Seminars

Harassment and Retaliation Update 2007

Please join us for a FREE seminar:

Dates: October 30th ***OR*** November 1st
Time: 7:30 a.m. - 8:30 a.m.
Place: AK&C
8712 West Dodge Road,
Suite 300

Register today, space is limited.

Call 392-1250 or email
dwatson@akclaw.com

Continental breakfast provided.

Attorney Spotlight

Jeffrey J. Blumel has been named to the Board of Trustees for the Mid America Council of the Boy Scouts of America

The Best Lawyers in America 2008

Three lawyers from Abrahams Kaslow & Cassman LLP were recently selected by their peers for inclusion in The Best Lawyers in America® 2008

John W. Herdzina
Corporate Law

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Corporate Law

Thomas J. Malicki
Trusts and Estates

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Fourth Quarter 2007

AK&C Legal Perspectives

from Abrahams Kaslow & Cassman LLP

Electronic Discovery: Is your business prepared to comply with the new rules of discovery?

By: Jeffrey J. Blumel and Nathanial J. Warnock

The discovery process is one of the most critical stages of litigation. It is during this process that the attorneys are able to review all relevant documents of the opposing party and, routinely, it is during discovery that a case is either made or broken. In the past, discovery has consisted of a relatively straightforward approach where the parties involved in the litigation turn over any relevant documents to the attorneys and the attorneys review these documents for their relevance. As a result of advancements in technology, including the increased use of electronically stored information (ESI), there have been some significant changes in the discovery process that directly effect businesses of all sizes.

Electronic Discovery Generally

Electronic discovery, or e-discovery as it has become known, has always been included in the discovery process. However, as of December 1, 2006, the Federal Rules of Civil Procedure (FRCP) were updated to include a number of rules which specifically require attorneys and businesses to take a pro-active role in being prepared for e-discovery should the business ever be engaged in a lawsuit.

The first major change to the FRCP is in regards to ESI. The new rules explicitly state that ESI is to be included in discovery which includes any documents, emails, instant messages, voicemail, video, metadata, login information, etc. that are electronically stored on computers, network servers, backup tapes, and other such media. Courts have stated that ESI also includes business documents stored on personal computers, handheld devices such as PDAs, and even old computers that are no longer being used by the business. The new rules, therefore, have potentially extensive consequences for small or medium sized businesses.

Another significant change to the FRCP deals with the enforcement of the new e-discovery rules. The FRCP provide for sanctions which can be placed upon businesses and attorneys that do not make a good faith effort to conform to the e-discovery rules. Courts have already been issuing decisions to enforce these provisions against businesses and their attorneys who did not take care to ensure preservation of ESI. This provision can be alarming especially for a small business owner who may not have an Information Technology (IT) manager to handle the company's electronic media. For that reason, the FRCP have included a "safe harbor" provision that protects a business owner who may have inadvertently lost ESI that would normally be discoverable. This exception protects business owners who make a good faith effort to manage their IT systems within the e-discovery provisions. However, courts have shown that it is unwise for a business of any size to rely on this exception because the term "good faith effort" has proven to be a vague term open to broad interpretation by the court. There have been cases where, despite the safe harbor provision, businesses were sanctioned for inadvertently deleting ESI.

An important point to keep in mind concerning e-discovery generally is that this is a very fluid area of the law in that technology is continually changing and it is very likely that the law regarding e-discovery will be just as volatile. For that reason it is critical that businesses of all sizes have a close working relationship with their attorney to ensure that they remain prepared for issues that may arise concerning e-discovery.

Electronic Discovery And Your Business

Preparation for potential e-discovery, even prior to litigation, is essential to comply with the e-discovery rules should the need arise. While nobody desires to be involved in litigation and the e-discovery process, it can happen despite all precautions taken to avoid it and no business, large or small, is immune. This is one area where your business can avoid significant expense by being prepared in advance.

Essential preparation includes being familiar with your IT system, no matter the size of your business, and developing an IT plan with data destruction and retention policies. Your IT system may consist of one computer that is used both personally and professionally or it may consist of thousands of computers linked on a national or global network. Regardless of the size of your business, it is critical that you have a firm grasp of how your IT system operates, including how data is created, managed, and stored and implement this into your IT plan. Knowledge of this information prior to

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IRS Gets Tough on Deferred Compensation

The much anticipated and much delayed rules from the IRS on the income tax treatment of deferred compensation are now available. At almost 400 pages, the rules are not exactly light reading for the average taxpayer. In general, taxpayers have until the end of 2008 to adopt written documents that comply with the new rules.

The Internal Revenue Code has special tax rules for "nonqualified" deferred compensation plans. These are not to be confused with "qualified" employer retirement plans, like a 401(k) plan, or with bona fide vacation leave, sick leave, compensatory time, or disability pay or death benefit plans. The new regulations expand the already broad definition of what constitutes deferred compensation. Essentially, a plan provides for deferred compensation if an employee has a legally binding right during a taxable year to compensation that has not been actually or constructively received and included in gross income, and that is, or may be, payable under the plan in a later year.

The impetus for the new rules was a growing concern that some individuals were deferring money over which they still had control, and which they could receive basically whenever they wanted it. The memories are still fresh of top Enron executives cashing out their deferred compensation early and leaving the company financially floundering. In a nutshell, the new rules accomplish the following:

- limit the flexibility for the timing of elections to defer compensation;
- restrict distributions during employment to fixed dates, certain changes in control, or extreme hardship;
- prohibit acceleration of distributions of deferred compensation;
- prevent key employees of public companies from receiving deferred compensation due to severance from service until six months after severance;
- and require that deferrals of distribution dates or changes in the form of payment be made at least one year in advance of the scheduled distribution date.

If the rules are not followed, the tax consequences are significant. The participant is immediately taxed on the value of the deferred compensation once it is no longer subject to a substantial risk of forfeiture. On top of that, there is a 20% excise tax on the amount that is included as income. For good measure, there is also an interest penalty. To avoid such a scenario, employers with deferred compensation plans should promptly come up to speed on the new rules and get appropriate professional help with making sense of, and responding appropriately to, the new IRS rules for deferred compensation.

Please contact Thomas J. Malicki at 392-1250 if you have questions about how the new IRS rules affect your business.

Electronic Discovery (Continued from page 1)

litigation as well as having electronic media organized on your computer or network with data destruction and retention policies will result in efficient gathering of the electronically discoverable materials and can literally save hundreds of thousands of dollars in litigation expenses. Remember, however, that as your IT systems and personnel change, you should update your IT plan to keep it effective.

If litigation occurs, it must be understood that there will be an obligation to make disclosure of certain ESI. In that regard, often times a "litigation hold" will be in place. Litigation holds outline the ESI that must be preserved and not destroyed. It is not only actual litigation that may cause the need for a litigation hold, but if the organization knows or should know that there is potential litigation looming, it must act to preserve certain ESI. After litigation starts, often times opposing counsel will send a letter outlining the documents and data that must be preserved. Destruction, deletion or modification of certain ESI in such situations, both before and after litigation begins, can be considered spoliation of evidence and severe sanctions can be imposed by the court for such spoliation. Companies must be meticulous in gathering ESI for e-discovery purposes assuring that it is unaltered and not destroyed. Gathering such ESI may involve employees and agents of the company, and even company attorneys and accountants. Again, preparation, including an IT plan with data destruction and retention policies as outlined above, will help avoid e-discovery pitfalls. Your attorney should be a vital component in determining when a litigation hold should occur and counseling you on preserving and gathering ESI.

Conclusion

Electronic discovery presents a number of issues that every business owner must be aware of and adjust for in planning their business model. It is critical that every business owner know how the IT system works in their business and how documents are stored and retrieved. This can save large amounts of expense should litigation ever arise. E-discovery can be complicated and broad, but it is important in the modern business world that every business be prepared should they ever be confronted with electronic discovery issues. Remember, while e-discovery is relatively new, it is here to stay and the sooner that your business takes steps to comply with the new rules the more protected your business will be in the future. If you have questions about Electronic Discovery, please contact one of our attorneys at 392-1250.

Update

No-Match Letter Response Rule Stayed by Federal Court

In a prior Newsletter, we discussed the rule the Department of Homeland Security (DHS) was to issue that would affect employers' responsibilities in verifying workers' employment authorization. The final form of the rule was issued and scheduled to take effect September 14, 2007.

Under the final rule, employers are expected to take specific steps when receiving a Social Security Administration no-match letter to ensure they are complying with legal hiring requirements. The new regulations have attracted significant controversy, leading prominent organizations such as AFL-CIO and ACLU to file suit challenging the rule. The suit asserts that because the final rule imposes liability on employers who fail to respond to a SSA or DHS letter, errors attributable to the government's database would pose a direct threat to the jobs of U.S. citizens and other authorized workers. A United States District Court in San Francisco has issued a temporary restraining order staying the implementation of the final rule. The order prevents DHS or SSA from enacting or enforcing the rule until an October 1 hearing to determine whether an injunction should be issued.

We will continue to monitor this issue and provide you with the latest updates as they become available. In the interim, please do not hesitate to contact us should you have questions or concerns about how the final rule could affect your responsibilities in verifying workers' employment authorization.

Learn about our Estate Planning Practice

AK&C has many years of experience counseling individuals and family businesses on the issues of business succession and wealth transfer. We provide estate and business planning, tax advice and charitable planning for individuals and entities, with an emphasis on each clients unique situations and needs. We handle lifetime and post-mortem trust and estate administration. We represent clients with substantial net worth, as well as those with smaller estates. In many situations, we represent multiple generations of the same family which allows us to more efficiently address the needs of each generation and succesion planning for family businesses.

Estate Planning

Estate planning is essential to preserve family wealth and goes beyond just the drafting and execution of a will. In today's society a broader approach to estate planning is necessary. We formulate and implement long-term programs aimed at protecting the client's financial security for life while minimizing the tax burden of transferring wealth to the next generation.

We have significant experience drafting all types of wills and trusts including special needs trusts, incentive trusts, generation skipping trusts and marital trusts. Our attorneys also create personalized plans utilizing sophisticated estate planning techniques such as lifetime trusts, family limited partnerships and charitable foundations.

Estate and Trust Administration

Our attorneys handle tax and probate matters for both individuals and fiduciaries. We counsel executors and trustees on all phases of administration, including representing our clients before courts and taxing authorities.

We have extensive experience in all phases of estate and trust administration and provide our clients assistance with tax planning, tax return preparation and filing, trust and estate accounting, and distributions from an estate or trust.

Closely Held Business Planning

Protecting the wealth represented by a closely held business is a major part of our trusts and estate planning practice. The need for closely held business planning goes beyond the family business. Planning for businesses consisting of unrelated partners and shareholders requires the same level of consideration required for clients who wish to pass their business interests to their children.

Our attorneys use creative long-term "business succession plans" to minimize the potentially devastating effect of death taxes on closely held businesses. These plans may include the creation of partnerships, long-term irrevocable trusts and the use of shareholder agreements. We are regularly involved in structuring client businesses to allow the owners to obtain the most tax advantageous position.

Update Your Estate Planning Documents

Attorney James A. Tews would like to remind you to have your estate planning documents reviewed on a regular basis and kept current with your life changes. Birth, death, marriage, and divorce are but a few life changes that can significantly affect your estate planning. Don't wait until it's too late to revise your plans to reflect your wishes and circumstances.

Please contact James at 392-1250 with questions or to set up a time to review your estate plans.