ATTORNEYS SERVING PRIVATELY HELD BUSINESSES AND THEIR OWNERS

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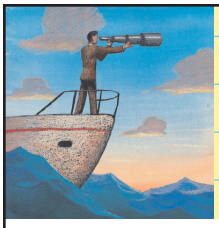

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AGE DISCRIMINATION: JUST THE FACTS

Employees are often quick to raise allegations of age discrimination, while employers typically fear such claims. But there are a number of common misperceptions about the main rules.

Background: The Age Discrimination in Employment Act of 1967 (ADEA) remains the controlling federal law. Protection under the ADEA is available to both employees and job applicants. ADEA applies to employers with 20 or more employees as well as to state and local governments.

Essentially, it is unlawful to discriminate against a person because of age with respect to any term, condition or privilege of employment, including hiring, firing, promotion, layoff, compensation, benefits, job assignments and training. But the ADEA permits employers to favor older workers based on age—even if this adversely affects a younger worker who is 40 or older.

Consider the following key areas of employment law.

Apprenticeship programs: It is generally unlawful for apprenticeship programs to discriminate based on age. Age limitations are valid only if they meet a specific ADEA exception or the Equal Employment Opportunity Commission (EEOC) grants an exemption.

Job notices and advertisements: Generally, age preferences, limitations or specifications cannot be made in job notices or advertisements, other than in rare instances when age is shown to be a "bona fide occupational qualification" (BFOQ). The BFOQ must be reasonably necessary to the normal operation of the business.

Pre-employment inquiries: The ADEA does not specifically prohibit an employer from asking an applicant's age or date of birth. Nevertheless, such inquiries may deter older workers from applying for employment or might otherwise

(see Age Discrimination ... on next page)

How to Head Off a Family Feud

Even close-knit families may be torn apart after the death of a parent, especially if the will is contested in court. Even worse, this sort of rift might easily have been avoided with advance planning.

Hypothetical example: Mrs. Smith, a widow, has three children: the oldest, Adam, is a banker; the middle child, Barbara, is a psychologist; and the youngest child, Cheryl, just began teaching elementary school. While Adam and Barbara are married and prosperous, Cheryl still lives at home.

However, if Mrs. Smith amends her will to leave more than one-third of her estate to Cheryl, the other two children may feel slighted. And since Cheryl lives at home, they might also suspect undue influence. Here are three ideas for Mrs. Smith to consider:

1. She can establish a trust through her will (called a "testamentary" trust). Mrs. Smith may keep all three children as equal beneficiaries and appoint a neutral party as trustee (e.g., a professional adviser). Once the trustee understands Mrs. Smith's intentions, he or she may be given absolute discretion to direct the money to where it is needed the most.

Hopefully, Adam and Barbara will understand when Cheryl receives an additional benefit. (They do not need the extra money anyway.) And they are less likely to contest the will under these conditions.

2. Mrs. Smith can begin a program of lifetime gifts. Frequently, wills are contested because the decedent is not alive to explain what he or she wanted. If Mrs. Smith gives away property while she is alive, her intentions are obvious.

It's doubtful that Adam and Barbara will contest the validity of a lifetime gift to Cheryl. And if they do, they run the risk of being written out of the will altogether.

3. Mrs. Smith might state in her will that anyone who contests it will be disinherited. (The statement is called an "in terrorem" clause in legal terminology.) This type of clause is generally enforced by the courts in most states to discourage litigation.

Note: It is usually best to provide something—no matter how little—for everyone in the immediate family. In any event, Mrs. Smith should mention the names of all of her children, even if only to say that she is leaving them nothing. Reason: One child may claim that an omission shows incompetency at the time the will was executed.

This is a highly sensitive area. Talk things over with your children to preserve family harmony. ✍

Age Discrimination: Just the Facts

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indicate possible age discrimination, so employers must be careful to limit requests to lawful purposes.

Benefits: The Older Workers Benefit Protection Act of 1990 (OWBPA) amended the ADEA to specifically prohibit employers from denying benefits to older employees. In limited circumstances, an employer may be permitted to reduce benefits based on age if the cost of providing the reduced benefits to older workers is the same as the cost of providing benefits to younger workers.

Waivers of ADEA rights: An employer may ask an employee to waive his or her ADEA rights in a settlement of an ADEA administrative or court claim, or in connection with an exit incentive program or other employment termination program. However, the ADEA, as amended by OWBPA, establishes specific minimum standards that must be met in order for a waiver to be considered "knowing and voluntary" and therefore valid.

This is just a general overview. Seek legal guidance pertaining to a specific claim. ✍

Ground Rules For Casual Athletes

Say you are injured in a pickup softball game with your friends. Do you have grounds for a lawsuit?

Generally, the answer for most "weekend warriors" is no. Injuries are a part of the game, and you have legally assumed the risk. But there could be extenuating circumstances (e.g., an injury caused by unreasonable behavior or faulty equipment).

Other factors, such as team sponsorships by employers and signed waivers, may come into play. Touch base with your attorney after an injury occurs.

Choosing Between Two Business Structures

If you are organizing a business structure, you may prefer to set up a small company as a traditional C corporation or an S corporation. Alternatively, you might switch from one to the other for an existing business. Before making a decision, note carefully the similarities and differences between the two forms. The following is a brief review of the two corporate formats.

The Similarities

- Each structure offers certain liability protection, so individuals with ownership interests generally will not be held personally liable for business debts and liabilities. This is often called the "corporate shield" or "corporate veil."

- Both corporations are separate legal entities governed by state law. For example, documents establishing a C corporation or an S corporation—often called "articles of incorporation"—must be filed with the state. These documents are essentially the same for C and S corporations.

- C corporations and S corporations have shareholders, directors and officers. Shareholders elect a board of directors that has oversight of the business. The board chooses the officers to manage the day-to-day affairs.

- Comparable corporate formalities must be observed, such as adopting bylaws, issuing stock, holding shareholder and director meetings, and filing annual reports.

- With either type of corporation, personal income tax is due on any compensation or dividends received by the owners or shareholders.

The Differences

- Generally, the C corporation format is the standard approach, while a special election for S corporations must be filed with the IRS. The S corporation election must be made by March 15 to be valid for that particular year.

- Other special requirements apply to S corporations. For instance, the number of shareholders cannot exceed 100 and the shareholders must be U.S. citizens or residents. These restrictions do not apply to C corporations.

- The main difference is taxation. With a C corporation, income is taxed first to the entity, and then amounts paid to owners as compensation and dividends are personally taxable, thus resulting in "double taxation." Conversely, with an S corporation, there is no tax on the entity level. Profits and losses are passed through to shareholders and reflected on their personal income tax returns.

A long trend toward switching from the C corporation format to S corporation status has somewhat abated since the highest individual tax rate of 39.6% currently exceeds the top corporate tax rate of 35% (with a 38% bubble). Nevertheless, this remains a viable option for some business owners. The decision on business structure should take all the relevant factors into account.

A third option, the limited liability company (LLC), is available to business owners and has been gaining in popularity. LLCs closely resemble S corporations. In a future issue, LLCs will be covered.

Five Home-buying Traps to Avoid

When you buy a new home, a lot can go wrong between the time you shake hands on the deal and the time you actually take the keys. Here are five potential traps to watch out for.

1. The mystery owner: After the contract is signed, a title search is conducted. The search reveals that the seller owns the home jointly with her brother. But the seller says she does not know where he is. Finding this person and having him sign the deed or disclaim his interest may take months.

2. The surprise lien: A title search may also uncover a lien other than a standard mortgage lien. For example, the IRS often places liens on property for unpaid income tax. Paying the amount that is due can clear the lien, but there may be other complications.

Suppose the amount due is greater than the seller's equity. Even if the seller provides funds to pay off the lien, this could delay settlement or closing of title.

3. The boundary lines: While it may not matter much to you that a tree, fence or garage is a foot over the property line, it certainly matters to your bank—and probably to the neighbor. Or maybe the neighbor is encroaching on the property you intend to buy. That's why a survey of the property is critical.

4. The settlement costs: You probably will have a "rough idea" of your settlement costs based on the good faith estimate from your mortgage lender. Typically, you may have to pay such expenses as property taxes, title search costs, house inspection costs, attorney closing fees and a real estate broker's fees (when appropriate). Don't forget to take these expenses into account.

5. The walk-through: Usually, the walk-through prior to closing is strictly routine. However, certain flaws may be revealed once the seller's furniture has been removed (e.g., holes in the walls or damaged floors).

These problems can be addressed (assuming both parties are agreeable) by placing a portion of the purchase money in escrow to cover the cost of repairs. But if furnishings you thought "went with the home" are not specifically included in the contract, you could be facing a drawn-out battle.

The exact laws concerning home sales vary from state to state. Obtain expert legal guidance.

BRIEFS

- I-9 Forms—With all the talk about immigration in this election year, employers should be reminded of their responsibilities relating to I-9 forms. These forms, which verify that employees are eligible to work in the United States, may be inspected by the federal government. Noncompliance can result in hefty fines and penalties. The audit threat is real, so make sure your business meets the requirements.

- Sticky Situation—An inventor is suing 3M Corporation for $400 million over a dispute involving Post-it Notes, claiming that the iconic product was originally fashioned after his "Press-on Memo." A similar legal action back in 1997 was quickly settled, but now the inventor says the manufacturer has violated the terms of the agreement. At the root of the case: The inventor says 3M is taking full credit for the invention.

- Tracking the Time—An employee who installed wireless networks drove to various work sites. His employer did not keep track of the hours he worked. Eventually, the employee sued for more than 1,100 overtime hours he says he worked, producing his own estimates based on his vehicle mileage log and records of e-mails with supervisors. Now the district court in Texas says this case can proceed.

- Pregnant Pause—In a new case, a police officer appearing at roll call without her gun belt was forced to reveal her pregnancy. Subsequently, a supervisor made a snide comment about it. The police officer sued under the laws against sexual discrimination. Although the California court said the comment did not constitute harassment in this particular case, employers should avoid potential problems.