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American Jobs Creation Act

By Ralph Kokka

The American Jobs Creation Act of 2004 (the Jobs Creation Act) was signed into law by President Bush on October 22, 2004. The law was intended to repeal the export tax incentive known as the extraterritorial income exclusion after the World Trade Organization ruled it to be an illegal export subsidy. Like many bills, however, the 2004 Jobs Creation Act contains a host of other provisions (270 in all) changing the tax treatment of many items. Among the provisions that directly impact businesses are the following:

- **Repeal of Extraterritorial Income Exclusion.** The gradual repeal of the extraterritorial income exclusion – in 2004, taxpayers can claim 100% of their foreign sales corporation/extraterritorial income benefits; in 2005, 80%; in 2006, 60%; and no benefit after 2006.
- **Foreign Subsidiary Dividend Deduction.** The Jobs Creation Act encourages companies to reinvest foreign earnings in the U.S. by temporarily making certain dividends received by a U.S. corporation from controlled foreign corporations eligible for an 85% dividends-received deduction. At the taxpayer's election, this deduction is available for dividends received either during (i) the taxpayer's first tax year beginning on or after Oct. 22, 2004, or (ii) the taxpayer's last tax year beginning before such date.
- **Domestic Production Activities Deduction.** An eventual 9% deduction for income from domestic production activities, phased in as follows: 3% through 2006; 6% in 2007-2009; and 9% thereafter. The deduction is based on the lesser of income from domestic production activities or the taxpayer's taxable income. The deduction is available to corporations, partnerships, sole proprietorships, cooperatives and estates and trusts with qualifying production activities. Qualifying production activities are broadly defined and include traditional manufacturing, construction, engineering, energy production, computer software, film production and processing of agricultural products.
- **Reduction in Heavy Vehicle Expensing.** The SUV expense loophole has been scaled back. Previously, a business owner could

fully expense any vehicle weighing over 6,000 pounds. Now, for vehicles between 6,000 and 14,000 pounds, the amount that may be expensed is limited to \$25,000. Any remaining amount must be depreciated over time.

- **Extension of Business Expensing of Equipment.** Extension of the \$100,000 limit (rather than the previous \$25,000 limit) on business expensing of equipment purchases through 2007. The special treatment is reduced when the cost of qualifying property placed in service for the tax year exceeds \$400,000. Both the \$100,000 and \$400,000 amounts are indexed for inflation, beginning in 2004.
- **Shorter Depreciation Period for Qualified Leasehold Improvements and Restaurant Property.** The depreciation recovery period for qualified leasehold improvements and restaurant property placed in service after Oct. 22, 2004 and before is reduced from 39 years to 15 years.
- **S Corporation Changes.** S corporations may now have up to 100 shareholders (up from 75). Also, the Jobs Creation Act allows certain types of S corporation shareholders to utilize suspended losses, disregard unexercised powers of appointment for electing small business trusts, and provides relief from some inadvertent elections and terminations of qualified subchapter S subsidiaries.
- **Withholding of Options.** For options exercised after Oct. 22, 2004, the Jobs Creation Act excludes certain stock options and stock purchase plans from employee wages for payroll tax and income tax withholding purposes.
- **Deduction of Fees for Unlawful Discrimination Claim.** The Jobs Creation Act allows an above-the-line deduction for attorney's fees and court costs incurred in connection with an unlawful discrimination claim for judgments or settlements occurring after Oct. 22, 2004.

The aforementioned are just a few of the many new provisions in the 2004 Jobs Creation Act that may be of interest to you as an individual or business owner. If you would like to discuss how the 2004 Jobs Creation Act impacts you or would like to discuss tax planning in general, please give us a call.

Community Involvement

By Don Odell

The members, attorneys and staff at McNichols Randick O'Dea & Tooliatos value their roles as leaders in the Tri-Valley legal community and members of the community at large.

McNichols Randick O'Dea & Tooliatos' roots run deep in the Tri-Valley. Members of the firm have been practicing in the Tri-Valley area for more than 35 years. Today, the firm enjoys its role as the largest independent firm in the Tri-Valley with 20 attorneys who collectively offer a wide range of legal services to our local, national and international clients.

Despite the firm's growth, McNichols Randick O'Dea & Tooliatos has always considered the Tri-Valley home and, along with its members, attorneys and staff, continues to work tirelessly to give back to the community through their time and money.

During the last two years alone, the McNichols Randick O'Dea & Tooliatos attorneys and staff have given thousands of dollars and countless hours to the community through our involvement in social, charitable and service organizations throughout the Tri-Valley.

As a firm, McNichols Randick O'Dea & Tooliatos has been a yearly sponsor of the Rotary Club of Pleasanton's Spirit Run, the GASIT Golf Tournament, the Women's Council of Realtors Golf Tournament, and the Pleasanton Chamber of Commerce. The Firm is a yearly supporter of the Adopt-A-Family and the annual Toy and Food Drives for Adopt-A-Family. The firm's members donated more than 60 wheelchairs to the Wheelchair Foundation, which in turn were donated to underprivileged disabled people in Mexico. The Firm bought more than 300 boxes of Girl Scout cookies. The Firm collects and donates hundreds of dollars worth of food each year to the Tri-Valley Food Bank.

A year ago, Julie Rose, Annette Neuhart, Christine Vincent, and Shelley Jarvis collectively walked 240 miles in support of Avon's 3-day Walk for the Cure, collecting thousands of dollars for breast cancer research. That year, Scott Boccia worked on the advance crew for the Avon 3-Day walk, putting in endless hours setting up the walk route. The Firm chaired the Special Olympics Walk for the Gold fundraiser for three years, and under Steve McNichols and Everett Beers' leadership and with the help of Don Odell, Kevin Martin and numerous others throughout the community, several thousands of dollars was raised for the Special Olympics.

Leslie Baxter, Everett Beers, Don Odell, and Mike Kyle dedicate hundreds of hours to their respective Rotary Clubs of Dublin, Pleasanton North, Pleasanton, and Danville-Sycamore. In January, 2004, Leslie Baxter spent four days in the City of Monterrey, Mexico with the Danville-Sycamore Rotary Club, helping to deliver a shipping container of wheelchairs to needy recipients and meeting with local Rotarians to establish ongoing program with that city. Leslie is also the public relations chairperson and a member of the Board of Directors for that Rotary Club and she serves the community as a Pro Tem Judge.

In addition to his activities with the Rotary Club of Pleasanton North and the Special Olympics, Everett Beers has served for three years as a member of Hope Hospice's Board of Directors and is now serving as its Board's Chairman.

Mike Kyle has committed not just years but decades to the Tri-Valley through various charitable organizations. Mike is a strong supporter of the "Lawyers in the Library" program donating hours of his time answering legal questions for our friends and neighbors. He is also a key supporter of the Rotary's Tri-Valley student speech contest, chairing the Dublin Rotary's participation in that event, he has hosted the event on numerous occasions, and he has even automated the materials used in the contest.

Don Odell and Kevin Martin have each completed the Pleasanton Leadership program. Brian O'Dea is a graduate of the Leadership San Ramon programs respectively. Brian is also active as a Trustee for St. Mary's College East Bay Scholarship Fund.

Don Odell is a member of the Board of Directors for AXIS Community Health and serves as the Co-Chair of AXIS' Foundation. He is a Member of the Board of Directors for the Pleasanton Chamber of Commerce, and Chairman Elect for that organization. Don also serves as the Community Legal Advisor for the Junior League of Oakland-Eastbay. He is an active member of the Pleasanton Rotary where he has chaired the Student of the Month and Student of the Quarter programs. He is also on the Rotary's Foundation Board, a member of the Centennial project committee, and he is the current Chairperson for the Rotary's annual Spirit Run. Don also coaches his daughter's soccer team, he has participated in the Pleasanton Police Department's Citizen's Police Academy, he serves as a Pro-Tem Judge for Alameda County, and acts as a scorer for the Contra Costa County and Alameda County High School Moot Court Competitions.

Kevin Martin fills his free time as a member of the Board of Directors of the Tri-Valley Growers Association, as a member of the Board of Directors of Junior Achievement (Tri-Valley/ Tri-Cities) and by teaching business law in a local community college.

Kathi Vermont is an Ambassador for the Pleasanton Chamber of Commerce, a frequent participant at various charitable events including the Women's Counsel of Realtor's Golf Tournament Fundraiser, the GASIT Golf Tournament, and the Jr. Achievement Bowl-A-Thon.

Phil Vermont is a long time supporter of Youth Music. He donated over 175 ice cream sundaes and personally served them to high school and college musicians during the Tour of Champions this year in San Jose. Phil also serves Master of Ceremonies and Announcer for the Annual Independence High School Marching Band competition and is a strong financial supporter of Pleasanton's Youth Music Programs. Phil is also active with the Pleasanton Chamber of Commerce, Women's Counsel of Realtors and the Valley Marketing Association of the Tri-Valley. He is a guest lecturer for the

(Continued on page 3)

Community Involvement cont. . . .

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Ohlone College Real Estate course; he acts as a Pro-Tem Judge for Alameda County.

Shelly Jarvis serves on the Board of St. Clares' Christian Preschool where she and Julie Rose provide pro bono legal service for the school. Shelly also is a parent volunteer at Walnut Grove, she is on the leadership committee for the Catholic Community of Pleasanton M.O.M.'s and is a member of the Million Moms Club.

Several members of the Firm's staff are key members of the Livermore-Amador Valley Legal Professional Association, with Lori Nelson serving as the Associations President.

Fulfilling their respective civic duties, Ryan Donlon spends election days working as a volunteer Election Judge here

in town, while Nick Tooliatos perhaps gave more than any through his nearly one year of active duty service as a colonel in the United States Army and his continuing service in the Army Reserves.

McNichols Randick O'Dea & Tooliatos, its attorneys and staff are committed to making our community better through volunteerism. The Firm gives of itself and strongly supports and encourages its members and staff to do the same. The results speak for themselves.

McNichols Randick O'Dea & Tooliatos, its members and staff have collectively made a significant contribution to the Pleasanton community and worthy of the Pleasanton Chamber of Commerce's Business Service Award.

Inverse Condemnation – A Powerful Weapon For Property Owners

By Steve McNichols

When private property is damaged by the construction or operation of a public improvement, the property owner should consider a claim in inverse condemnation. The remedy of inverse condemnation has a number of advantages for plaintiffs over other causes of action used to obtain compensation for this type of damage to private property.

Damage to private property may occur many ways. The primary source of damage is water, such as flooding, soaking, depositing of silt and other debris, erosion or hydraulic forces. Other common sources of inverse condemnation damage include land instability (earth movement, landslide and the undermining of lateral support), loss of advantageous conditions (interference with or loss of access, an easement or airspace, impairment of view, loss of water supply or natural irrigation, accretions of sand and gravel and contamination or pollution of soil, water or air), damage due to concussion or vibration (damage from blasting, shock waves or pile driving), damage due to dust, noise or fumes, damage from escaping fire, sewage and chemicals, and damage caused by entry by public officers onto private property to perform public duties (inspections, surveys, abate a nuisance), improper land use regulation (regulations enacted in bad faith, eliminating all reasonable use, not directly related to legitimate government interests, conditions not roughly proportionate to the impact of a project). All of these situations can produce a claim in inverse condemnation.

Inverse condemnation claims offer remedies unavailable in other causes of action. First, liability in inverse condemnation, in most situations, is based upon a theory of strict liability. Under strict liability, the plaintiff is not required to prove fault, negligence or foreseeability. Second, the requirement that there be a link between the public improvement and damage is broadly defined. Third, an inverse condemnation claim does not accrue until there is a substantial interference with the



use and enjoyment of the property, diminution in value and the plaintiff discovers the cause of the damage. Additionally, the plaintiff can wait until the project is complete and the damage stabilizes. Fourth, in addition to offering more remedies for the plaintiff, inverse condemnation claims offer fewer defenses for the defendant. Fifth, the scope of damages and remedies available in inverse condemnation are extremely broad. A property owner can obtain an injunction and recover monetary damages which include pre-judgment interest. Damages include the difference in value of the property immediately before and after the injury, expenditures made to determine the cause and to prevent or minimize further damages, whether successful or not, the cost of making repairs, damages due to loss of use of the property, loss of past and prospective profits, as well as increased operating expenses pending repairs, relocation costs and severance damages. The property owner can also obtain pre-judgment interest on the damages awarded. In addition, the property owner can recover appraisal and engineering costs, as well as attorneys fees.

This firm experienced a recent success in this area of law. The property owner's land was damaged by a flood which resulted when a culvert was blocked during a storm. Water, mud and debris were deflected onto the plaintiff's property. The judgment included an injunction requiring the State of California to make changes in the operation of the culvert in order to prevent future injury, as well as damages in excess of \$1 million dollars. The damages included our client's attorneys fees and costs.

Development of land in California is proceeding at a phenomenal rate. Urbanization brings with it the construction of a multitude of public improvements. These improvements are an increasing factor in causing damage to private lands. Inverse condemnation is a potent remedy for private parties whose property is damaged by the construction or operation of such improvements.

In The Law – Mandatory Sexual Harassment Training

By Julie Rose

On September 29, 2004, Governor Schwarzenegger signed Assembly Bill 1825. This bill requires that all employers having 50 or more employees shall provide at least two hours of classroom or other effective interactive training and education regarding sexual harassment to all supervisory employees who are employed as of July 1, 2005 and to all new supervisory employees within six months of their assumption of a supervisory position. Any employer who has provided this training to a supervisory employee after January 1, 2003, is not required to provide training by the January 1, 2006, deadline. After January 1, 2006, each employer covered by the bill shall provide sexual harassment training to each supervisory employee every two years.

The law requires that the training shall:

- (1) Include information and practical guidance regarding the federal and state statutory provisions concerning the prohibition against and the prevention and correction of harassment and the remedies available to victims of sexual harassment;
- (2) Include practical examples aimed at instructing supervisors in the prevention of harassment, discrimination, and retaliation; and
- (3) Be presented by trainers or education with knowledge or expertise in the prevention of harassment, discrimination, and retaliation.

To qualify as an “employer,” means any person regularly employing 50 or more persons or regularly receiving the services of 50 or more persons providing services pursuant to a contract.

“Supervisor” is not defined in the statute. It is assumed that the definition contained in the Fair Employment and

Housing Act (FEHA) will apply. Under FEHA, a “supervisor” is any individual having the authority “to hire, transfer, suspend, layoff, recall, promote, discharge, assign, reward, or discipline other employees, or the responsibility to direct them, or to adjust their grievances, or effectively to recommend that ... if the exercise of that authority is not of a merely routine or clerical nature, but requires the use of independent judgment.” Govt. Code § 12926(r).

What does this mean for the employer?

Any employer with 50 or more employees, part time or full time, including independent contractors working for the employer, must provide the training.

If the employer has not already provided this training, it must be completed prior to January 1, 2006 and every two years thereafter. All supervisors after January 1, 2005, must be trained within 6 months of being hired.

An employer will need to keep records of those attending the training to document compliance with the new law.

Because a new supervisor must be trained within 6 months of being made a supervisor, the employer will probably have to conduct a minimum of two training sessions a year.

The training must be interactive. Merely showing a video will not be sufficient.

The trainer must have knowledge and expertise in preventing harassment.

An employer should broadly interpret the meaning of a supervisor to cover those employees who have input on another employee’s performance review and directs work that he gives to that employee. Knowing and understanding these rules is essential for every covered employer in order that it fulfill statutory obligations and maximize the efficiency of its business operations.

GOING PLACES – Steinbeck Country

By Julie Rose

Looking for a fun, tasty and, dare I say it? – educational day trip? Hop on Highway 101 South for about 2 hours (28 miles past Gilroy). Take the Salinas Main Street exit and follow the signs to Steinbeck Country, also known as The National Steinbeck Center at 1 Main Street.

John Steinbeck was born in Salinas in 1902. Although Steinbeck traveled extensively, most notably with Charlie, his full-size poodle, immortalized in *Travels With Charlie*, he remained rooted in the earth and the people of the Salinas Valley until his death in 1968. His literary prowess garnered him the Nobel Prize for literature in 1962.

It is fitting, then, that in 1998 the Steinbeck Center opened in Historic Old Salinas as a lasting tribute to the man, his life, his philosophy and most of all his writing. In a modern brick building at the end of Main Street, visitors enter into an educational, informative, entertaining and



interactive world that makes Six Flags Great America pale by comparison – well, almost.

The Center consists of a Main Exhibition Hall, dioramas, a research library, a theater, a restaurant, a gift shop and two large halls devoted to agriculture in the Salinas valley.

In the Main Exhibition Hall, visitors can view an extensive collection of Steinbeck memorabilia including *Rocinante*, the truck that took Steinbeck and Charlie 10,000 miles across America and back. The theater shows a 20 minute orientation that integrates Steinbeck quotes with pictures and film footage from his life.

Each of the dioramas depicts a different Steinbeck novel including *East of Eden*, *Cannery Row*, *Of Mice and Men*, *The Grapes of Wrath* and *The Red Pony*. Film clips of movies and stage productions are shown continuously.

The Valley of the World exhibit provides an extensive history of California central valley agriculture from the late 1800s to the present. The exhibit includes the cab of a produce-hauling big-rig that you can try on for size, voting for

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GOING PLACES – Steinbeck Country cont. . .

your favorite vegetable, an interactive quiz game, a fascinating discourse on the affect of the WWII Japanese internment on the Valley's agriculture, making a personalized fruit/vegetable label and trivia such as the name of the very first Artichoke Queen (you'll have to make the trip to find out who - oh, heck, you've got internet – it was Marilyn Monroe, 1949).

The gift shop is worth while. Lots of neat stuff, including inexpensive paperback copies of virtually all Steinbeck's literary works and cool T-shirts.

The trip is tasty too! The Center includes the very nice One Main Street Café where you can get fresh soups, salads, sandwiches, pastas and Monterey Peninsula wines. And, right next door to the Center is the Monterey Peninsula Tasting

Room where you can sample not only the established wines of the area but those of many smaller producers as well.

You can also walk down the street and have lunch at a restaurant located in the parlor of the house in which Steinbeck was born. For the severely parched, a few steps from the Center is the Monterey Coast Brewing Company, which serves fine food including a Scottish Red Ale (their flagship brew) marinated tri-tip and a bevy of other great beers in a nice atmosphere. If none of the above appeal, there are a number of other restaurants close by that sounded good but that we didn't have time to try.

Admission is: adults \$10.95, \$7.95 for kids 3 – 17, \$5.95 for 6 – 12 and, under 5, free. Show your AAA card and get a discount. So whatcha waitin' for?

Epicurean Delights

Roast Pork Loin with Cherries

By Brendan Lund

The following is a scrumptious recipe for a holiday feast or a great Sunday night dinner.

3 ½ – 4 lb. pork loin, rolled and tied
2 cups cherries, plus 1 cup canning juice from a 24 oz. jar of pitted tart cherries
Juice of ½ lemon
Salt and freshly ground black pepper
4 tbsp. butter, softened
1 cup chicken stock
1/3 cup Madeira
Grated zest of 1 orange
2 pinches ground cinnamon
Pinch ground cloves
Pinch ground cardamom

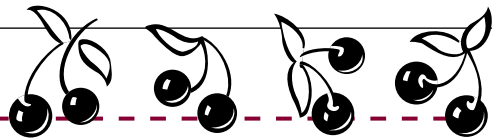
1. Preheat oven to 450°. Make 14 incisions, ½" deep, all over pork and insert cherry into each incision. Rub pork with lemon juice, then

generously season with salt and pepper. Rub butter all over pork and transfer to a large heavy-bottomed roasting pan. Roast pork, basting occasionally, until it begins to brown, approximately 15-20 minutes.

2. Add stock and cherry juice to roasting pan and scatter remaining cherries around pork. Reduce oven temperature to 325°, loosely cover pork with heavy-duty foil and continue roasting until meat is tender, about 2 hours.

3. Transfer pork to a warm serving platter, loosely cover with foil, and set aside to let rest for 10-15 minutes. Meanwhile, pour pan juices and cherries into a medium heavy-bottomed saucepan and bring to a boil over high heat. Add Madeira, orange zest, cinnamon, cloves, and cardamom and boil until sauce has reduced by two-thirds (to about 1 ½ cups) and thickened, about 20 minutes.

4. Discard twine from meat, then carve pork. Transfer sliced pork to a warm serving platter and spoon cherry sauce around meat. This dish can be complemented with wild rice and seasonal vegetables, as well as a nice Pinot Noir or Zinfandel.



Beer Chili By Phil Vermont

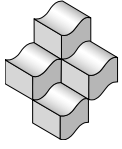
With the cold weather fast approaching, this recipe for beer chili is perfect for a cold night in front of a warm fire.

2 lbs. ground beef (or ground turkey for less calories)
1 lb. beef stew meat cut in small pieces
1 whole onion
3 cloves crushed or finely chopped garlic
1 green pepper finely chopped
1 red pepper finely chopped
5 to 10 medium sized mild golden pepperocini's (depending on the heat you want) finely chopped
3 cans red kidney beans (undrained)
3 cans black beans (undrained)
1 can chopped tomatoes in water
1 to 2 bottles dark or lager beer

Chili powder (to taste)
2 tsps. ground black pepper
Salt (to taste)



Begin by placing ground meat, stew meat, chopped onion, chopped peppers, salt and pepper in large, deep soup pot. Simmer everything together on low to low-medium heat until meat is completely browned. Pour in beer and tomato can. Add chili powder (about ½ the amount you will use for the entire recipe). Simmer for approximately 10-15 minutes. Then, add all cans of beans, add additional chili powder to taste, and simmer at least 3 hours on low heat. As desired, simmer on low heat longer to reduce liquid to reach the consistency you prefer. Serve with fresh hot corn bread and a large green salad, and your winter meal is complete.



McNICHOLS RANDICK
O'DEA & TOOLIATOS LLP
 ATTORNEYS AT LAW

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PAID
 PLEASANTON, CA
 PERMIT NO. 354

5000 Hopyard Road, Suite 400
 Pleasanton, CA 94588
 Phone: 925-460-3700
 Fax: 925-460-0969
 E-Mail: info@McNicholsLaw.com
 Web Site: McNicholsLaw.com

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Quips & Quotes By John Nielsen

Jerry Seinfeld

It's amazing that the amount of news that happens in the world every day always just exactly fits the newspaper.

Steven Wright

I hate it when my foot falls asleep during the day because that means it's going to be up all night.

I'm addicted to placebos. I'd give them up, but it wouldn't make any difference.

Last week, I forgot how to ride a bicycle.

My neighbor has a circular driveway. He can't get out.

Today I met with a subliminal advertising executive for just a second.

What's another word for thesaurus?

Will Rogers

After eating an entire bull, a mountain lion felt so good he started roaring. He kept it up until a hunter came along and shot him ...

The moral: When you're full of bull, keep your mouth shut. Income tax has made more liars out of the American people than golf.

Chinese (Proverb)

He who does not know and asks is a fool for five minutes.
 He who does not know and does not ask is a fool forever.

Italian (Proverb)

Once the game is over the king and the pawn go back into the same box.



Western Union

This "telephone" has too many shortcomings to be seriously considered as a means of communication. (1876 memo)

Michigan Savings Bank

The horse is here to stay, but the automobile is only a novelty - a fad. (Bank's president, to Henry Ford's lawyer, Horace Rackham.

He ignored the advice and invested \$5000 in Ford stock, selling it later for \$12.5 million.)

Decca Records

We don't like their sound. Groups of guitars are on the way out. (After turning down the Beatles, in 1961.)

Ronald Reagan

Government's view of the economy could be summed up in a few short phrases: If it moves, tax it. If it keeps moving, regulate it. And if it stops moving, subsidize it.

If a man speaks in the forest and there is no woman to hear him ... **Is he still wrong?**

A hen is an egg's way of making another egg.

Celibacy is not hereditary.

Buy one for the price of two and get another one free!

As far as we know, our computer has never had an undetected error.