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REMINDER

REAL PROPERTY TAX

Grievance Day
is fast approaching!

See page 3

DISCRIMINATION LAW UPDATE

Disability Discrimination

The Equal Employment Opportunity Commission (EEOC) has released data showing that filings of discrimination and retaliation claims remained high in 2009 (though slightly lower than the record year in 2008). Disability discrimination claims showed the greatest increase in filings. With the recent amendments to the Americans with Disabilities Act (ADA) that make it easier for an employee to maintain such a lawsuit, this trend is likely to continue. Consequently, the wise employer will take steps now to avoid such claims.

Employers should have a policy that not only addresses discrimination on the basis of disability, but also provides a path for an employee to request a reasonable accommodation of any disability. Too often, employers do not have a clear policy for employees to request a needed accommodation. Such a policy should include to whom the employee should go and what documentation an employee is required to provide.

Of course, a policy means nothing if the appropriate people are not properly trained. Supervisors, managers and human resources personnel need to be aware of employer obligations under the ADA and have a means of engaging an employee in an interactive

process to determine an appropriate accommodation when feasible.

Finally, employers should be wary of overbroad policies that may affect people with disabilities. The EEOC recently won a multi-million dollar settlement in a case where the employer had a blanket policy of terminating people who had exhausted their sick leave, without attempting to ascertain whether employees were capable of doing some work or whether light duty was an option. Such blanket policies will continue to draw scrutiny from the EEOC and state agencies.

Failure to Conform to Gender Norms

While the New York Human Rights Law (NYHRL) protects employees from discrimination on the basis of sexual orientation, federal law does not. New case law may, however, signal a trend recognizing discrimination on the basis of sexual orientation under a theory of discrimination based on an individual's failure to comply with typical gender behavior.

Last September, the Third Circuit (governing Pennsylvania, Delaware, New Jersey and the U.S. Virgin Islands) upheld a federal claim by a male machine operator, who was admittedly gay and effeminate, on the grounds that he was

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discriminated against because of his co-worker's and manager's perception that he did not "conform" to their view of a typical male. More recently, the Eighth Circuit (governing Arkansas, Iowa, Minnesota, Missouri, Nebraska, North and South Dakota) allowed a claim to go forward against a hotel by a female clerk who was characterized by a manager as masculine and not a typical Midwestern girl. While neither case has advanced beyond the preliminary stages, both decisions signal a greater

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DISCRIMINATION LAW UPDATE (CONTINUED)



Photographed by ComStock Images

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willingness by the courts to consider such claims.

As noted, New York employers are already prohibited from discriminating on the basis of sexual orientation. The increase in federal claims, which allow for attorney's fees if the plaintiff is successful, should serve as a reminder to all employers to ensure that their decisions are based on

rational, business related factors, and that their work environments are free from bullying and harassment of any kind.

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HOMEOWNER TAX CREDITS ARE STILL AVAILABLE

The deadline to claim the First Time Homebuyer Tax Credit is quickly approaching. Taxpayers who are eligible to claim this credit must enter into a binding contract to purchase a home by April 30, 2010, and must close by June 30, 2010.

The taxpayer must be a "first time homebuyer," which is defined as a person who has not had an ownership interest in a principal residence within the past three years. The credit is 10% of the purchase price, with a maximum credit of \$8,000. In order to claim the full credit, annual income must not exceed \$125,000 for an individual or \$225,000 for married people. Individuals with incomes of \$145,000 or less and married couples with incomes of \$245,000 or less may claim a reduced credit.

Below is a list of common questions and answers regarding the credit:

• I qualify as a first time homebuyer, but my parent is co-signing on my mortgage. If they do not qualify as a first time homebuyer, may I still claim the credit?

Yes. If you meet all of the other requirements, you are not precluded from claiming the full credit simply because your parent is co-signing on your loan. The same rule applies if you are purchasing a home with an unmarried individual who does not qualify as a first time homebuyer.

• I am legally separated from my spouse. My spouse owns a principal residence but I have not lived there or owned a principal residence within the past three years. Will I qualify for the credit?

No. Even if you file a separate tax return, the IRS requires that neither the taxpayer nor the spouse have owned a principal residence within the past three years.

• I am purchasing my home by land contract, but I will not have my name on the deed. Do I still qualify for the credit?

Possibly. If you purchase your home by a land contract or similar installment contract, you may still claim the credit if you maintain the "benefits and burdens" of homeownership, even if you are not named on the deed. The IRS will consider the following in determining eligibility: the right of possession; the right to obtain title upon full payment of the purchase price; the right to improve the premises; the obligation to pay taxes; the risk of loss; the obligation to insure property; and the obligation to maintain the property.

• If I am named on the deed to my home, but did not purchase it or make mortgage payments, can I still qualify as a first time homebuyer?

No. If your name is on the deed to your principal residence, you are considered to have an ownership interest and you do not qualify for the credit. Similarly, an individual who inherits a principal residence is not eligible as a first time homebuyer.

• I want to sell my house to my child. Will they qualify for the credit?

No. You may not claim the credit if you purchase the home from a close relative, including a parent, spouse, grandparent, child or grandchild.

Along with filing IRS Form 5405, taxpayers claiming the credit must also submit a settlement statement with their return. The IRS requests that the settlement statement contain the address of the property and signatures of both the buyer and seller.

The IRS website (www.irs.gov) includes download able forms, defines the requirements for the credit, and answers common taxpayer questions regarding whether they qualify for the credit.

Long time homeowners may also be eligible to claim a credit of up to \$6,500.00 for the purchase of a replacement principal residence. A binding contract of sale must be signed by April 30, 2010 and the closing must occur before June 30, 2010. Taxpayers are not required to sell their former residence to qualify for the credit, but they must use the new home as their principal residence.

To receive this credit, taxpayers must provide documentation to the IRS that shows that they lived in their former home for five consecutive years during the eight-year period ending on the date the new home is purchased. The homebuyer is not required to own a home at the time they purchase, only to have owned a home for five consecutive years within the eight year period.

Taxpayers should refer to the IRS website and consult an attorney or an accountant to confirm that they meet all of the eligibility requirements for the credit.

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TAX UPDATE: DISCHARGE OF INDEBTEDNESS INCOME IN 2009-2010

As you may or may not be aware, whenever you discharge a debt or have a debt forgiven, you must include the amount discharged or forgiven as gross income on your tax return. The IRS's rationale is that, since you do not have to pay the debt back, you have generated "income" for yourself or your business (when in reality you have not earned a dime). This type of phantom income is known as Cancellation of Debt (or COD) income. The person or entity that discharges or forgives the debt is required to report the COD income to the IRS, and to provide a 1099c to the "recipient."



Photographed by 4 Eyes Photography

Prior to 2009, you could avoid tax on COD income by excluding it from gross income under one of four different categories under Section 108 of the Internal Revenue Code. The first two exceptions were based on the status of the taxpayer: if you were in Chapter 11 bankruptcy or you were insolvent (e.g., your liabilities are greater than the market value of your assets), you could exclude the COD income. The second two categories were based on the type of debt: if the debt was qualified farm indebtedness or was qualified real property business indebtedness, you could also exclude COD income. Otherwise, you had taxable COD income.

Recently, the American Recovery and Reinvestment Tax Act of 2009 added a mechanism for deferring recognition of qualified COD income and to spread the tax payments out after COD income is recognized. If the deferment election is made under IRC § 108(i), qualified COD income incurred in 2009 or 2010 is reported ratably as income from 2014 to 2018. This means that you do not have to pay tax on deferred COD income until 2014 and tax payments are spread out over five years until 2018. The COD income deferral is available for qualified transactions that occur after December 31, 2008 and before January 1, 2011. Taxpayers have an automatic twelve month extension to make the deferral election from the due date (including extensions) of the federal income tax return.

The IRS has issued guidance to taxpayers showing how the COD income deferral election may be used with the COD exclusions explained above. One example is to make a

protective COD income deferral election and treat the COD income as falling in one of the exclusions. If the IRS determines that the COD income does not fall within one of the four exclusions, your protective COD income deferral election allows you to pay the tax in the years 2014-2018.

Another example is to exclude some of the COD income and defer some COD income. Some taxpayers may be benefited by excluding a portion of the COD income and deferring the rest to 2014. A partnership (or LLC) can elect to defer one partner's share of COD income to 2014 while the other partner may elect to pay the COD income tax in the year it was incurred.

There are many qualifications and criteria to meet should a taxpayer wish to exclude COD income or defer COD income. Additionally, if the COD income exclusion or deferral is allowed by the IRS, there are procedures that must be followed with respect to the debt and COD income. If you had COD income in 2009 or plan to have COD income in 2010, you should speak with your tax advisor or attorney to review the applicability of IRC § 108 to your situation. Sources: IRC § 108, Rev. Proc. 2009-37, PLR 200953005.

IRS Circular 230 Disclosure

To ensure compliance with requirements imposed by the IRS, we inform you that any U.S. federal tax advice contained in this document is not intended or written to be used, and cannot be used, for the purpose of (i) avoiding penalties under the Internal Revenue Code, or (ii) promoting, marketing, or recommending to another party any transaction or matter that is contained in this document.

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GRIEVANCE DAY

If you own residential or commercial property and feel that you are over-assessed, you must file a grievance complaint with your local assessor on or before Grievance Day.

Grievance Day is typically the fourth Tuesday of May (May 25, 2010). However, some municipalities differ, so check with you local Assessor's Office.

For questions or concerns about your real property tax assessment, contact Paul T. Sheppard, Esq., at (607) 231-6729 or sheppard@hbkc.com or Tina Fernandez, Esq., at (607) 231-6913 or tfernandez@hbkc.com



Photographed by Yellow Dog Productions

RIGHTS AND RESPONSIBILITIES OF EMPLOYERS AFTER A WORK RELATED ACCIDENT

We all know that accidents happen, but what is required and what an employer should do when they occur at the workplace is not always as clear.

Preliminarily, all employers should review their compliance with the notice requirements of the Workers' Compensation Law. This requires every employer to post—in a conspicuous place—a typewritten or printed notice that the employer has secured the payment of compensation to its employees. This notice should also list the name of and contact information for the insurance carrier, and the policy number of the employer. Most employers obtain this form (Form C-105) from their workers' compensation insurance carrier.

Once an injury occurs, the injured worker should receive all the necessary medical treatment required. The employer should then fully investigate the accident. The injured worker should fill out an accident report, fully detailing the circumstances of the injury. This report should include the names of potential witnesses to the accident, along with the nature of the injury suffered to the particular body parts.

The employer is then required to report the accident to the New York State Workers' Compensation Board ("Board"). Specifically, within ten days of the accident, the employer (or a third party on behalf of the employer) is required to file a report, with the Board, of any accident that will cause a loss of time from work or will require medical treatment beyond ordinary first aid. Even if the injury does not result in a loss of time from work or require medical treatment, the employer is still required to document the accident and maintain the accident report in its records.

Employers should be prepared to produce records regarding the employee. Pursuant to Workers Compensation Law § 131, an employer must keep accurate records of the number of employees, classification, wages and accidents for their business for four years. The employer will be required to provide the Board with payroll information for the injured worker for the entire year prior to the date of the accident.

The majority of injured workers return to work after a short period of lost time and after receiving medical attention. However, work related injuries can result in more than just increased premiums. Injuries can result in lost productivity, increased overtime, decreased

employee morale, and the costs of hiring and training new employees. In order to reduce the costs that employers and insurance carriers incur as a result of work related injuries, the Board is encouraging employers to initiate a "Return to Work" program.

Essentially, a successful Return to Work Program focuses on the goal of successfully restoring the employee to gainful and appropriate employment as soon as medically possible. This requires the employer to communicate with the employee, the insurance carrier, the health care provider, and the employee's legal representative. By reducing the injury recovery time, the employer can avoid some of the costs attendant to work-place injuries. For example, a return to part-time employment can result in a reduction in the wage replacement benefits that are paid to injured employees, thus



Photographed by Monty Rakusen

reducing the insurance carrier's cost, which will result in reduced premiums.

Obviously, the best way to reduce the costs of work related injuries is to prevent injuries in the first place. However, when injuries occur, an employer should be ready to comply with the law and assist the injured worker. In the long run, compliance and assistance are in everyone's best interests.

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CARBON MONOXIDE DETECTORS MANDATED

On February 22, 2010, Amanda's Law went into effect, requiring installation of carbon monoxide detectors in most New York homes. Carbon monoxide detectors are now required in every one- or two- family dwelling, and in most multiple dwellings. An alarm must be installed on the lowest sleeping level of the home, at a minimum. The only dwellings exempt from the law are those without gas sources and with no garage.

It is recommended, but not required, that homeowners install a carbon monoxide detector in a central location outside each sleeping area, and on each level of the home. While

battery-powered carbon monoxide detectors may be installed in homes built prior to January 1, 2008, houses built after must have hard-wired alarms.

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Photographed by Stockbyte

S U M T H I N G T O T H I N K A B O U T

Imagine that you are driving home, listening to an interview on NPR that is somehow both interesting and tranquilizing, when BAM!, you are T-boned by a teenaged driver who was too busy texting or tweeting or twizzling to notice the stop sign that she just ran through. Imagine further that you are injured badly enough to seek out legal counsel to explore your options. Let's address some of the questions that you might have, and focus on an issue that is all too often ignored until it is too late.

First, are your medical expenses and lost wages going to be paid? Yes. New York is a "no fault" insurance state, which means that all drivers are required to maintain insurance coverage on their own vehicles that will afford coverage for "basic economic loss." Essentially, your own insurance company will be paying your out-of-pocket damages, subject to certain limitations, including a maximum pay-out of \$50,000. These payments adequately address most injured party's immediate concerns.

Second, can you sue anybody to recover additional damages? Maybe. In this regard, there are both threshold and practical limitations. Under the No-Fault Law, an individual injured in an automobile accident can only sue if he has sustained a "serious injury." There are a number of statutory definitions regarding this standard, the details of which would warrant an entirely separate article.* Suffice to say that most "soft tissue" injuries, such as whiplash, are not going to qualify.

Assuming that you have sustained a serious injury, the next question is: who can you sue? In other words, what damages are you really going to be able to collect from a 17 year old driver?

In New York, the owner of the motor vehicle responsible for the accident is vicariously liable for the negligence of the driver (unless the owner is a rental agency). As such, if the young motorist's parents actually own the car, they are potential defendants. But the real target of any action for damages is the defendant's liability (as opposed to your own no-fault) insurance company. Just so that no one feels bad about going after their money, we will call them "AGI."

Now that we have a defendant and insurance, the inquiry turns to the matter of available coverage. New York requires a minimum policy of \$25K per person/\$50K per accident. If you were the only victim of this accident, and the other driver had a minimal policy, this means that you will only be able to collect a maximum of \$25,000 from AGI. This may seem terribly inadequate, especially if you have been seriously injured. Financially conscientious drivers,

* Just to illustrate, here is a list of the Top Ten Serious Injury Categories or Heavy Metal Group Names: (10) Significant Disfigurement; (9) Metallica; (8) Fracture; (7) Permanent Consequential Loss of Use; (6) Anthrax; (5) Dismemberment; (4) Black Sabbath; (3) Significant Limitation of a Body Function or System; (2) Death; and (1) Megadeth.

especially those with other assets to protect, often opt for additional liability insurance coverage; perhaps \$100K /\$300K or even \$500K /\$1M. Despite that, odds are fairly good that your opponent in this litigation will only have \$25,000 in available coverage. Now what?

At this point, your lawyer should have a question for you: what are your SUM coverage limits? SUM (or Supplemental Uninsured/Underinsured Motorists) coverage affords responsible drivers an opportunity to protect themselves against other drivers who are not only negligent, but underinsured. Nevertheless, for reasons that are unclear, many people do not have anything approaching adequate SUM coverage.



Photographed by Eric Van Den Brulle

SUM coverage is relatively inexpensive, but there is often a lack of information attendant to its availability. New York does mandate a minimum level of uninsured coverage equal to the \$25K/\$50K limits described above. However, in order for a SUM policy to actually provide underinsurance coverage, it has to exceed these minimum liability limits. That is because the coverage is literally supplemental, and is effective only where the injured party's SUM limits exceed the defendant's liability limits. In other words, if the AGI limits are \$25K/\$50K, and you have SUM coverage of \$50K/\$100K, you could collect \$25,000 from AGI and an additional \$25,000 from your own carrier. Obviously, the more SUM coverage you carry, the better protected you will be.

SUM coverage entails a number of preconditions, including prompt notice to the SUM carrier following an accident, securing the SUM carrier's consent before settling with the defendant, and exhausting the defendant's "available coverage." Disputes with the SUM carrier can be resolved via arbitration or in a separate court action. The bottom line is pretty clear: you should carry at least as much SUM coverage as you have in liability coverage.

One final note in the personal injury world: Over the past decade or so, there has been a lot of uncertainty regarding the rights of health insurance companies to reimbursement from damages paid to injured plaintiffs, especially as the result of out-of-court settlements. In some situations involving limited liability or limited assets, medical insurers were asserting the right to recoup all of a plaintiff's recovery, even where the parties specifically stipulated that the settlement proceeds included no recovery for medical expenses, and even where no such recovery would be permitted if the case went to trial.

In November 2009, the New York State Legislature corrected this situation by adding Section 5-335 to the General Obligations Law. This new anti-subrogation law provides that health insurance carriers have no right to recover payments made to or on behalf of the insured out of settlement proceeds. While there are still some questions regarding the interplay between this provision and the federal ERISA law, it is a giant step in the right direction.

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LABOR LAW SECTION 193-a POTENTIAL MINEFIELD FOR EMPLOYERS

As New York State faces yet another budget crisis, some departments, including the Department of Labor, are stepping up enforcement actions against employers. Recent comments from the Department indicate that there is particular focus enforcement against employers who violate Labor Law §193. This statute prohibits employers from making any deductions from an employee's wages unless those deductions: 1) are expressly authorized in writing by the employee; 2) are for the employee's benefit; and 3) fall into the following categories: insurance premiums, pension or health and welfare benefits, contributions to charitable organizations, payments for United States bonds, payments for dues or assessments to a labor organization, or similar payments for the benefit of the employee. The "similar payments" provision has been held to limit deductions to items that fall into one of the enumerated categories or are related to one of the enumerated categories.

Most employers are aware that Section 193 prohibits them from deducting from an employee's wages, an employee's cash shortages or amounts for damage to company property. Section 193 also prohibits "company store" credit purchases that directly benefit the employer, such as a fee for cashing an employee's payroll checks.

Employers are often not aware, however, that Labor Law §193 prohibits employers from making payroll advances to their employees that will be recouped from later paychecks. The Department of Labor and courts have reasoned that such advances

and deductions are not related to the categories contained in the statute and are thus impermissible even if the employee agrees.

Perhaps even more frustrating, Labor Law §193 has been found to prohibit an employer from recouping overpayments of wages in most circumstances. Recently, we requested and received an opinion from the Department of Labor on the topic of recoupment of wages.

The Department advised that an employer who has overpaid an employee may reach out to the employee and ask them to voluntarily agree, in writing, to have the amount deducted from the employee's future wages. The employer must advise the employee that a refusal to agree to the wage deduction will not result in disciplinary action against the employee. If the employee refuses, the employer may not take any disciplinary action against the employee for the refusal. The Department declined to comment on whether the employer could take disciplinary action against an employee who knew he or she had received an overpayment of wages, but did nothing about it. If an employee refuses to



Photographed by Jeffrey Coolidge

agree to the recoupment, an employer's only choice appears to be to bring a lawsuit against the employee to recover the overpayments.

Labor Law §193 provides a number of pitfalls for employers. Employers are advised to speak with counsel before making deductions from employees' wages to avoid investigation by the Department of Labor.

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