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HURRICANE IRENE AND TROPICAL STORM LEE ASSESSMENT RELIEF ACT SPECIAL PROPERTY TAX RELIEF AVAILABLE

In 2011, Hurricane Irene and Tropical Storm Lee left property owners across the state reeling. Their immediate property damage concerns were compounded by the knowledge of impending property tax bills, which were premised on the pre-flood assessed value of the property. The New York legislature recognized the hardship that would be imposed by this scenario and, in response, has passed the “Hurricane Irene and Tropical Storm Lee Assessment Relief Act.” (“Relief Act”)

The Relief Act will allow certain property owners to seek a retroactive reduction in their assessments based on property damage caused by these storms. This relief will be available only in counties declared a federal disaster area, but virtually every county in the Southern Tier, Capital District, and downstate regions is included. Exceptions include those few assessing units that use a taxable status or valuation date after August 27. However, most jurisdictions use March 1 and would be covered by the Act.

Not all property owners are eligible for these reductions

in assessment. To be eligible, the property must have suffered at least a 50% reduction in the “value” of the property. How this change in “value” is supposed to be measured is a question that remains unclear. Generally, properties are assessed based on their condition as of a taxable status date (i.e., March 1, 2011), but based on an earlier valuation date (i.e., July 1, 2010). The Relief Act does not indicate that this theoretical pre-flood value is to be used as the “before” value, and does not provide for any post-flood dates to use for comparative purposes.

In addition, the Relief Act will only apply to properties in a county, city, town, village, or school district which affirmatively opts in to the program. This must be accomplished within 45 days of December 8, 2011. Affected property owners, therefore, have a powerful incentive to contact their representatives to urge adoption of these flood assessment relief provisions.

The procedural requirements of the statute are fairly simple. First, a property owner must file a written

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CONGRATULATIONS!

WE ARE PLEASED TO ANNOUNCE THAT

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AND

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JANUARY 1, 2012

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WISHES YOU AND YOUR FAMILY

HAPPY HOLIDAYS AND HAPPY NEW YEAR!

SPECIAL PROPERTY TAX RELIEF AVAILABLE

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request to the assessor within 90 days of December 8, 2011, or by March 7, 2012. This request must describe the damage done to the property in reasonable detail and describe the condition of the property after the storm. This request should include any available supporting documentation. Examples of relevant documents would include: (a) before-and-after appraisals; (b) documentation of clean-up costs; (c) before-and-after income and expense data; (d) photographs.

The assessor is then directed to make a factual determination as to the amount of reduction in value the property suffered. If the assessor determines that the reduction in value was less than 50%, the application is denied. If the assessor determines that the reduction in value is more than 50%, the property is then classified into one of several broad damage categories (50%-60%, 60%-70%, etc.). The property's assessed value is then reduced by an amount roughly correlating to the loss in value of the property. The assessor must mail a written notice of determination to the property owner.

If the property owner disagrees with the assessor's determination, the findings can be challenged before the local

Board of Assessment Review. The Board will consider the evidence and make a determination, and must then inform both the property owner and the assessor. If the taxpayer is still unhappy with the outcome, a judicial proceeding can be filed.

Whether or not an owner pursues relief under this statute will not impact the right to challenge an assessment through normal means. A taxpayer can still seek a modification of an assessment based on the damage done by the storm for subsequent taxable years. The main advantage of this statute is to grant relief for the 2011/12 tax year.

Property owners who would like assistance in pursuing their rights under this statute are advised to seek the advice of their attorney as far in advance of March 7, 2012 as possible.

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MEDICAID EXPANDS ESTATE RECOVERY

Starting September 8, 2011, new regulations will permit and require local Departments of Social Services (DSS) to recover Medicaid benefits paid from assets previously exempt from estate recovery. The expanded recovery rights include joint bank accounts and securities, annuities, and life estates in real property. Prior law always allowed for this expanded recovery but New York did not opt to pursue these assets. This will no longer be the case.

Joint bank accounts and securities have always been viewed by DSS as belonging entirely to the Medicaid applicant. This change should not impact many people. The other two changes, annuities and life estates, may cause significant disruption in Medicaid protection planning.

Annuities purchased before February 8, 2008 were considered exempt assets when an application for Medicaid was filed. DSS would require periodic distributions from the annuity, but would allow any death benefit to pass to the recipient's beneficiaries. Under the new regulations, DSS can recover these death benefits. As this change will likely only affect annuities purchased prior to February 8, 2008, significant changes in

Medicaid planning may not be necessary, but the attractiveness of using these assets in a spend down to Medicaid eligibility will change and may even be



Illustrated by David Turner

preferred over other options.

The ability of DSS to recover the value of a recipient's life use in a home in the month of the recipient's death will impact many existing Medicaid plans. DSS will initiate this by filing a lien against the life use after the death of the recipient. This will require that the remaindermen of the real property pay the lien before the house can be sold. The life use will be valued using IRS values that are more favorable to the beneficiaries than the existing DSS valuation table.

We expect a court challenge to the new rules. At the present time, it is not clear whether or not the new regulation will be retroactive or not. We do not know how long DSS will take to file the lien or whether the lien will be retroactive to the date of the life tenant's death. Potentially, the longstanding ability to protect a home with the use of a life tenancy has ended.

We recommend that if you have deeded your house to your beneficiaries and retained a life use that you consult with your Medicaid planner. If you are considering this transfer, we would recommend that you review alternative planning techniques or await the outcome of the expected litigation.

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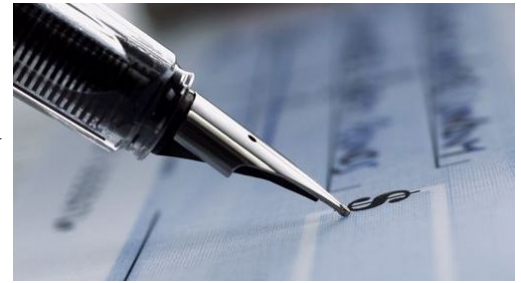
FLOOD RECOVERY GRANTS FOR BUSINESSES

On December 9, Governor Cuomo traveled to Johnson City and signed into law several programs to aid local businesses impacted by recent storms. This new aid includes grants of up to \$20,000 to small businesses, farms, owners of multi-family dwellings, and non-profit organizations for losses sustained and not compensated through any other program. Prior aid to businesses was in large part limited to low-interest loans. Details of the application process and eligibility are yet to be determined by Empire State Development, the agency administering the program, but the law states that preference will be given to those businesses with the greatest need.

Other features of the new legislation include a job retention tax credit for disaster-affected businesses, additional direct aid to municipalities, and aid to counties for flood-mitigation projects. It was also recently announced that the New York State Agricultural and

Community Recovery Fund for Main Street Businesses would designate its second round of funding to businesses in Broome and Tioga counties to aid in repairing both commercial and residential properties. Affected businesses are encouraged to consult with their counsel in connection with these new programs.

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Photographer Pete Gardner

CAN YOUR NON-PROFIT CHANGE HOW IT MANAGES ITS ENDOWMENT FUND?

In order to provide more flexibility to nonprofits, which have large endowments but lack operating funds, the New York Legislature enacted the New York Prudent Management of Institutional Funds Act (Prudent Funds Act). The Act has been in place for a little over a year now, and has effected several significant changes to the law regarding the management of nonprofit endowment funds. Perhaps the most important change is the elimination of the prohibition on an institution's spending below the "historic dollar value" of an endowment fund.

Under prior law, an institution could appropriate for expenditure an amount of the net appreciation of a gift deemed by the governing board to be prudent. The institution could not, however appropriate below the historic dollar value of the gift unless authorized by a court or consented to by the donor in the original gift instrument. Under the Prudent Funds Act, institutions are given discretion to use so much of an endowment gift as it finds prudent,

even if this includes using the original gift itself.

With regard to endowments donated before September 17, 2010, in order to take advantage of the new rule, the institution must provide notice to the donors, allowing them ninety (90) days to opt-out of the new rules and retain the prohibition on spending below the historic dollar value. This allows a donor who made an endowment under the old rules to choose which rules will apply to the gift. A failure to respond is treated as consent for the institution to apply the new rules. For donations made after September 17, 2010, the new rules apply unless the gift instrument specifically prohibits expenditures below the historic dollar value.

There are exceptions to the notice requirement. A donor must be either living (for a natural person) or "in existence and conducting activities" (for an entity). The institution must also be able to locate the donor with reasonable efforts. No notice needs to be sent when the gift instrument specifically permits expenditures from the fund without

regard to the fund's historic dollar value. No notice needs to be sent for funds received as a result of an institutional solicitation where there is no separate statement of the donor restricting the use of those funds, such as funds received as a result of an annual appeal. Finally, where a gift instrument specifically prohibits expenditures below the historic dollar value, sending the notice is unnecessary, as it will not serve to undo the explicit gift instrument.

Finally, the new rules require an institution to include specific language in solicitations for endowment funds advising donors of the current state of the law.

Donors seeking advice on setting up endowment funds are advised to consult with a qualified attorney; and non-profits are advised to review their notices with their counsel to ensure compliance with the law.

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END OF YEAR CHECKLIST FOR EMPLOYERS

The end of 2011 and beginning of 2012 are upon us, and that means it is time, once again, to take out your employee handbook, review your employment practices, and see what needs to be updated. Benjamin Franklin said that “an ounce of prevention is worth a pound of cure,” and nowhere is that more true than in the employment arena. This article will provide you a place to start with the process of updating:

Retaliation

The United States Supreme Court was busy again this year in the arena of retaliation claims. In *Thompson v. North American Stainless*, the Court held that retaliation against third parties is actionable. In *Kasten v. Stain-Gobain Perf. Plastics Corp.*, the Court indicated that the Fair Labor Standards Act anti-retaliation provision protects an employee who makes verbal as well as written complaints.

Employers should be sure their anti-retaliation provision is clearly spelled out in their handbook and that supervisors are educated with regard to the prohibition on third-party retaliation and with regard to the seriousness of verbal complaints. Retaliation claims present a distinct threat. It is not unusual for employers to prevail on a claim of discrimination, but then to lose on a related claim of retaliation.

Inflexible Leave Policies and the Americans with Disabilities Act

The Equal Employment Opportunity Commission (EEOC) continues to vigorously pursue employers with inflexible leave policies. Falling on the heels of its settlement with Sears Roebuck last year, the EEOC settled with Verizon Telecom, LLC for \$20 million—the largest settlement ever for an Americans with Disabilities Act case. In *Sears*, the complaint was that Sears terminated employees who could not return to work after their disability and Family Medical Leave Act leave had been exhausted. The EEOC contended that the employer was required to explore with the employee whether there was a reasonable accommodation (including an additional unpaid absence) that would allow the employee to return to work.



Photographed by Thomas Grill

In *Verizon*, the EEOC contended that Verizon’s “no fault” absence program was unlawful, as it treated absences necessitated by a disability (such as doctor’s appointments) in the same way as other absences.

In each of these cases, the EEOC has made it clear that an employer must consider a disabled individual’s situation on a “case-by-case” basis. With the expansion of the definition of a disabled individual under the amendment to the ADA, employers must review their policies to ensure that employees have the opportunity to request reasonable accommodations, including unpaid leaves of absence and time off from work to attend doctor’s appointments.

NLRB Posting

Initially, the National Labor Relations Board required employers to post notice to their employees of their right to unionize in November of 2011. However, after a lawsuit was filed by the U.S. Chamber of Commerce, the Board moved the compliance date to January 2012. Employers are advised to obtain the poster from the NLRB website.

Wage Theft Prevention Act

In New York, the legislature was also busy this year. Many of the provisions of the Wage Theft Prevention Act have already gone into effect, but 2012 will be the first year that employers are required to provide notice of the Act to all employees. The notice form, which must be provided between January 1 and February 1, 2012, can be found on the Department of Labor’s website. This is an excellent time to review your classification of

employees to ensure you have appropriately classified them as exempt or non-exempt.

A Word About Social Media

In our next issue, we will be providing a more comprehensive guide to social media in the workplace. But for now, employers should, if they have not already, draft a social media policy. This should include whether employees are permitted to use work computers, employer issued cell phones, etc., for their personal social media; whether employees are permitted to engage in social media on work time; and whether the employer will monitor use of its computers, phones, etc. to ensure compliance.

Given the recent spate of cases before the National Labor Relations Board and in the Court regarding social media and employers, this issue is not going away any time soon.

Conclusion

Of course, updating your policies and procedures is only the first step. Supervisors and employees must be trained. When was the last time you had anti-harassment training? When was the last time supervisors were trained in what to do when a complaint is brought to their attention? When was the last time your investigating employees (be they HR personnel or others) received training on how to properly conduct an internal investigation? Policies are meaningless if they are not followed. Keeping up-to-date on these trainings is the best way to prevent costly employment litigation, and to ensure success without trial if such litigation is brought against you.

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**BUYING THE ASSETS OF A NEW YORK COMPANY?
WATCH OUT FOR THE SALES TAX!**

Buying the assets of a corporation in New York can result in unexpected sales tax liability under a New York law that is a tax trap for the unwary. Even the use of a well-accepted federal tax-free transaction structure can still yield state sales tax liability and careful planning is necessary to be sure the deal stays outside the bounds of the New York tax net.

New York carves out a little-known exception to its normal exceptions from sales tax liability that renders “C” reorganizations under the Internal Revenue Code (“IRC”), subject to sales tax in New York, though triggering no federal income tax. This little-known legal pull-back, done through language buried in the regulations, frequently stuns businesses when they receive a tax bill in the mail months or years after concluding what they and their advisors thought was a tax-free reorganization.

An examination of this trap will assist with our understanding of its application and will help explain how to legally avoid it.

First, consider the nature of the transaction under IRC §368(a)(1)(C). This is commonly known as a “stock for assets sale” and is, when properly structured and executed, a tax-free reorganization under the IRC.

The illustration below shows the Target Corporation liquidating after the asset sale, leaving the old Target shareholders now owning Purchaser Corp. stock and Purchaser Corp. owning all of Target’s former assets.

This is a very common way of effecting a tax-free reorganization under the IRC and is often undertaken for such reasons as avoidance of the Target’s potential liabilities, simplification of the valuation of the sale, or the sheer simplicity and speed of completing an asset sale over a sale of stock. When properly structured and executed under the extensive federal rules, such reorganization generally leaves the Purchaser, the Target, and their respective shareholders without any immediate federal tax impact.

New York (among a few other states) is aware of the popularity of this sort of transaction and has created an elaborate set of rules that, at first, states that this type of reorganization is a “merger” under New York law and, hence, is not subject to sales tax.

Thirty-one paragraphs later in that same regulation, however, there is language that simply undoes the earlier assurance. It states that reorganizations done pursuant to the “C Type” merger doctrine, described above, are actually not mergers for purposes of New York sales tax and the value of the property transferred is subject to sales tax.



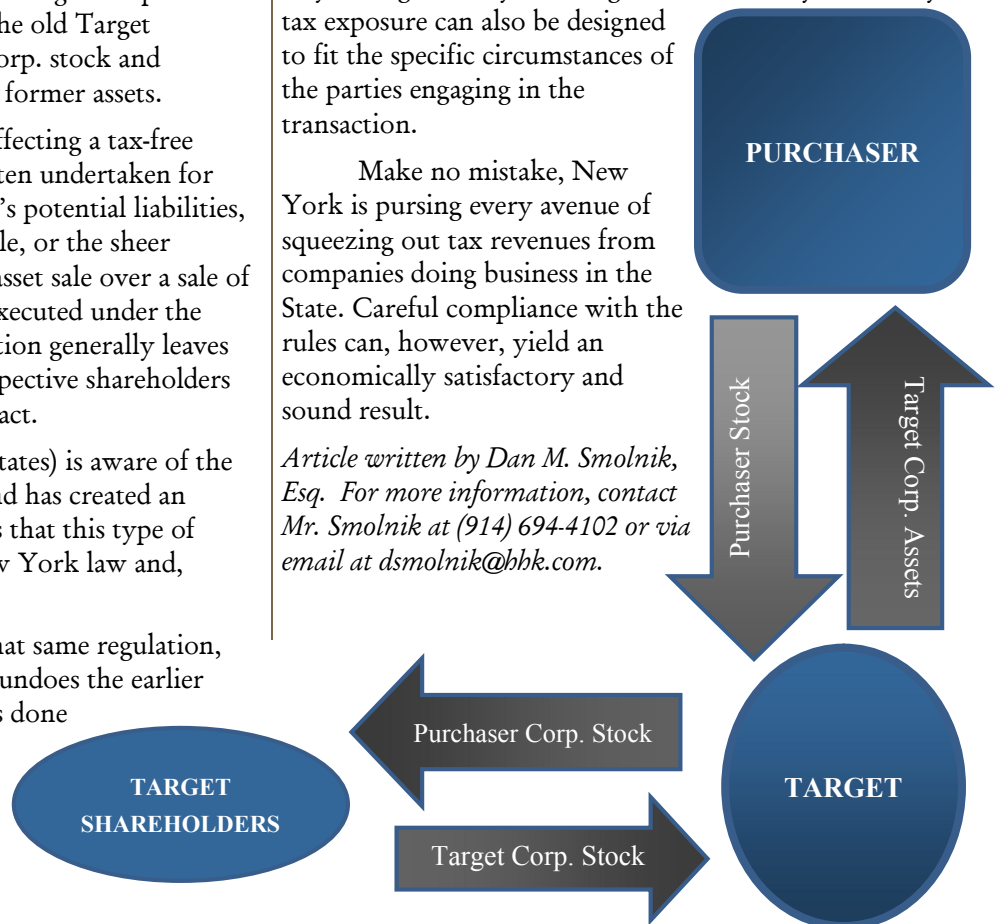
Photographed by Rubberball

This result has astounded numerous sophisticated businesses undertaking what is, in nearly every other state, a routine and tax-free transaction.

One way around the sales tax is simply to include these additional steps: (a) forming a new company, (b) conducting a reorganization known as a “triangular merger,” and (c) complying with the federal and state regulations to effect such a reorganization correctly. Other ways of legitimately avoiding this unnecessary and costly tax exposure can also be designed to fit the specific circumstances of the parties engaging in the transaction.

Make no mistake, New York is pursuing every avenue of squeezing out tax revenues from companies doing business in the State. Careful compliance with the rules can, however, yield an economically satisfactory and sound result.

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MORE LEARNED PROFESSIONALS, LESS EMPLOYEE OVERTIME

Under the Fair Labor Standards Act (FLSA), an employer is required to pay its employees overtime (1.5 times their normal rate of pay) for those hours that an employee works in excess of 40 hours per workweek. There are exceptions to this requirement, including where the employee is a “learned professional” as defined by statute. New York State has also adopted the “learned professional” exception. Recently, as a result of litigation involving an employer accused by an employee of failing to pay him overtime, this exception has been expanded. The federal court determined that the employee, a licensed funeral director, was not entitled to overtime. The court’s reasoning is instructive.

Is the Employee a “Learned Professional”?

There has long been a two-part analysis to determine whether an employee is a “learned professional” and thus exempt from receiving overtime. First is the “salary test,” which analyzes how and how much the employee is paid. The federal regulations require that the employee be paid at least \$455.00 per workweek. The “salary test” also considers whether deductions are made from the employee’s salary based on the quantity or quality of the work the employee performs.

The employee’s job must also satisfy the “duties test.” The “duties test” analyzes whether the employee’s duties are those that are typically performed by a bona fide learned professional. There are three factors for this test: (1) whether the employee performs work requiring advanced knowledge; (2) whether the

advanced knowledge is in a field of science or learning; and (3) whether the advanced knowledge is customarily acquired by a prolonged course of specialized intellectual instruction.

The application of these statutory factors is subject to some interpretation. Some examples of occupations that generally qualify as “learned professionals,” listed in the regulations that implement FLSA, include certified public accountants, certified physician assistants, and dental hygienists. However, these examples are not intended to be an exhaustive list, nor will an employee automatically qualify as a “learned professional” simply because the employee’s job title is the same as one listed in the regulation.

The Expansion of the “Learned Professional” Exception

In *Rowe v. Olthof Funeral Home, Inc.*, a case of first impression, the District Court for the Western District of New York determined that a licensed funeral director was a “learned professional” under the FLSA. As such, he was not entitled to overtime. The court held that the plaintiff, a licensed funeral director, who held an Associate’s Degree in Funeral Services and had served as a resident at the funeral home in accordance with New York State’s licensing program, met both the salary test and the duties test.

In particular, the court found that the plaintiff’s duties met the requirement for advanced knowledge, because they included embalming and cremation, both of which require knowledge and the application of anatomy, biology and



Photograph from FHI Images

chemistry. Finally, with regard to a “prolonged course of specialized intellectual instruction,” which usually requires a four-year degree or graduate study, the court explained that individuals with two-year degrees who had also undergone a residency program and a rigorous licensing process may qualify.

Beyond its obvious application to the funeral industry, this case also opens the door for the possibility that other positions in other industries may qualify as “learned professionals” even though they are not specifically enumerated in the regulations. This analysis is highly technical, however, and there are significant financial implications for the improper classification of an employee, including fines and attorneys’ fees. It is advisable for an employer to consult with counsel before classifying particular employees as exempt from overtime under the Fair Labor Standards Act.

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