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- Tax Planning and Litigation

Labor Law Update

by Julie Rose

Every year the California Legislature passes new laws that impact the employer/employee working relationship. Below is a summary of some of these new laws.

Family Temporary Disability Insurance

California is the first state to pass a law providing for paid family leave. The law will go into effect on January 1, 2004 and will cover family leaves commencing on or after July 1, 2004. An employee taking leave to care for a sick child, parent, spouse or domestic partner or for the birth, adoption or foster care placement of a new child will be eligible for six weeks of paid leave, to be paid by state disability insurance. The program will be funded by employee contributions to the state disability insurance tax.

Use of Sick Time to Care for a Family Member

Current law provides that if an employer provided

employees with sick leave, the employee could use one half of that sick time to care for an ill family member. A new law passed this year provides that an employer who has an absence control policy, i.e., a policy that provides for adverse action against an employee who is absent a certain number of days a year, cannot count the days taken to care for the sick family member in administering the policy. In other words, the time taken to care for the sick family member is a "protected absence."

Discussing Work Conditions

Labor Code section 232 states that an employer may not require as a condition of employment that an employee refrain from disclosing the amount of his wages, or discharge or discipline an employee for doing so. This last year the legislature passed Labor Code Section 232.5 which prohibits an employer from discharging or disciplining an employee who discloses information about the employer's working conditions. The immediate question that this raises is, would this new law prohibit an employer from terminating an employee who exhibits a poor attitude by constantly complaining about the job?

(Continued on page 5)

Inside this Issue:

- Labor Law Update
- Nick Tooliatos Called to Active Duty
- Estate Taxation of Resident Alien Estates
- New Developments for Landlords
- Epicurean Delight The Marvelous Dungeness Crab
- Recent Successes
- Going Places: Australia!

Nick Tooliatos Called to Active Military Duty

McNichols Randick O'Dea & Tooliatos partner, Nick Tooliatos, a Colonel in the army reserve, has been mobilized starting January of 2003. Colonel Tooliatos is part of the 91st Division, Training Support. It has been approximately sixty years since the 91st Division has been mobilized to active duty.

On March 7, 2003, partners and staff of McNichols Randick O'Dea & Tooliatos were pleased to attend the mobilization ceremony hosted by the 91st Division at Camp Parks. This photograph was taken at the mobilization ceremony, and shows Colonel Tooliatos in combat fatigues.

While on active duty Colonel Tooliatos will be stationed in Dublin California at Camp Parks Reserve Forces Training Area. He is available for client consultation in the evenings and on weekends, and will be working closely with other members of the firm to insure that there is no interruption in client services.



Estate Taxation of Resident Alien Estates

By Pamela Young

Citizen and non-citizen residents of the U.S. are subject to estate tax on all their assets, worldwide. At present, the estate tax increases progressively, to a maximum of 49% of the value of a decedent's property. Under recently enacted law, this percentage will be reduced incrementally until 2010, when the estate tax will be repealed. Estate planners and taxpayers are uncertain, however, whether the law will remain in effect long enough to cause total repeal. The discussion below presumes that the new tax law will be modified so that some amount of estate taxation will continue to apply.

Estate Tax Deferral for Citizen v. Non-Citizen Spouses

When one member of a marriage dies with a taxable estate and the surviving spouse is a U.S. citizen, the surviving spouse enjoys deferral of estate taxes on decedent's property gifted to, or used by the surviving spouse. This tax deferral is referred to as the "marital deduction." The marital deduction is a valuable tool in planning for the care and comfort of a surviving spouse.

If the surviving spouse is not a U.S. citizen, generally, the deferral of decedent spouse's estate taxes until death of the surviving spouse is not available. However, with careful estate planning, non-citizen spouses may obtain a similar tax deferral by creating a special trust. Specifically, non-citizen surviving spouses are entitled to deferred estate taxation on property contributed from decedent's estate to a Qualified Domestic Trust ("QDOT"). Such trusts allow tax deferral until principal of the trust is distributed to the surviving spouse, or until death of the surviving spouse.

To satisfy federal regulations concerning QDOTs, the trust instrument must contain certain provisions. For example, income from the trust must be distributed at least annually to the surviving spouse (such income is not subject to estate tax. However, income distributions, unless otherwise exempted, will be subject to income tax.) Also, at least one trustee of the QDOT must be a U.S. citizen; if the property in the trust is valued at more than \$2,000,000, the trustee may have to be a domestic bank.

Maximum Use Of Estate Tax Exemptions

The QDOT provisions can be included in a family trust that is also designed to make maximum use of the available estate tax exemption amounts. This amount, currently \$1,000,000, is the value of assets that can be gifted either during the lifetime, or at the death of each spouse. In large estates, if the first spouse to die leaves his/her interest in the estate to the survivor in its entirety, the first spouse never utilizes his/her exemption. A properly drafted family trust contains an exemption or by-pass subtrust which serves to utilize the exemption of both spouses, by reducing the taxable estate of the second spouse.

No Gift Tax Deferral for Non-Citizen Spouses

Lifetime gifts made by U.S. citizens and non-citizen residents are subject to gift tax. Under present law, no gift tax is triggered unless the value of all gifts to one donee exceeds \$11,000 in one year. This amount is referred to as the "annual exclusion." Accordingly, each year a donor may gift up to \$11,000 of assets to each donee without gift tax. Lifetime gifts between U.S. citizen-spouses are not limited by the annual exclusion amount. Instead, such gifts are allowed as a marital deduction, for any amount.

However, if the donee spouse is a non-citizen, a different rule applies. For such donees, there is no marital deduction. Gifts from a spouse to his or her non-citizen spouse will trigger gift tax. However, the annual exclusion amount for such gifts is \$110,000. The annual exclusion amount provides an opportunity for tax planning between spouses. If one spouse, for example, has significantly more assets than the other, the richer spouse can move assets out of his or her estate by gifting assets worth up to \$110,000 to the poorer spouse each year. Under the gift limitations in effect for 2003, the richer spouse could gift \$990,000 to the poorer spouse over a nine-year period, without incurring gift taxes. The purpose of the gifts is to increase the poorer spouse's estate to an amount that can pass at his or her death without incurring estate tax. As additional benefit, if properly transferred, the gifts may be assets available to support the non-citizen spouse without the restrictions (or the tax upon distributions) of a QDOT. Depending upon several factors, upon the death of the surviving spouse, his or her assets in excess of the exemption amount may still be subject to estate tax. (Recall, however, that future existence of the estate tax is not certain.)

QDOT that Functions as Family Trust Prior to First Death

In order to save estate taxes when the surviving spouse is a non-U.S. citizen, a QDOT need only come into being at or immediately after the death of the first spouse. However, trusts can accomplish more than tax goals. For taxpayers with young children, or with elderly or disabled relatives, a revocable trust with provisions to create a QDOT when needed, would allow the taxpayers to protect their assets and their loved ones in the unlikely event of the taxpayers' early deaths. Such a trust would allow the taxpayers, as trustees, complete access to the assets in the trust. The trust instrument would contain instructions to the persons the taxpayers choose to serve as trustee after their deaths. Such instructions would include, for example, the ages or conditions upon which children are to receive shares of the taxpayers' estate after their deaths.

Probate Fees as Avoidable Cost of Administration

(Continued on page 5)

New Developments for Landlords

By Phillip G. Vermont

In January 1, 2003, many new statutes took effect which will be of great importance to landlords.

Termination Notices

The legislature modified California Civil Code, section 1946.1, applicable to the termination of month-to-month leases, to require the owner of a residential rental unit to give at least sixty days' notice prior to terminating the tenancy. However, the owner need only give thirty days' notice for a tenancy of less than one year.

The statute also indicates that, if a landlord is terminating a tenancy of a property where the owner has contracted to sell the unit and an escrow has been opened, then thirty days' notice is still permitted (so long as the notice is given no more than 120 days after the escrow has been established).

Security Deposits

California Civil Code, section 1950.5 (Security Deposits for Residential Properties), has also been significantly modified. This section now requires that, within a reasonable time after notification by either the tenant or the landlord of the intention to terminate the lease, the landlord must notify the tenant in writing of his or her option to request an initial inspection and of the tenant's right to be present at the inspection. At a reasonable time, but no earlier than two weeks before the termination or the end of the lease date, the landlord or the agent of the landlord shall, upon the request of the tenant, make an initial inspection of the premises prior to any final inspection the landlord makes after the tenant has vacated the premises. The purpose of the initial inspection is to allow the tenant an opportunity to remedy identified deficiencies in order to avoid deductions from the security deposit. If the tenant chooses not to request an initial inspection, the duties of the landlord under this modified statute are discharged. If an inspection is requested, the parties shall attempt to schedule the inspection at a mutually acceptable date and time. The landlord must give at least 48 hours written notice of the date of this inspection. The landlord must proceed with the inspection whether the tenant is present or not, unless the tenant previously withdrew the request for the inspection.

Based on the inspection, the landlord must give the tenant an itemized statement, specifying repairs or cleaning that are proposed to be the basis of the deductions from the security deposit. Thereafter, the tenant has the opportunity, during the period following the initial inspection until termination of the tenancy, to remedy the identified deficiencies.

Further, the statute now states that the bad faith retention by a landlord, or a landlord's successors, of the security deposit or any part of it in violation of the statute, may subject the landlord or the landlord's successors to statutory damages of up to twice the amount of the security deposit in addition to the tenant's actual damages.

It is strongly suggested that all landlords of residential property obtain a copy of California Civil Code, section 1950.5, and read it carefully.

Landlord Access to Rental Properties

California Civil Code, section 1954, has also been modified, this section addresses when and how a landlord may enter the residential rental property during the tenancy. The statute now states that the landlord must give the tenant reasonable notice, in writing, of the landlord's intent to enter. The landlord may enter only during normal business hours. The modified statute now requires that the notice be personally delivered to the tenant, left with someone of a suitable age at the premises, or left on, near, or under the usual entry door of the premises, in a manner in which a reasonable person would discover the notice. The notice may now also be mailed to the tenant. Mailing of the notice at least six days before an intended entry is presumed reasonable notice.

If the purpose of the entry to the premises is to show the dwelling to actual or prospective purchasers, the notice may then be given orally, in person or by telephone, if the landlord or his or her agent has notified the tenant in writing within 120 days of the oral notice that the property is for sale and that the landlord or agent may contact the tenant orally for the purposes of the inspection.

Finally, the court in Syufy Enterprises, LP v. City of Oakland a Bay Area Court of Appeal decision decided December 20, 2002, held that when a master commercial tenant rejects a lease in bankruptcy, the privity of estate is terminated between the landlord and the tenant, including subtenants. As soon as the master lease is rejected, the landlord has an unconditional right to regain possession of the entire parcel, including the subleased portion. The Court held that a subtenant such as Syufy does not retain a right of possession under these circumstances.

Epicurean Delight—The Marvelous Dungeness Crab

By Steve and Kathy McNichols

During the entire month of February, San Francisco celebrated its first annual Crab Festival. Included were organized walks around Fisherman's Wharf, where the City's fondness for crab began over one hundred years ago, a Bon Appetit Cook-off Event, and many special menu items at the City's many fine restaurants. This is destined to become a classic San Francisco event. Keep your eyes open for it next year! Record numbers will enjoy this tasty local specialty this season. The haul from the Central California fishery, an area of some 400 square miles, is expected to exceed two million pounds for the season, which runs from November to June. Dungeness crab, known for its sweet and succulent meat, reigns supreme over, its Alaskan and Atlantic kin: blue, stone and snow crab. Most often, it is served unadorned - freshly cracked and teased from its shell. With the addition of a loaf of sourdough bread and a bottle of chilled Chardonnay, this triumvirate of crustacean, crust and crush has been hailed as "the quintessential San Francisco meal" by the late San Francisco Chronicle columnist, Herb Caen.

Eat at a Fisherman's Wharf crab stand today, and you will enjoy a San Francisco experience that has changed little over the past 100 years. A freshly caught, live Dungeness crab is dropped into a pot of boiling water. Fifteen minutes later, when its shell changes from yellow to red, it's ready. You can eat it right there, with melted butter or zesty cocktail sauce! However, if you would like to enjoy a favorite Italian style

meal with this delicacy, here is a recipe from the event website, www.sfvisitor.org/crab. It was reportedly a favorite of the two famous San Francisco Joes, DiMaggio and Alioto. ENJOY!

Ingredients

1/4 cup olive oil
1 teaspoon black pepper
1 cup chopped onions
2 teaspoons salt
1 teaspoon chopped garlic
1/2 teaspoon paprika
1 teaspoon chopped parsley
1 1/2 cups water
1 teaspoon chopped celery
1 lb. fresh crab meat
1 cup solid packed tomatoes
1 lb. spaghetti
1 cup tomato sauce
Grated Parmesan cheese
1/4 cup sherry



Sauté onions, celery, garlic and parsley in olive oil until golden brown. Add tomatoes, tomato sauce, water and seasoning. Simmer over low flame for 1 hour. Add crabmeat and wine, and simmer for 10 minutes. Cook and drain spaghetti (do not rinse) and add to sauce. Place on serving platter and top with generous sprinkling of Parmesan cheese. (Serves 5 to 6)

Recent Successes

FIRM RECOVERS \$870,000 FOR HOME BUYERS

An Alameda County jury rendered a fraud verdict against East Bay real estate agent Daniel Marchand last week, finding that he misrepresented, concealed and failed to disclose material facts in the sale of a Castro Valley residence.

Marchand had represented the seller of the property, Olympic Gold Medalist Matthew Biondi, in the sale to homebuyers Susan and Cynthia Pisani. After the 1998 escrow closed, however, the Pisanis learned of serious problems with the water supply and a landslide.

The jury found that Marchand acted with fraud, oppression, or malice in the purchase transaction. The jury issued a verdict against Marchand of approximately \$370,000 in compensatory damages and \$500,000 in punitive damages. The Pisanis' were represented by attorneys Steve McNichols and Theresa Muley of McNichols Randick O'Dea & Tooliatos, LLP.

The jury also ruled against Daniel Marchand on his lawsuit against the Pisanis, finding that the Pisanis did not commit trespass. He also lost in his attempt to gain prescriptive easement rights over the property of another neighbor, the Mullens Family.

In another hard fought trial, Phillip Vermont won a judgment for a business client who was defrauded in the purchase of a business. The judgment included an award of \$125,000 in punitive damages against the selling corporation. The court also judged found the corporation's president jointly and severally liable for the \$125,000 punitive damage award, because the president had personally misrepresented and withheld upon transfer, the assets of the business she sold to our client. The president appealed the judgment against her for fraud and punitive damages. Leslie Baxter handled the appeal, extensively briefing the matter to preserve the judgment. In a unanimous decision, the court of appeal upheld the fraud judgment, noting that Mr. Vermont had presented "ample evidence" of the president's fraud and malice in the business deal. The court of appeals did rule in the president's favor on punitive damages, by holding that there was inadequate evidence to support the \$125,000 punitive damage award against her. However, the appellate court has sent this case back to the trial court, to determine whether the punitive damage award should remain at \$125,000, or be reduced or increased. By appealing the judgment we obtained, the malicious president may end up paying MROT's client more than the \$125,000 in punitive damages she owed at the end of trial!

Labor Law Update cont...

(Continued from page 1)

Payroll Records

Labor Code Section 226 was amended to provide that when an employee requests to review his payroll records, the employer must comply with the request within twenty-one days.

Age Discrimination

In mid-2002, the California Supreme Court ruled that an employer did not violate the Fair Employment and Housing Act when it denied an older employee's request to participate in its education reimbursement program. The employer refused the request because the employer felt that the employee would retire before the employer reaped the benefits of the expense. The court held that this did not violate age discrimination laws because the law was limited to prohibiting discrimination in hiring, discharge, suspension and demotion and that the law, as written, did not extend to employee benefits. In response to this ruling, the California legislature amended Government Code section 12940, making it unlawful for an employer to discriminate in compensation or furnishing of employee benefits based on a person's age.

Time for Filing Lawsuit

Government Code section 12965 was amended to provide that the one-year statute of limitations period to file a civil lawsuit under the Fair Employment and Housing Act is tolled in any case where the Equal Employment Opportunity Commission conducts an investigation of its own, or reviews the determinations of the Department of Fair Employment and Housing.

Sexual Assault Victims

Labor Code section 230 was amended to extend rights, currently provided to victims of domestic violence, to victims of sexual assault. The law prohibits an employer from discharging or discriminating against an employee for attending court or seeking assistance due to domestic violence or sexual assault.

Cal-COBRA

Effective January 1, 2003, eligible employees are now entitled to 36 months of COBRA coverage instead of the previous 18 months of coverage.

Plant Closings and Mass Layoffs

California has passed its own version of the Worker Adjustment and Retraining Notification Act (WARN), which requires 60 days notice to employees of a mass layoff, relocation or termination of a covered facility, employing 75 or more persons at any time within the preceding 12 months.

Now for some good news:

California did **not** pass Assembly Bill 2989, which would have required employers to provide severance pay when they layoff or terminate employees.

The court determined that veganism is not a religious creed within the meaning of the Fair Employment and Housing Act and therefore, the employer's termination of an employee for refusing to take required vaccines (which are developed using animal products) was not religious discrimination.

Estate Taxation cont...

(Continued from page 2)

In California, decedents' estates with property valued at greater than \$100,000 are subject to court procedures referred to as "probate." Not all assets are subject to probate. Assets held in joint tenancy, for example, and assets that pass according to a beneficiary designation, such as trusts, insurance, and retirement benefits, are not subject to probate. Accordingly, those assets are not counted as contributing to the \$100,000 threshold.

The fee charged for probate is based upon a percentage of the value of probate assets. For example, the first \$1,000,000.00 of probate assets will trigger probate fees in excess of \$23,000. These fees are avoided if a living trust is created, and the trustee's assets are transferred to and held by such trust. Other methods of avoiding probate fees, such as the transfer of prop-

erty into joint tenancy, must be carefully examined for both tax and non-tax repercussions.

Alternative to Non-Tax Issues language:

QDOTs and gifts up to the annual exclusion amount are standard estate planning tools for married non-citizens. However, QDOTs are an estate planning tool for reasons beyond tax planning. For example, a QDOT within a family trust allows the trustee to protect their assets and their loved ones in the event of their early death. Also, contributing assets to a properly funded trust can avoid the application of probate procedures upon death of the trustee. Probate fees are charged as a percentage of the asset value in the probate estate. As an example, the fee totals \$23,000 for the first \$1,000,000 of assets. Smaller percentage fees apply to assets in excess of \$1,000,000.



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Achieving Results Through Innovation®

Going Places

By Kevin Martin

"AUSTRALIA!" Some of you may remember this classic movie line from Gene Hackman in his role as Lex Luthor in Superman II. Luthor, it seemed, had just negotiated for ownership of the southern continent in return for leading the evil villain, General Zod, to Superman's remote ice castle. Thankfully for all involved, Superman prevailed in that epic battle of good v. evil and Australia remains free of such tyranny. Seriously, though, if you have not had the opportunity to go "down under" you should definitely put it at the top of your list.

My wife Patricia and I recently honeymooned in this unique country and were both stunned by its beauty and diversity. From the sophistication and history of Sydney to the almost barren outback, Australia is a blend of cosmopolitan and tradition. Sydney, for its part, has grown from its origins as a prison colony to a bustling, vibrant city reminiscent of London or Paris. There is plenty to see and do here, including visiting the old prison quarters, sunning on the



luxurious beaches, or taking in a show at the famous Opera House. Up further north is the city of Cairns (pronounced "CANS") which is the launching pad for tours out to the great barrier reef. As a newly minted "certified" diver, I was overwhelmed by the colors and sealife that abound on the coral reef. We swam with sea turtles, saw all kinds of sealife and then cruised back to shore drinking wine and dining on cheese and crackers. The experience was so good, in fact, we went back two days in a row.

Mid and western Australia are mostly comprised of the famous "outback" terrain. This rugged, arid and dry country is still home to Australia's aborigine population whom, for the most part, live as they always have. Of particular interest is the monolithic Ayer's Rock, which abruptly rises out of the horizon and changes color with the sun. While we were there, Patricia and I saw a pack of wild kangaroos, a few friendly koalas, and more than enough snakes. To be sure, the 16 hour plane ride down is by far the worst part of visiting Australia. Once there, however, you will be glad you made the trip.