



HINMAN, HOWARD & KATTELL, LLP

ATTORNEYS AT LAW

JUNE 2009

PRACTICE AREAS

- ▶ Banking and Financial Services
- ▶ Commercial Real Estate and Financing
- ▶ Corporate and Securities
- ▶ Criminal Defense
- ▶ Disability Benefits
- ▶ Environmental
- ▶ Estates and Trusts
- ▶ Family Law
- ▶ General Business Representation
- ▶ Health Law
- ▶ Intellectual Property
- ▶ Labor and Employment
- ▶ Litigation
- ▶ Matrimonial Law
- ▶ Oil and Gas Leasing
- ▶ Pension and Employee Benefits
- ▶ Personal Injury
- ▶ Real Property Tax Assessment and Condemnation
- ▶ Residential Real Estate
- ▶ Taxation
- ▶ Zoning, Land Use and Development

ANNOUNCEMENTS

DICK'S SPORTING GOODS OPEN
JUNE 27TH 2009



VISIT US AT WWW.HHK.COM
FOR INFORMATION ABOUT TICKETS

BACK HOME AND BACK TO WORK: RIGHTS UPON RETURN FROM MILITARY DEPLOYMENT

The Uniformed Services Employment and Reemployment Rights Act (USERRA) 38 U.S.C. §4301-4333 details the various legal rights afforded a military member, including his employment rights, upon returning from a military deployment or activation.

The latest major revisions to this statute were enacted in October 1994 (Congress further amended the law in 1996, 1998 and 2001). The revisions overhauled the World War II era Veterans Reemployment Rights Act, added several benefits, and improved the act considerably.

The purpose of USERRA is to encourage military service, minimize the disruption to both the employer and the military member and, more importantly, prevent discrimination when the military member returns to his or her civilian employment.

USERRA covers all categories of employers, regardless of size, full time, part time and probationary employees. The service that is covered, generally speaking, is initial military training, funeral duty, processing, activation, and most other types of military service. The act also provides rights to the military member for either voluntary or involuntary activation.

The act articulates the service members' duties, which primarily requires the military member to give his employer notice of a pending activation and/or departure, and also an obligation to apply for a reinstatement upon

return from duty. Notice can either be written or oral, but it must be in advance, unless it is impossible, unreasonable or precluded by military necessity. Once the military member has deployed and is returning to his civilian employment, in order to be reemployed by the employer, he must request a timely reinstatement within the five year window of being activated. The military member must also have been honorably or generally discharged from his military obligation. The military member must request to be reinstated in writing, but the statute does not set forth any prescribed format and the timing of the reapplication for reinstatement depends upon the length of service.

The employer also has certain obligations set out under the statute. A military member who seeks to be reinstated is under an obligation to apply for reinstatement. Thereafter, the employer must promptly reinstate the military member. The employer must also ensure that the military member, upon reinstatement, receives seniority credit, health benefits, pension credit and job status. In addition, the members can only be removed for cause.

In the event a military member has successfully proven that his rights have been violated under the statute, he can seek back pay, reinstatement or liquidated damages if the violation is willful.

THIS ISSUE FEATURES

- ▶ Back Home and Back to Work: Rights upon return from Military Deployment..... 1
- ▶ Swine Flu at Work..... 2
- ▶ Land Use Alert..... 2
- ▶ Borrowers Fight Foreclosure with RESPA Rights..... 3
- ▶ The IRS in the Non-Profit Boardroom4-5
- ▶ New York Limited Liability Companies 5
- ▶ Who Owns Your Website?..... 6

The statute is very useful and prescribes a variety of remedies to both the employer and the employee. If there are questions, USERRA provides for a variety of resources through the US Department of Labor, The Veterans Employment and Training Service, and the Employer Support of the Guard and Reserve. There are also a number of helpful websites. Of course, legal counsel may be consulted regarding any uncertainties, internal policies, or questions regarding possible violations of USERRA.

Article written by Joseph E. Lamendola, Esq. (Col, HQ NYANG/SJA). For more information, contact Mr. Lamendola at (315) 473-9414 or via email at jlamendola@bbk.com.

SWINE FLU AT WORK

The current news about the H1N1 Virus (formerly known as the Swine Flu Virus) has led many employers to consider how they would manage such an outbreak in the workplace. This article addresses some of the legal concerns for employers that have been raised by the possible pandemic.

Current Employment Policies

Employers should typically review their employment policies annually, and the possible virus outbreak provides an additional reason to undertake that review now. In particular, employers should ensure that they understand their current sick leave and personal leave policies, and that such policies are up-to date. For example, employers may want to modify policies that penalize excessive sick time use when that use is for illness due to the H1N1 virus or similar medical condition. Certainly, employers do not want ill employees coming to the workplace and spreading disease. Employers should also make sure that they are knowledgeable about the federal and state laws that might come into play if an outbreak were to affect employees.

Discrimination Laws

Both Federal law and the New York State Human Rights Law prohibit discrimination on the basis of national origin. The EEOC has already issued a statement reminding employers that they may not refuse to hire someone solely because the person is of

Mexican decent or recently immigrated from Mexico.

Similarly, both Federal and New York State law prohibit discrimination on the basis of an employee's disability. While it is not clear that H1N1 would rise to the level of a disability under the federal law, it will almost certainly qualify under New York State Law. Consequently, employers cannot require blanket testing of employees as a condition of employment. Employers may, however, require an employee exhibiting symptoms of the disease to be tested. The employer must pay the cost of the test and should maintain the results confidentially.

Family and Medical Leave Act

The Family and Medical Leave Act (FMLA) applies to employers with 50 or more employees and provides unpaid leave to employees for certain serious health conditions and military service of a family member. Generally, the flu in an otherwise healthy adult is not considered serious enough to qualify under the FMLA as a covered health condition. However, hospitalization, or a course of treatment by a medical provider that meets the definition under the statute may qualify an employee for leave under the FMLA.

Health Insurance and Portability Act (HIPAA)

Employers who are in possession of employees' medical information must be

careful not to disclose personally identifying information to others without authorization. HIPAA does not prohibit an employer from inquiring of employees about H1N1 exposure or requiring employees exhibiting symptoms to be tested. Moreover, HIPAA does contain some exceptions for disclosure to prevent the spread of disease, but employers would do well to consult with counsel prior to making such disclosures without authorizations or court orders.

Depending on the circumstances, other state and federal laws may affect an employer's response to a potential disease outbreak at work. Employers with concerns are advised to discuss their particular situation with an attorney.

Article written by Dawn J. Lanouette Esq. For more information, contact Ms. Lanouette at (607) 231-6917 or via email at dlanouette@bbk.com.

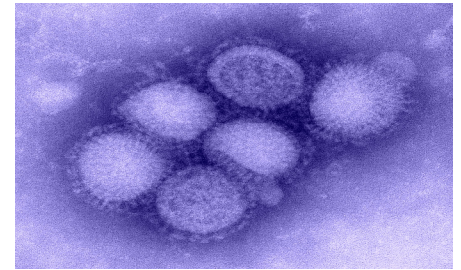


Image of the H1N1 Virus (formerly Swine Flu) from the CDC Website

LAND USE ALERT

In late March, the Binghamton City Council amended certain sections of the Zoning Regulations which may affect your property. A summary of the most significant of these changes follows:

1. Conversions of a dwelling unit to more than four (4) bedrooms in Residential Zoning Districts: The new regulations require Planning Commission approval (Special Use Permit and Series A Site Plan Review) for conversion of a dwelling unit into more than four (4) bedrooms. The new regulations also establish minimum building size and lot area requirements for these conversions to be permitted. This new section also reminds the reader that existing City off-street parking regulations and New York State Uniform Fire Prevention and Building Code specifications must be met.

2. For commercial properties, the Zoning Code has been amended to require Series A Site Plan approval from the Planning Commission for the following: all new

construction, all commercial uses, all special permitted uses, and all changes of use (including vacant to occupied). This Code modification essentially removes all administrative approval powers from the Planning Department staff.

The impacts of these changes are significant as they relate to timing. The Planning Commission meets only once each month. Applications are due a minimum of 30 days in advance of a meeting date. The Series A Site Plan Review Process requires two meetings: a preliminary meeting to address the State Environmental Quality Review Requirements and to set a public hearing; and a second meeting to hold a public hearing. Thus, the entire process requires approximately 90 days.

The full process may be waived at the discretion of the Planning Department and Building Inspector. However, the waiver criteria are very narrow and will rarely be applicable in a commercial setting.

The changes will have a significant impact on anyone who desires to convert a residential dwelling to a unit having more than four bedrooms, and also to anyone involved with commercial real estate, including developers, landlords and tenants.

Article written by Sarah Grace Campbell, Esq. For more information, contact Ms. Campbell at (607) 231-6730 or via email at scampbell@bbk.com.



Image from: Medioimages/Photodisc

BORROWERS FIGHT FORECLOSURE WITH RESPA RIGHTS

The current economic downturn and financial crisis is causing enormous stress on banks and their borrowers. Every day, it seems, we read reports about record numbers of bankruptcy filings, increased unemployment and decreased home values. In turn, these developments produce loan delinquencies, reduction in the value of collateral securing residential mortgage loans and, in too many cases, the ultimate tragic result: foreclosure proceedings.

Foreclosure does not happen overnight. Typically, it is preceded by increasingly forceful correspondence between the lender and the borrower, beginning with friendly reminders, continuing through collection letters and culminating in a demand letter from the lender's attorney. Attempts at negotiated workouts involving repayment extensions, interest rate reductions and even principal balance reductions are common.

In this Internet Age, cyber-savvy borrowers are more informed of their rights in their dealings with lenders. Encouraged by on-line advisers offering assistance for a fee, many borrowers and their attorneys are using the Real Estate Settlement Procedures Act ("RESPA") to obtain information about their loans that might increase their negotiating leverage. These requests often demand comprehensive information, including copies of notes, mortgages, deeds and other origination documents, as well as account information and other materials pertinent to the servicing of the loans.

RESPA is a federal consumer protection law enacted by Congress in 1974 and administered by the Department of Housing and Urban Development ("HUD"). Its primary purposes are: (1) to mandate certain disclosures in connection with the real estate settlement process so home purchasers can make informed decisions regarding their real estate transactions; and (2) to prohibit certain unlawful practices by real estate settlement providers, such as kickbacks and referral fees, that can drive up settlement costs for home buyers.

Section 6 of RESPA, added in 1990, details the procedure for borrowers to obtain information relating to the servicing of their loan. The information must be sought through a Qualified Written Request, which imposes a duty upon the lender, as a loan servicer, to respond. A Qualified Written Request is written correspondence which includes: (1) the name and account of the borrower; and (2) a statement of the reasons for the borrower's belief that the account is in error or sufficient detail regarding other

information sought by the borrower.

Once a Qualified Written Request is delivered, the lender has two obligations. First, the lender must acknowledge receipt of the request within 20 days. Second, within 60 days, the lender must: (1) make appropriate corrections to the account of the borrower and notify the borrower in writing of the corrections; or (2) provide the borrower with a written explanation as to why the lender believes the account is correct and supply the name and telephone number of an employee who can assist the borrower; or (3) provide the borrower with the requested information or a written explanation of why the requested information is unavailable and cannot be obtained, together with name and telephone number of an employee who can assist the borrower. During the 60 day period beginning with receipt of the Qualified Written Request, the lender may not provide information regarding any overdue payment owed by such borrower and relating to such period or Qualified Written Request to any consumer reporting agency. Borrowers can recover their actual damages against a lender that fails to comply with a proper Qualified Written Request.

Distressed borrowers have begun to use Qualified Written Requests for purposes that seem to go beyond the intent of Congress when it enacted Section 6 of RESPA. In addition to standard loan information like payment history, escrow account records and payoff balances, more borrowers now are requesting information that appears to serve no purpose other than to supply negotiation or even litigation ammunition. For example, borrowers may seek correspondence with loan officers and associated work papers in the hope that they might form a basis for a lawsuit against the lender. Lenders, of course, view these requests as illegitimate fishing expeditions that pervert RESPA's intent.

What is the proper scope of a Qualified Written Request?

HUD has provided some guidance regarding the type of information that a borrower may seek via a Qualified Written Request, as follows:

"The statute encompasses all information relating to the servicing of a mortgage loan and does not restrict the subject matter to questions

concerning the transfer of servicing, installment payments, or account balances. For example, a written inquiry concerning a collection for or disbursement from an escrow account would be a qualified written request if the correspondence contains the required identifying elements."

The courts have not defined the boundaries of Qualified Written Requests, but they have addressed the purpose and scope of RESPA Section 6 as a whole. While other courts have ruled that RESPA is a consumer protection statute whose provisions should be interpreted broadly in favor of consumer rights, a federal court in New York has decided that the statute, including its damages provision, should be read narrowly. This decision is good news for New York lenders because, while they must continue to comply with properly framed Qualified Written Requests, they can question and reject demands for documents that go beyond the basic loan servicing information of the kind described in the HUD guidance. They need not furnish documents that ought to be obtained in litigation. Also, while the New York courts have not addressed this question, lenders faced with voluminous demands might consider assessing an administrative or processing fee for responding to Qualified Written Requests.

One thing is certain: as foreclosure litigation increases, borrowers will continue to use Qualified Written Requests for possible use in negotiations or litigation, and courts will be called upon to flesh out the meaning of the law.

Article written by Clifford S. Weber, Esq. For more information, contact Mr. Weber at (914) 694-4102 or via email at cweber@bhk.com.



Image from GettyImages.com

THE IRS IN THE NON-PROFIT BOARDROOM

As a result of major changes regarding not-for-profit reporting requirements, tax-exempt organizations need to start planning now.

The 9-11 Commission Report specifically identified the failure of Treasury to anticipate that charities might be sending money to terrorist organizations. On August 23, 2004, Secretary John Snow sent his Under Secretary for the Office of Terrorism and Financial Intelligence, Stuart A. Levey, to face Congress's questions about its response, or lack thereof, to what Congress now perceived to have been an early opportunity to block at least some funding of the attacks. Mr. Levey's vague response to the Committee's demand for a plan merely antagonized them:

"The IRS is doing work to update the types of information that they are getting from organizations before they get tax-exempt status and that sort of thing. I am not sure I am familiar with all the details but I know that there is a significant amount of work going on."

This prompted Congress to begin holding a series of public hearings, all focused on the notion that American charities were somehow inadequately regulated and were, as a result, frequently used as conduits for getting funds out of the country and into hands antagonistic to the country. These hearings had the effect of pressuring Treasury to direct the IRS to find a way to control charities.

The problem was, and is, that there are 175 new tax exempt entities added every day of the week, including weekends. There is now one tax exempt entity for every 228 Americans. With the rise of the Internet, charities have become effectively stateless and cash flows across borders, facing little or no regulation. Delving into the breadth and depth of charitable operations, where they get their money and what they do with it, and the actual behaviors of their many directors, officers, employees, donors and agents, is a daunting assignment.

There is a second problem: Most charities are corporations, and corporations are creatures of state, not federal law. The federal government simply has no authority to regulate the behavior of corporations outside the statutory authority granted to it by Congress. Publicly held corporations, companies in regulated businesses such as banks, and food and drug companies are regulated as to their products and relationships with the public, but not as to how they run their corporate meetings, pay their officers or vendors, or manage their internal policies.

The IRS appears to have hit upon a solution. Rather than letting the IRS directly control corporate behavior (as that domain belongs to the states), the Service has, for the first time since 1979, revised Form 990, on which charities and other tax exempt organizations are obliged to annually report their activities to the IRS. Those revisions are extensive and the additional information which tax exempt organizations are now obliged to report requires substantial advance planning.

Particular advance planning is required for three new policies the IRS is asking about on the new form: document retention, compensation and conflicts of interest. These policies are required neither by federal nor state law, so the IRS is resorting to the enforcement body it anticipates will be most effective—public opinion. Virtually the entirety of Form 990 is open to public inspection and there are several web sites which devote themselves to publication of the filed forms. The IRS reminds the users of the

public nature of this document several times in the form and in the instructions.

The form asks about these policies and directs the filing organization to state, with yes or no answers, whether it has policies concerning document retention, compensation and conflicts of interest. The idea is, that the implied message to donors, sponsors and supporters will be that these policies are part of a well managed enterprise and, it follows, conspicuously absent from a poorly managed (or dishonest) one.

These policies must make sense for the particular organization adopting them and must, more importantly, be actually usable and meaningful for the entity and its representatives. Hence, it is essential that the policies be crafted to the organization, its purpose, and its actual business model.

The policies invoked by these three questions call for organizations to take deliberate steps to accomplish certain behaviors that the IRS believes will substantially reduce a tax exempt organization's vulnerability to improper influences.

First, an organization's records retention and destruction policies should ensure that necessary records and documents are adequately protected and maintained, and ensure that records that are no longer needed or are of no value are discarded at the proper time. In addition, it can aid employees in understanding their obligations in retaining electronic documents – including e-mail, Web files, text files, sound and movie files, PDF documents, and all Microsoft Office or other formatted files.

Second, the IRS has long believed that fairness in decision making is more likely to occur in an impartial environment. This impartial environment is protected by avoiding or effectively managing conflicts of interest.

The potential for a conflict of interest arises in situations in which a person is responsible for promoting the interest of the enterprise at the same time he is involved in a competing personal interest. While some laws regulating non-profits may limit the concern to "material interests," an organization's reputation with donors and other constituencies may be injured by personal or relational interests, and even the appearance of a conflicted decision.

To protect the impartial decision-making and reputation of both the organization and those involved with it, transactions with related parties, where a potential conflict of interests exists or may appear to exist, must be expertly handled. Such transactions should be disclosed to the governing board and evaluated to ensure they are made on a sound economic basis and in the best interest of the organization.

Third, the IRS believes that financial controls are substantially tightened when compensation to officers, directors and others is subject to some objective review by a board that includes independent directors. A sound compensation policy, then, is one of the key challenges for governing boards. How much is enough and yet not too much? Should a portion of the compensation be fixed and another part be variable based on the attainment of certain goals? How does the organization determine the relationship between the pay of the CEO and other employees? How should executive compensation compare with other similar non-profit or for-profit organizations?

Based on the public perception that some charity leaders are paid excessively, there continues to be a keen interest in the

(Continued on page 5)

(Continued from page 4)

compensation of non-profit executives. While attention centers on high salaries and benefits, many non-profits experience too many needs and too few resources. This often results in executive compensation that is exceedingly low.

Establishing a fair and reasonable compensation plan for executives is not accomplished in one step; it is a process. That process needs to be the subject of a functional and flexible, policy.

The development and approval process for these policies is time consuming and requires no small amount of knowledge of both best practices and your own legal and practical business environment. However, the impact on the organization's reputation from answering "no" to one or more of these questions requires that you deal with the issues now.

Article written by Dan M. Smolnik, Esq. For information, contact Mr. Smolnik at (607) 231-6862 or via email at dsmolnik@hbh.com.

NEW YORK LIMITED LIABILITY COMPANIES

Chances are, if you do business in New York State, you have come across a limited liability company in one fashion or another. Twenty-five years ago that may not have been the case, but these days we rarely see an individual or groups of individuals doing business without the treasured veil of protection provided by New York's Limited Liability Company Law (LLCL) or as traditionally provided by a separate corporate structure. New York's LLCL was formally enacted in 1994 and, at present, practically all states have enacted limited liability company statutes.

Generally speaking, limited liability companies may be formed for any lawful business purpose. In New York, one or more individuals associated with the LLC act as the organizer by preparing, executing, and filing Articles of Organization with the Secretary of State. At the time of formation, an LLC must have at least one member, which can be an individual or other type of entity.

As with other business organizations in New York State, naming the entity can be challenging, as statutory restrictions that govern the name stem from the New York Business Corporation Law. The entity's name must be distinguishable from all other business entities registered with the New York Secretary of State. In addition, the name must contain the words "limited liability company" or the abbreviations "L.L.C." or "LLC," referencing its technical legal status.

Within ninety (90) days of formation, the member(s) must adopt an Operating Agreement. An Operating Agreement is the document that defines the rights and obligations of the members and sets forth company procedures similar to the by-laws of a corporation. The Operating Agreement is a flexible document that can be amended by the members as business conditions change or develop over time.

Unlike traditional corporations, LLC's do not have a board of directors. The Articles of Organization can provide that management of the LLC be vested in a manager, managers, or class of managers. If the articles are silent as to managers, then management of the LLC vests in its members, subject to the Operating Agreement, which can allocate management to one or more specified members. Those managers or members assigned with management of the LLC act as agents for the LLC for purposes of its business by legally binding the LLC contractually or otherwise.

Generally, the main attraction of forming any business entity is to obtain a limitation on personal liability. New York LLCL Section 609 provides that members or managers of an LLC are not generally liable for debts or obligations of the LLC, as long as they are acting on behalf of the LLC in their capacity as a member or manager.

Significantly, these liability limitations extend to claims made by creditors of the LLC, contractors, vendors or vendees, and to those who may be injured by some act on behalf of the LLC. They are, in essence, the same limitations of liability previously afforded shareholders of a corporation. Monetarily speaking, a member of an LLC is personally liable for his contributions to the capital of

the LLC and any additional future capital contributions that may have been promised pursuant to the Operating Agreement. In most instances, a member of an LLC can usually only lose his investment in the LLC.

Since an LLC is a pass-through entity, all the tax attributes, income and otherwise, pass-through to the individual members. In addition to liability protection, the pass through nature of LLC ownership is one of its most attractive attributes. An LLC combines the liability protection of a corporation with the tax benefits of a partnership.

Traditionally, there are a number of different types of business entities which are also available in New York State. Selection of these other options depend specifically on the facts of each individual case, as there can be no one entity which is appropriate in all circumstances. These other entities include sole proprietorships, general partnerships, limited partnerships, and corporations with their varying elections.

LLC's, however, have certain attributes that make them an attractive option to many new businesses and differentiate them from other forms of business entities.

Sole proprietorships do not provide the limited liability protection of LLC's or corporations. Traditional corporations are not pass-through entities, so the corporation is taxed at the corporate level and at the shareholder level. Subchapter S-Corporations combine limited liability protection with pass through tax attributes, but S-Corporations have restrictions on who can be shareholders, have no flexibility on how profits are split up among owners and are subject to the same corporate formalities of traditional corporations. LLC's offer greater flexibility in ownership, profit sharing and ease of operation. There are no restrictions on who can be a member of an LLC, and profits can be split up in any way the members deem appropriate. LLC's even permit profits to be shared with individuals or entities that are not capital members of the company. Further, LLC's are not subject to the corporate formalities that traditional corporations and S-Corporations must follow.

The factors to be considered in selecting a form of an entity would include ease of organization and operation, availability of resources, management, ownership interests, ability to control other members, transferability of ownership interests and, of course, the extent of the liability protection afforded. Given the ease of organization, flexibility, ownership and management issues together with the added benefits of being a pass-through entity and still providing the liability protection often sought in these respects, a New York limited liability company can be an excellent option for a new business.

Article written by Ronald L. Greene, Esq. and Ryan M. Mead, Esq. For information, contact Mr. Greene at (607) 231-6718 or via email at rgreene@hbh.com, or Mr. Mead at (607) 231-6928 or via email at rmead@hbh.com.

WHO OWNS YOUR WEBSITE?

Unpleasant Surprise on the Internet

After spending hundreds or thousands of dollars for a web designer to develop the perfect image and message for customers or clients, you may find that you do not own what you think you do. Often, we see companies learning this lesson the hard way, when the web designer refuses to allow the web site to be copied or used as a template for another site. Or worse, sometimes the web designer attempts to extort the very party that has paid him or her.

How can this happen? After all, you paid cash for the development. You may have entered into an agreement, prepared by the web designer, that spelled out your designer's duties and obligations. It does not seem logical and it certainly does not seem fair that you, the principal, would not have complete ownership and the right to use the web site materials any way you wish. It may not be fair, but unfortunately, like certain other situations, it is legal.

Enter the Copyright Act

Our Founding Fathers included an important provision in the U.S. Constitution that went into effect in 1789. It stated that Congress had the power to secure for authors, for limited times, the exclusive right to their writings. This provision was to protect the individual artist from unfair copying of his or her creative work. The original Copyright Act was enacted in 1790.

The Copyright Act lists an ever-growing number of "writings," now called "works of authorship," that are protectable under our copyright law. In 1790, the list included only maps, charts and books. In the years following, the list was expanded to include prints, dramatic compositions, photographs, music and choreographic works, motion pictures, sound recordings, works of authorship from which works can be

perceived, reproduced, or otherwise communicated with the aid of a machine or device, computer programs, and architectural works. And in 1998, the Act was supplemented by the Digital Millennium Copyright Act, which specifically prohibits certain activities relating to computer software.

Under the original Act, and surviving to this day, is the clause, "the owner of copyright... has the exclusive rights to do and to authorize" a number of activities, including reproduction of the work and preparation of works that are derived from the original.

But Who is the Owner?

Since it is clear that the owner has exclusive rights (i.e., the right to exclude others), the question is who is the owner, especially of works that are commissioned by another party.

Case law has settled the question (for now), holding that, absent an agreement to the contrary, the individual who creates the work is the owner of the copyright. For example, you may pay a photographer \$50,000 to shoot a single photo of a wedding party, you may show him exactly what you want, and he may merely snap the photo, but it is he, the photographer, who owns the copyright rights and you will not have the right to make a copy for yourself.

As another example, you may provide all of the text and images for a web site, and even give the web designer detailed directions to arrange those images and text on the computer screen. Of course, you agree to pay the designer, possibly an exorbitant amount of money for his services. But it is still the web designer who owns the work.

As unfair as it seems, this outcome is entirely consistent with the Framers' intent to reward creativity by giving the author exclusive rights to his work.

Exception to the Rule

As the 17th century vicar at Oxford University was fond of saying, "No rule is so general, which admits not some exception." Here's the exception to the general rule of copyright ownership: if the "author" is your employee, you own the copyright rights. How will a court know if the author is an employee? A line of cases culminating in a 20-year-old U.S. Supreme Court case, *CCNV v. Reid*, spells out factors that would lead a court to conclude there is an employer/employee relationship. Factors, among others, to be considered include whether you withhold taxes from the designer's pay, and whether the designer uses your equipment and materials to do his job.

Even if a designer is clearly not an employee, a written agreement signed by him can take care of the situation. If both parties agree that the end product is a "work made for hire," courts will generally decide that the designer has created a work whose copyright rights are transferred to the entity that commissions him. These four magic words - "work made for hire" - when included in a written agreement, allow the entity that commissions the work to own the copyright rights. A well-drafted copyright assignment agreement, however, will also include a clause that expressly assigns the work to the commissioning entity, regardless of whether the court rules that the work was one made for hire.

Needless to say, it makes sense to reduce the agreement for web site design to writing before the payment is made and the work begins.

Article written by Mark Levy, Esq. For more information, contact Mr. Levy at (607) 231-6991 or via email at mlevy@hhk.com.



FOR MORE INFORMATION

Hinman, Howard & Kattell, LLP
700 Security Mutual Building
80 Exchange Street
P.O. Box 5250
Binghamton, New York 13902-5250

Phone: (607) 723-5341
Fax: (607) 723-6605
www.hhk.com

This newsletter is for information purposes only, and does not constitute legal advice. The Publisher assumes no liability for the reader's use of information herein.