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LEGAL UPDATES FOR BUSINESSES

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December 2017

Welcome to the December 2017 issue of Schenck, Price, Smith & King's "Legal Updates for Businesses." Understanding that business owners and managers have an extremely wide variety of issues to deal with on a regular basis, in this edition we have featured two articles related to employment questions and three related to commercial real estate. Each author of these articles is very experienced in his/her area. They and the rest of our colleagues would welcome the opportunity to assist with your legal matters.

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BYOD — Bring Your Own...Device?

By Meghan V. Hoppe, Esq.

With a newer smartphone around every corner, it's a challenge for any IT department to stay on top of the most up-to-date technology. That's where BYOD can help. BYOD, or "bring your own device," is the trend of employees utilizing their personal devices (e.g. smartphones, tablets and laptops) to work remotely and on-the-go. Companies benefit as employees are more accessible, and personal devices are often upgraded more regularly due to employee interest in having the most innovative hardware. While it's certainly efficient, allowing employers to cut costs while optimizing employee productivity, there are several factors a company should keep in mind before jumping on this bandwagon.

First things first: a comprehensive BYOD policy is key. An organization must look at the type of data it generates and uses in order to determine what level of security risk is involved. Does the organization transmit confidential company or third-party data? Does any data include personal or medical information? A BYOD policy should also address day-to-day operational issues: What happens in the event a personal device containing company data is lost? How does the company retrieve data if the employee quits or is fired?

Once an organization has developed a policy and identified security risks, there are many protections that can be taken to ensure that company data is secure. As a condition to BYOD, companies can require employees utilize the password lock screen feature that is standard on most devices. There is also mobile device management ("MDM") software and other tools available that companies can employ to maintain control over the devices used in their network. These cybersolutions can help by encrypting communications, enabling users to securely access the company network and remotely wiping company emails and data from personal devices. Again, the appropriate solution will vary depending upon the nature of the business, resources available and a comprehensive solution of the potential risks.

However, BYOD policies and security requirements won't do any good if employees aren't cyberaware or don't fully understand what their obligations are when using personal devices. Corporate BYOD policies should be communicated to employees during onboarding and continuously

through training on cybersecurity best practices. Ongoing technical support concerning software requirements, the remote wipe controls of the company and instructions on the backup of devices in order to avoid data loss are also important topics that can streamline compliance.

Lastly, healthcare providers, financial institutions and other regulated industries must stay up to date on applicable regulations and guidance regarding access to and storage of information, as well as mandatory reporting requirements for any data breaches or security incidents on employee-owned devices.

BYOD is a very good example of the new legal issues arising as the result of the development of technology. Businesses will need to stay in front of these issues before problems arise.

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Evaluating Your Commercial Real Estate for Tax Savings

By John E. Ursin, Esq. and Robert B. McBriar, Esq.

Annual real estate taxes billed by your municipality are based on the assessed valuation of your property. The New Jersey Constitution mandates that all real property be assessed according to the same standard of value. If a County Board of Taxation or the Tax Court of New Jersey determines that your assessment is in excess of the true or assessable value of your property, you may be entitled to a tax refund or credit against future quarterly taxes. Moreover, a reduced tax assessment yields further cost savings throughout successive tax years.

Tax Assessors are required to assess all property according to its "full and fair value." In valuing commercial and industrial properties, Tax Assessors frequently use the Income Approach. The Income Approach analyzes the future income stream produced by a property to estimate the sum which might be invested to purchase the property in order to receive future benefits. This requires a detailed budgetary study of income and expenses associated with the property. The resultant net income is capitalized at an interest rate which the property investor can expect as a reasonable return. Using this approach, the capitalized value of the net income represents the present value of the property.

In using the Income Approach, Tax Assessors must be certain that the income utilized can be traced strictly to the property itself, and not to the business which is conducted on the premises. To do so, Tax Assessors generally ask owners of income-producing properties to provide income and expense data in the form of a "Chapter 91 Request." With limited exception, failure to respond to such a request within 45 days will preclude you from filing a tax appeal.

You may be entitled to reduce your tax payment by filing a tax appeal challenging your current assessment. The deadline for filing an appeal for the 2018 tax year is April 1, 2018 unless your municipality performed a revaluation or reassessment, in which case the filing deadline is extended to May 1, 2018.

Economic influences continue to affect the value of many commercial properties throughout New Jersey. While fluctuations in the commercial real estate market have generally resulted in lower rents and higher vacancy rates, necessary expenses such as insurance premiums, utilities, repairs, maintenance and administration continue to rise. Given these competing factors, you should consider reviewing your commercial real estate inventory to determine whether your tax assessment is correct. You just may find that you are being over-assessed and entitled to significant tax savings.

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Is Requiring Employees to Agree to Mandatory Arbitration Enforceable?

By Joseph Maddaloni, Jr., Esq.

The use of arbitration agreements in the workplace continues to be a source of litigation. However, as evidenced by two recent New Jersey appellate court

decisions, mandatory arbitration agreements will be enforced in New Jersey if they are properly drafted and offered to an employee as a precondition of employment, and if the employee assents to the terms of the agreement.

A New Jersey appeals court recently upheld an arbitration agreement signed by an employee as a precondition of employment with her employer, Raymour & Flanigan. The employee sued the employer for race and sex discrimination. The suit was dismissed by the trial court based upon the arbitration agreement, and the employee appealed. In an unpublished opinion, the appeals court agreed with the trial court and rejected the employee's argument that the arbitration agreement was unconscionable and a violation of public policy. The court also rejected the employee's claim that the arbitration agreement was signed under duress. Rather, the court noted New Jersey's long-standing public policy that strongly favors arbitration to settle disputes. The court also recognized that New Jersey has long permitted employers to require prospective employees to sign an arbitration agreement as a precondition of employment.

In another recent New Jersey appellate court decision, however, the court determined that an arbitration policy contained in the electronic policy manual of Best Buy Co., Inc., was unenforceable. The employee sued the employer for age discrimination following his termination, and the suit was dismissed based upon the arbitration policy. The employee appealed. In another unpublished opinion, the appellate court reversed the dismissal and refused to enforce the arbitration policy because of the absence of an explicit waiver of the right to file suit, and because of a lack of assent by the employee to be bound by the policy. The court, once again, noted New Jersey's strong public policy favoring arbitration to settle disputes. Yet, the court recognized that arbitration agreements are regulated under general contract principles and, like any other contract, must be the product of mutual assent as determined under customary principles of contract law. There must be an explicit, affirmative agreement that unmistakably reflects the employee's unambiguous assent to arbitrate the dispute, which requires a full understanding of the terms of the agreement and the rights being waived.

Best Buy's policy did not contain an explicit waiver of the right to sue, which the court deemed fatal to enforcement of the policy. Further, the employee merely clicked on a box acknowledging that he read and understood the policy, which the court determined to be ineffective assent by the employee even if the waiver of the right to sue was explicit. While the court affirmed that an employee can assent to the terms of an arbitration policy by electronically clicking on a website box, such assent requires that the employee affirmatively agree to be bound by the policy.

These recent cases show that mandatory arbitration agreements remain viable for employers in New Jersey. However, the courts will scrutinize these agreements and find them unenforceable on any basis that exists at law or in equity for the revocation of a contract. Employers must be careful in drafting these agreements, and must assure that the terms are understood, acknowledged and expressly agreed upon by the employee.

Employers are encouraged to have their arbitration agreements and policies reviewed to avoid an unfavorable outcome in the event of a legal challenge.

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Compliance with NJ's Bulk Sale Statute: Practical Considerations

By Jason R. Rubin, Esq.

The New Jersey Bulk Sale Statute (N.J.S.A. 54:50-38, et. seq.) applies to the sale, transfer or assignment of an individual's or company's business assets, in whole or in part, outside of the company's ordinary course of business. A "business" is deemed "any endeavor from which revenue or consideration is realized for the purpose of generating profit or loss" and a "business asset" is "any asset that generates income or loss". Business assets can include goodwill, materials, supplies, licenses, patents, copyrights, equipment, leases, merchandise, inventory and real property (including vacant land). Sales of assets made in the ordinary course of business, such as retail sales to customers, are not considered bulk sales and therefore are not subject to this Statute.

The Bulk Sale Statute requires that a Notification of Sale, Transfer or Assignment in Bulk ("Bulk Sale Notice") be filed with the New Jersey Division of Taxation at least 10 business days prior to the bulk sale, transfer or assignment of business assets. Upon receipt of the Bulk Sale Notice, the Division of Taxation will issue a clearance letter (confirming that no payments are due), an escrow letter (instructing that an escrow be held pending a final determination regarding the tax liability) or a demand letter (demanding payment of a sum certain to satisfy a tax obligation). A failure to file the Bulk Sale Notice renders the purchaser liable for any State tax obligations due from the seller. The State can seek to satisfy such obligations through judgment, levy and seizure of assets of the purchaser as well as the seller.

There are measures which can be taken by purchasers and sellers of business assets to prevent compliance with the Bulk Sale Statute from causing delays or impediments to the transaction. From a seller's perspective, there is an advantage to making certain that any escrow or demand for payment accurately reflects the approximate tax liability due. A seller should have its accountant prepare an Asset Transfer Tax Declaration form ("TTD") for filing along with the Bulk Sale Notice. In most cases, the TTD form allows the Division to more accurately calculate the tax liability and results in an escrow or payment that is more in line with the realities of the transaction. Some sellers do not recognize the importance of filing the TTD simultaneously with the Bulk Sale Notice, and as a result, incur delays caused by the Division needing to revise their initial response based on the additional information subsequently provided by the TTD form.

The Bulk Sale Statute only requires 10 business days advance notice before closing on a transaction. However, in some recent instances the responses from the Division of Taxation have taken longer than the 10-day of the notice period. While a purchaser in a bulk sale transaction is protected from successor liability should the required 10 days of notice be given before the closing pursuant to the terms of the Statute, many purchasers elect out of an abundance of caution to instead delay the closing and wait for a formal response from the Division. To avoid such a scenario, notice should be given well in advance of the required 10 business day period to allow ample time for a response (or requests for more information) from the Division.

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Changes to NJDEP Soil Cleanup Standards

By Sean Monaghan, Esq.

The New Jersey Department of Environmental Protection ("NJDEP") changed the Soil Remediation Standards for 19 contaminants by publishing an announcement in the New Jersey Register on September 18, 2017. These changes have important implications for many businesses with soil contamination, including for example, those businesses that are subject to the New Jersey Industrial Site Recovery Act when a business subject to the Act is being sold or transferred.

The contaminants for which remediation standards changed include some of the most common contaminants in soil and groundwater and applied to many NJ businesses. These contaminants also had some of the lowest soil remediation standards previously, some lower than 1 part per million (ppm). The standards for 11 contaminants are now less stringent. For example, the Residential Direct Contact Soil Remediation Standard (RDCSRS) for Benzo(a)Anthracene and Benzo(b) Fluoranthene, two of the contaminants that are presumed to be present in historic fill material, increased from 0.6 ppm to 5 ppm and the Non-Residential Direct Contact Soil Remediation Standard (NRDCSRS) for those contaminants increased from 2 ppm to 17 ppm. Another favorable change was the increase in the standard for Tetrachloroethene, commonly referred to as "PCE" or "Perc". Perc was very widely used for dry cleaning and degreasing metal parts. The RDCSRS for Perc was increased from 2 ppm to 43 ppm and the NRDCSRS was increased from 5 ppm to 1500 ppm.

Not all the changes were increases. The standards for six contaminants became more stringent. For example, Trichloroethene (TCE) went down. Like Perc, TCE was

commonly used for degreasing and is a common soil contaminant at industrial sites. The RDCSRS for TCE decreased from 7 ppm to 3 ppm and the NRDCSRS decreased from 20 ppm to 10 ppm.

The impact of these changes on site remediation could be important, especially for sites where the remedy will rely on the use of institutional and engineering controls, such as a Deed Notice and impervious cover, e.g. a building slab or pavement, as a "Cap." Relying on this Deed Notice and Cap technique, while providing cost savings, can have long-term implications on the property value and permitted uses. If the contaminants remaining at a site are one or more of the 19 contaminants, the tables attached to the Deed Notice should be reviewed to determine whether the levels at the site are now lower than either the NRDCSRS or the RDCSRS. If all the contaminants are now below the RDCSRS, the Deed Notice may be terminated and with it the NJDEP Remedial Action Permit. This would obviate the need for filing biennial certifications with NJDEP and render the site "clean" for purpose of New Jersey site remediation law. If the levels remaining at the site are above the RDCSRS, but below the NRDCSRS, the Cap or other engineering control will no longer be required. That will allow the Remedial Action Permit to be modified to eliminate the requirements for monitoring the engineering control. It will also allow the financial assurance posted with NJDEP to be released.

NJDEP estimates that hundreds of closed cases may be affected by these changes. If you are responsible for complying with a Remedial Action Permit for Soil, you should examine the potential impact of these changes on your site.

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