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DECEMBER 2010

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## THE FEDERAL ESTATE TAX IS BACK AND BETTER THAN EVER

After a year hiatus, the federal estate tax will return effective January 1, 2011. On December 17, 2010, President Obama signed into law the Tax Relief, Unemployment Insurance Reauthorization, and Job Creation Act of 2010 (the “2010 Act”). Included in the 2010 Act is the reinstatement of the federal estate tax—a tax imposed on the transfer of property at death. In order to understand the implications of the new law, some background is necessary.

### Brief History of Federal Estate Tax

Since 1916, the federal government has imposed a tax (commonly referred to as the “death tax”) on the testamentary or intestate transfer of property. Although the tax applies to every estate, the tax code provides an exclusion amount that protects smaller estates from the burden of the estate tax. If the taxable estate is less than the exclusion amount, the estate owes no estate tax. The exclusion amount rose from \$50,000 in 1916 to \$675,000 in 2000. In 2001, the Economic Growth and Tax Relief Reconciliation Act of 2001 (the “Bush Tax Cuts”) increased the exclusion amount such that, by 2009, it stood at \$3.5 million. The culmination of the Bush Tax Cuts was the complete elimination of estate tax in 2010. In 2011, however, the estate tax was to have returned with an exclusion amount of \$1 million and tax rates as high as 55%.

### The 2010 Act

The 2010 Act reinstates the estate tax retroactive to January 1, 2010 with an exclusion amount of \$5 million per estate and a maximum tax rate of 35%. This rule has important implications for estates where the decedent died between January 1, 2010 and December 31, 2010. In such cases, the executor is given a choice to either apply the 2010 Act or not. If the executor applies the act, the estate will owe tax if it exceeds \$5 million. However, heirs are given a stepped-up basis in inherited property equal to the fair market value on the date of death. If the executor does not apply the act, the estate will not owe any tax. However, heirs will receive a limited stepped-up basis in inherited property and, therefore, may need to pay tax on capital gains from inherited property.

Moreover, the 2010 Act makes the exclusion amount portable between spouses. In other words, if a husband does not use up all of his exclusion, he may pass the unused portion on to his surviving wife. To illustrate: under the 2010 Act, each spouse has a \$5 million exclusion from federal estate tax. If the husband dies in 2011, leaving a taxable estate of \$3.2 million, the law recognizes that he has

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HAPPY NEW YEAR!

# HH&K

WISHES

YOU AND  
YOUR FAMILY

A HAPPY NEW YEAR!

CONGRATULATIONS!

WE ARE PLEASED TO  
ANNOUNCE THAT  
**TINA FERNANDEZ**  
BECOMES A PARTNER  
IN THE FIRM EFFECTIVE  
JANUARY 1, 2011

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## THE FEDERAL ESTATE TAX (CONTINUED)

(Continued from page 1)

not used \$1.8 million of his exclusion. Therefore, the surviving wife may add the \$1.8 million of unused exclusion to her own \$5 million exclusion, allowing her to exclude \$6.8 million from federal estate tax.

Finally, the 2010 Act sets the federal gift tax and generation-skipping tax exclusions at \$5 million with a 35% tax rate for gifts over the \$5 million threshold. It is important to note, however, that every dollar used in gift tax exclusion reduces the estate tax exclusion by the same

amount.

The 2010 Act is set to expire on December 31, 2012, when the exclusion amount will return to \$1 million and the maximum tax rate will return to 55%. Accordingly, you should consult an attorney to discuss a strategy that will enable you to take advantage of this generous tax law in a manner that will minimize your future estate tax liability.

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## 2011 HEALTH CARE REFORMS

With the New Year comes a new set of health care reforms. What follows are several of the reforms scheduled to go into effect in 2011. Please note that this list is not exhaustive.

**Reporting the Cost of Health Care Insurance on W2 Forms:** Every employee's W2 for tax year 2011 must show the cost of employer-provided health coverage. Although this will not apply to the 2010 W2s that your employees will be receiving in January, it will apply to any W2 that is requested during the 2011 tax year. If your plan is self-funded, look for the IRS to release guidance soon regarding how to calculate the cost of coverage.

**Automatic Enrollment for Full-Time Employees Who Work for Large Employers:** Employers with over 200 employees who provide health insurance coverage must automatically enroll new full-time employees. Employees can choose to opt out of their employer's insurance coverage.

**Requirements for Grandfathered Plans:** If an employer's health insurance plan existed on March 23, 2010 and had at least one participant enrolled, it can choose to continue with that plan. In addition, the plan can cover new employees. These health plans must continue to enroll at least one person in order to remain "grandfathered." A plan can also lose its grandfather status for many reasons, including, but not limited to: (1) the employer decides to change insurers; (2) the plan eliminates benefits to diagnose and/or treat certain conditions; (3) the amount of an insured's copayment increases beyond the medical inflation rate; or (4) the employer decides to drastically reduce its contribution rate.

**Insurance Coverage for Adult Children:** Nationally, health plans must extend a child's eligibility to participate in their parents' health plans through age 26. The health coverage must be tax-free and provided regardless of whether or not the child is considered a dependant for tax purposes. Children who were previously ineligible may re-enroll during open enrollment. In New York, however, required insurers must provide an option for young adults to purchase insurance through a parent's employer until age 29. For a young adult to take advantage of this provision, the young adult's parent must also participate in the employer's group policy. In order to be eligible, the young adult must (1) be unmarried; (2) be age 29 or under; (3) not be eligible for health insurance through his or her own employer;

(4) live, work or reside in New York State; and (5) not be insured by Medicare. A young adult is eligible for coverage even if he or she does not live with the parent, or is not financially dependent on the parent, or is not a student.

**Prohibition on Lifetime and Annual Limits:** Beginning in 2011, there is a general prohibition on lifetime and annual insurance policy limits for participants' essential health benefits. Currently, essential health benefits are defined to include, but are not limited to: emergency services, preventative and wellness services, pediatric services, maternity services, prescription drugs and hospitalization services.

**Restrictions on Reimbursement for Over the Counter Medication:** Medicines obtained without a prescription are no longer reimbursable through a health savings account, flexible spending arrangement, or health reimbursement arrangement. This restriction does not apply to insulin.

**Prohibition on Exclusion Based on a Child's Pre-Existing Condition:** Health plans cannot exclude children under age 19 for preexisting conditions.

**Establishment of the Community Living Assistance Services and Support Act (the "CLASS Act"):** Employers may choose to automatically enroll their employees into long-term care insurance, via payroll deductions, to provide aides and other help if the beneficiary requires care but desires to continue to live in the community. After 2016, if an employer has automatically enrolled an employee and the employee becomes disabled, as defined by the law, the employee can receive a cash benefit of at least \$50 per day. An employee can choose to opt out of the program once enrolled by an employer.

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Photographer: Jeffrey Hamilton

## PLACING PRODUCTS IN YOUR PRODUCTION

How would you like to earn \$15 million on your next photograph or video production merely by moving some burgers around on camera? That's what the producers of *Men in Black II* did in 2002 when Burger King paid them to have BK products appear on screen. Although Burger King may not be willing to give you \$15 million to advertise its products in your photographs or independent movie, you can always seek smaller deals to help subsidize your production.

Product placement is a form of advertisement in which particular brand names or products are incorporated into your work. Advertisers often prefer the subtlety of this method of exposure, as compared with explicit commercials that may bother potential customers. Product placement has become more commonplace as a means to subsidize increased film or still photograph production costs.

However, as an independent creator, you may not have the luxury of receiving compensation in exchange for your depiction of a particular trademark or brand name. It is not uncommon for a trademarked item (e.g., Coca-Cola, Prada, Corvette) to be displayed in a film or photograph, regardless of whether the exposure was deliberate. If you include an identifiable brand name in your production, you should become familiar with the array of laws and regulations surrounding the matter.

### You Can Use Trademarks

The Trade Marks Act of 1985 prohibits the "unauthorized use of trade marks as trade marks." Consequently, you generally can display a trademarked product in your production. For example, your actor

may drink a cup of McDonald's coffee without infringing McDonald's registered trademark. As long as the trademark is not represented as a "badge of origin" it will not be a cause of concern for you. In fact, if you can get Will Smith to drink from the cup and smile on camera, the McDonald's corporation may even pay you for placement of that product. In 1982, Steven Spielberg got the Hershey Chocolate Company to spend \$1 million merely to have E.T. follow a path of Reese's Pieces candy. Was it worth it? Sales of Reese's Pieces candy increased by 65% that year.

### Copyright Law

Although the trademark law was implemented as protection for the manufacturers of specific goods, copyright law serves to protect the rights of owners of artistic works. The Copyright Act defines artistic work as: paintings, sculptures, drawings, engravings, or photographs.

Branded products that are the subject of copyrights may be used in videos or photographs as long as their appearance is "incidental." For example, an actor or model may walk past a copyrighted painting without infringing the copyright law, as long as the painting is not the focus of the scene. Whether such an occurrence is considered incidental is determined by the degree with which the copyrighted item is incorporated into your work. However, there are circumstances in which the use of a copyrighted item will

not be considered incidental. For example, Tom Cruise and his movie studio are facing a possible lawsuit for the replication of Hitler's infamous globe in the production of "Valkyrie." Similarly, if you wish to incorporate a well-known image (e.g., painting, photograph, sculpture) into your



Photographer: Dream Pictures; Stone Collection

work, make sure to first determine whether the image or sculpture is under copyright.

It has been established that the incorporation of trademarked and copyrighted items into photographs or video is permissible if they pertain to the most common circumstances of use. However, it is unlawful to make false, disparaging or harmful statements about a branded product. The common law tort of "passing off" protects a manufacturer from a misrepresentation of its product that may damage its reputation, or "good will." For example, your work cannot depict the consumption of a Gatorade drink as a leading cause of blindness, nor could you indicate a correlation between Levi's jeans and sterility. Fallacious statements about a trademarked product can lead to a Trade Practices Act claim, which is a legal action pertaining to misleading or deceptive conduct. In order to avoid such claims, include a disclaimer at the onset of your production that states that it is not associated with any of the products or brands that it features.

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Photographer: Peter Dazeley

NEW YORK'S ONE (AND ONLY?)  
USER-FRIENDLY ENVIRONMENTAL PROGRAM

New York State has a well-deserved reputation for having one of the country's strictest environmental regulatory programs.

For example, under the State's oil spill program, a faultless landowner on whose property petroleum has spilled is a "discharger" liable for the cleanup. So is a subsequent purchaser of a gasoline service station from which a discharge occurred, even though the purchaser had absolutely nothing to do with causing the discharge and had no ability to prevent it. When a hazardous substance or petroleum release occurs, owners, operators and their agents have a duty to report it "immediately."

In addition, under the State's Inactive Hazardous Waste program, similar to federal "Superfund," one who caused or contributed to contamination of soil or groundwater—and even an innocent current owner—must remediate the site to pre-release conditions. While the "cost-effectiveness" of the remedy has to be considered in evaluating remedial alternatives, the owner's ability to pay is not a relevant consideration.

Also, even if there is no current or foreseeable harm to public health or the environment—because the affected and surrounding sites are all covered with buildings and pavement, soil vapor intrusion has been mitigated, the area is served by public water (i.e., no consumptive uses of groundwater), it is an urban area with no potential for fish or wildlife impacts, etc.—New York rules still require extensive remediation of soil and groundwater because of potential, albeit remote impacts (i.e., dermal contact with contaminated soil and groundwater and inhalation of contaminated air) that *could* occur in the event that subsurface excavation or building construction occurs at some point in the future.

In marked contrast to these strict liability programs, New York State does have one environmental program that can actually be called "user-friendly." That is the Brownfield Cleanup Program or "BCP." Although New York was one of the last states to enact a statutory brownfield program (in 2005), the BCP follows the general approach of other state brownfield and "voluntary cleanup" programs and the federal brownfield law. Unlike "Superfund" laws, which hold present and past owners and operators of inactive hazardous waste sites strictly, jointly and severally, retroactively, and perpetually liable for site contamination, the BCP recognizes that innocent volunteers are not going to be induced to purchase, clean up and redevelop contaminated sites with which they had no prior connection or legal responsibility by threatening strict liability and punitive enforcement.

Instead, the BCP does five key things to incentivize prospective purchasers to redevelop brownfield sites:

1. It relaxes clean-up standards by calling for a "risk-based" cleanup sufficient to protect public health and the environment, based on the intended land-use, rather than trying to force full restoration to pre-release conditions;
2. It treats a current owner who did not cause or contribute to contamination as an innocent "volunteer," rather than as a strictly liable "responsible party" (or "participant");
3. It exempts volunteers from responsibility for remediating offsite migration of contaminants, rather than holding current owners strictly responsible for all offsite as well as onsite

contamination;

4. It provides a liability release, binding on all state agencies, to volunteers who complete a DEC-approved cleanup and receive a Certificate of Completion ("COC"). The COC also provides "contribution protection" against responsible parties who take court action to try to force new site owners to share in prior cleanup outlays. While the COC does not prevent third-party claimants from suing for personal injury or property damage, having a COC will make such claims less likely to succeed; and

5. It provides financial incentives—most notably in the form of "refundable tax credits" (where the State Tax Department sends the taxpayer a check for tax credits in excess of the taxpayer's tax liability)—to help brownfield cleanup volunteers and redevelopers defray a portion of their cleanup, demolition and other site preparation costs, and also reward them for making capital improvements to the site to spur economic revitalization.

Since Upstate real estate and redevelopment projects generally entail smaller stakes and lower returns on investment than projects in the New York City area, while environmental cleanup costs are equally high everywhere, financial incentives are especially needed to promote cleanup and reuse of brownfields in Upstate New York.

The BCP has been criticized in the news because of some well-publicized Downstate examples of very large tax credits for projects that required very little in the way of remediation. The Department of Environmental Conservation ("DEC") sought to limit site eligibility by excluding sites from the BCP where cleanup costs were not very large in relation to the cost of redevelopment and the return on investment, such that contamination could not be said to "complicate" redevelopment—an element of the BCP's definition of a "brownfield site." The issue was litigated in courts throughout New York, with Downstate courts generally siding with the DEC and Upstate courts generally siding with cleanup applicants. Ultimately, the Court of Appeals rejected the DEC's narrow eligibility criteria. In 2008, the Legislature amended the BCP to limit what is called the "tangible property component" of the redevelopment tax credit (i.e., the credit for constructing a capital improvement on the site) to a multiple (either 3 times or 6 times) of site preparation costs. In 2010, the State took action to defer payment of a portion of certain tax credits—in effect giving the cash-strapped state an interest-free loan. As the Legislature adjourned in 2010, several other proposals had been introduced to further reduce the generosity of BCP tax credits.

Anyone considering acquiring and/or redeveloping moderately contaminated properties that could qualify as brownfield sites, might be well-advised to invest in such projects now, while land prices are low and BCP tax credits are still high.

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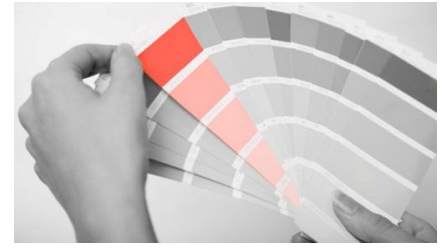
## SHADES OF GRAY: MISCLASSIFICATION OF EMPLOYEES

In the face of an ever-worsening recession, state and federal governments are finding new ways to generate revenue. Government agencies have indicated that investigation of employee misclassification (i.e., improperly treating employees as independent contractors) will become a top priority. President Obama has asked Congress for an additional \$25 million to increase staffing in the Department of Labor to enhance scrutiny of employee classifications. It is estimated that, over the next decade, \$7 billion in taxes and penalties can be recovered on the basis of such misclassification. With the potential for so much additional revenue, employers can be sure that state and federal agencies are going to follow through on their promise to increase enforcement and assess penalties in this arena.

In addition to increased agency oversight, legislatures are also focusing on misclassification. Congress has proposed the Employee Misclassification Prevention Act, which would amend the Fair Labor Standards Act to implement more onerous record-keeping and compliance requirements. In New York, the Construction Industry Fair Play Act was recently adopted. It creates a presumption that construction workers are employees instead of independent contractors. New York has also formed a Joint Enforcement Task Force on Employee Misclassification. Through the Task Force, state agencies will pool information so that an employer who is caught violating one agency's policies will likely face an audit from all of the member agencies.

How can an employer avoid misclassifying its workers? Unfortunately, there is no one test that all the agencies use to determine whether a worker is an employee or an independent contractor. Different agencies use different tests to evaluate workers, based on the type of law that creates their framework.

The common theme among the tests, however, is that where the employer exercises indicia of control over the worker, including financial and behavioral control,



Photographer: ImageSourceL

then the worker is likely to be considered an employee. Under the current legal framework, for instance, telling a person to "paint your house" could be enough to make them an employee under some of the governing laws. The majority of employee classification tests contemplate whether the employer controls where the work is to be done, during what hours the work can be done, who provides the necessary supplies, who owns the tools being used to do the work, and what control the employer exercises over the hiring of other workers or subordinates to complete the job. While these factors are not exclusive, they are representative of most of the tests that deal with employee classification. The more control that the employer exercises, the more likely it is that the worker will be deemed an employee.

There are no black and white tests, standards or guiding principals on this issue. Some of the agency tests for classification are complicated, and the results obtained create varying shades of gray. To be safe, to minimize exposure for fines and back taxes, employers should seek legal counsel for assistance with the complex task of classifying workers.

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## ANNOUNCEMENTS



WE ARE PLEASED TO ANNOUNCE THAT  
EFFECTIVE  
SEPTEMBER 20, 2010,  
**LINDA B. JOHNSON**  
REJOINED HH&K  
AS SPECIAL COUNSEL

following a one year appointment with the Appellate Division in Albany. Ms. Johnson has focused her practice on appeals, commercial litigation, construction disputes, plaintiff's personal injury, real property disputes and debtor-creditor matters. Ms. Johnson will be based in Albany, NY while also working out of our Binghamton office as a member of our commercial litigation practice group.



WE ARE PLEASED TO ANNOUNCE THAT  
EFFECTIVE  
OCTOBER 4, 2010,  
**KENNETH S. KAMLET**  
JOINED HH&K  
AS SPECIAL COUNSEL

and will be based in our Binghamton office. Mr. Kamlet is an experienced attorney with a broad background in environmental law and land use and zoning matters, particularly with respect to shopping center development. Prior to joining HH&K, Mr. Kamlet was the director of legal affairs for Newman Development Group, LLC. Mr. Kamlet is admitted to practice in New York, Maryland and the District of Columbia.



WE ARE PLEASED TO ANNOUNCE THAT  
EFFECTIVE  
JANUARY 1, 2011,  
**DENNIS P. SHEEHAN**  
JOINS HH&K  
AS SPECIAL COUNSEL

and will be based in our Binghamton office. Mr. Sheehan has extensive experience representing plaintiffs, defendants, and insurance companies in areas including personal injury, construction, insurance coverage and products liability. He also practices in the areas of real estate and labor relations. Prior to joining HH&K, Mr. Sheehan was a partner at Hickey, Sheehan & Gates, P.C.

**NEWCOMERS BEWARE:  
PUBLIC WORKS CONTRACTS ARE RISKY BUSINESS**

The New York Legislature has long recognized the risk of favoritism associated with the letting of public works contracts. The concern—justified by historical abuses—is that the officers responsible for awarding such contracts are susceptible to influence. General Municipal Law sections 101 and 103, known as the Wicks Law, were enacted to stem such abuses by creating competitive bidding requirements for public works projects. Significantly, public contracts let in violation of these rules are void.

**The Scope of the Wicks Law and Section 103.**

The Wicks Law mandates that, for certain public construction projects, there be separate contracts for the construction, plumbing, HVAC and electrical components. The law applies to projects which cost more than \$3 million in New York City, \$1.5 million in Nassau, Suffolk and Westchester counties, and \$500,000 in the rest of the state. Simply put, the governmental entity must award separate prime contracts for each of these major components of work. In addition, those four subdivisions of work must be awarded in the manner outlined in section 103, which requires the municipal entity to advertise for bids.

Section 103 also governs public works projects valued over \$35,000, and therefore the great majority of public works contracts in general. For all such projects, Section 103 directs the school, town, village, etc., to advertise for bids, and then to assign the contract to the lowest responsible bidder. It is this advertising requirement that places the power of contract formation squarely in the hands of the entity letting the same. A contractor's bid is essentially an offer—which the New York courts have generally considered “firm”—and the governmental award is an acceptance, which results in a binding agreement.

**The Effect of Competitive Bidding and Advertising Under §103**

Normally, in New York, a bid may be withdrawn only if made under an unintentional mistake, and only if withdrawn prior to its acceptance. However, since acceptance of a contractor's bid is relatively simple, withdrawals are often untimely. Essentially, the laws governing the submission of construction bids are analogous to the rules controlling auction sales. All that is necessary is that the auctioneer (or the governmental entity) give some seasonable expression of acceptance, in any mode that is clear to the bidder. After such acceptance, the sale is considered consummated, the contract formed, and the parties legally bound.

Accordingly, ambitious contractors and subcontractors should take care to avoid biting off more than they can chew when submitting their bids. Obviously, to secure available public contract work, a contractor must endeavor to come in with the lowest responsible bid. Too often, however, slight oversights in bid calculations may cause a promising deal to become a tremendous burden.

The law surrounding public works contracts is harsh and oftentimes hard to navigate. There are extenuating circumstances which may give rise to relief, and processes for voiding contracts which may have been improperly let. However, such situations are decidedly the exception, and those venturing into the world of public works contracts would be wise to consult an attorney in connection with all facets of the bidding process.

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**CONGRESS NARROWS THE SCOPE OF  
THE RED FLAGS RULE**



The Federal Trade Commission's “Red Flags Rule” requires many businesses and organizations to have a written Identity Theft Prevention Program designed to detect the warning signs – or “red flags” – of identity theft in their day-to-day operations. There has been significant opposition to the broad spectrum and application of the Rule, including frustration expressed by the FTC, which was charged with implementing the Prevention Program. On December 8, 2010, Congress passed the Red Flag Program Clarification Act of 2010, clarifying the scope of the Rule. As a result of the clarifications, the Rule now excludes professionals such as doctors, lawyers, and accountants from its application. The bill has been sent to President Obama for signature, which is

expected to occur without further incident.

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