource Law
ERISA
Franchise Disputes
Insurance Coverage and Defense
Labor Arbitration
Landlord/Tenant
Lender Liability Claims
Municipal
Personal Injury
Probate, Trusts and Estates
Real Estate including Condemnation, Foreclosures, Tax, Environmental and Evictions
RICO Litigation
Wage and Hour
Wireless Communications
Workers' Compensation
Zoning

Employment Update

Immigration Compliance Review

The Immigration Reform and Control Act of 1986 ("IRCA") makes it unlawful to hire, recruit for fee or refer for fee any foreign national not authorized to work in the United States. All employers must complete a United States Customs and Immigration Services I-9 form for all employees hired after November 6, 1986. IRCA places burdens on both employers and employees: The employees must attest to their identification and work authorization and employers must examine documents attesting to the employees' identification, attest to having done so, and maintain I-9 and any supporting records. Employers who fail to properly comply with I-9 and employment authorization requirements, or knowingly hire or retain undocumented workers, may be subject to civil and criminal penalties.

IRCA is enforced by the Immigration and Customs Enforcement ("ICE") agency. Investigations and charges have increased dramatically in recent years. ICE conducts audits of employers looking for evidence of knowingly hiring undocumented workers. ICE may fine employers for "paperwork violations" resulting from incomplete or incorrect information on I-9 forms. Generally, an employer has 72 hours' notice to prepare for the audit and make any necessary corrections or clarifications. ICE also may appear with warrants to conduct "raids" to arrest undocumented workers and employers who had knowledge of undocumented workers.

ICE has also sought more access to Social Security Administration "no-match" letters to investigate employers with undocumented workers. Inevitably, some employee identification documents are inconsistent with federal government records. The SSA issues no-match letters in an attempt to correct these mismatches. When the SSA initially issued no-match letters, many employers took adverse employment actions against non-aliens. However, the mere receipt of a no-match letter is insufficient grounds to impute actual or constructive knowledge to an employer that it is employing an unauthorized worker and, therefore, an employer may not lawfully terminate an employee based solely on receipt of a no-match letter.

Presently there is no clear guidance from ICE or the SSA on how to handle receipt of no-match letters. However, the Department of Homeland Security ("DHS") issued a proposed regulation regarding responding to no-match letters which sets forth specific steps for investigating discrepancies and responding to no-match letters. Although the regulation has not been finalized, the DHS takes the position that it is presently the "best practice" to follow.

In summary, the DHS proposal requires the employer to check its own records and to report any necessary corrections within 14 days. If the employer's records are insufficient to correct the discrepancy, the employer must instruct the employee to visit the local SSA office or DHS facility to correct the problem. The employee has 60 days to resolve the discrepancy and provide new or corrected identification information to the employer. If the employee cannot correct the discrepancy, but claims to be eligible to work, the employer must then complete another I-9 form for the employee within 3 days, without reference to the SSN or document reported as suspect in the no-match letter. If the employee does not produce sufficient documentation within 3 days, the employer should terminate the worker.

If you have any questions about the receipt of a no-match letter or compliance with immigration laws, please contact a lawyer in our employment law group.

Nebraska Wage Payment Act (continued from page 1)

sick and vacation leave plans under the Wage Act. Pursuant to LB 255, the Wage Act now provides that "Paid leave, *other than earned but unused vacation leave,* provided as a fringe benefit by the employer shall not be included in the wages due and payable at the time of separation, unless the employer and the employee or the employer and the collective-bargaining representative have specifically agreed otherwise."

Payment of Commissions to Employees after Termination. The Wage Act now provides: "Unless the employer and employee have specifically agreed otherwise through a contract effective at the commencement of employment or at least ninety days prior to separation, whichever is later, wages includes commission on all orders delivered and all orders on file with the employer at the time of separation of employment less any orders returned or canceled at the time suit is filed." Payment of commissions is to be made to terminated commissioned employees as follows: "Whenever an employer separates an employee from the payroll, the unpaid wages constituting commissions shall become due on the next regular payday following the employer's receipt of payment for the goods or services from the customer from which the commission was generated. The employer shall provide an employee with a periodic accounting of outstanding commissions until all commission have been paid or the orders have been returned or canceled by the customer."

It is now the law of Nebraska that employers must pay all accrued but unused vacation to terminated employees regardless of any employment policy to the contrary. Employers, therefore, should update their polices and remove any forfeiture provisions for accrued and unused vacation leave. An employer is still free to establish the terms and conditions under which sick leave will accrue and be payable to employees.

Notably, the amendments to the Wage Act do not address pay out of PTO (paid time off) plans, or the impact upon vacation or PTO policies that do not permit employees to carry over all or some of their accrued but unused time from one year to the next. It is our recommendation, however, that employers with PTO plans that do not permit payout of earned and unused PTO plans should permit payout of accrued but unused time upon termination or simply create separate sick and vacation leave plans. Employers should also consider modifying any vacation leave or PTO plans that do not permit carry over of time from one year to the next as employees can argue that all earned but unused vacation leave, which arguably may include PTO leave, cannot be taken away. Employers can limit the accrual of vacation or PTO leave by establishing caps on periodic accruals of such leave.

With respect to commission employees, LB 255 specifically permits an employer and an employee to contract as to when commissions will be earned and paid. The Wage Act definition of wages is now a fall back definition that will apply only in the event the employer and employee have not previously entered into an agreement as to when commissions are earned and payable. The Wage Act now provides guidance to employers on how and when to pay commissions that become due to a terminated commissioned employee after termination.

Based upon the new law, we recommend that you contact our employment attorneys to review your paid leave policies and your written agreements with any employees paid on commission to assure that you are in compliance with the new law.