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LEGAL UPDATES FOR BUSINESSES

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Welcome to the first issue of Schenck, Price, Smith & King's *Legal Updates for Businesses*, a new newsletter that explores the issues and developments that impact business. Our aim is simple: to tell you what is happening and why it matters to your business. We welcome your feedback. Please let me know if there are topics that you would like us to cover in upcoming issues.

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Selection of Product and Service Names: A Cautionary Tale

By Ira J. Hammer, Esq.

Once upon a time, a successful real estate developer decided to build a hotel casino in Atlantic City and named it the "Carnival Club Hotel & Casino." The groundbreaking was well publicized. One of the newspaper readers was not amused. He was the owner of Carnival Cruise Lines ("CCL") and had spent millions of dollars on nationwide advertising to build its name and reputation. CCL did not want this upstart to take advantage of its marketing efforts, or to sully the name Carnival. Litigation ensued and, although the marks and respective services were not identical, CCL prevailed because the marks were confusingly similar and the services were competitive with each other. The hotel casino owner was still lucky, because the lawsuit was brought before the hotel casino opened its doors, and therefore the hotel-casino owner was not required to pay damages.

When choosing the name of a product, business or service, it is important to make sure that the name does not infringe the rights of existing businesses. The last thing a new business or an existing business with a new product or service name needs is to be told to stop using that name.

The story above demonstrates just one of the pitfalls of selecting a business, product or service name without seeking appropriate legal advice, but there are others. Don't put yourself in the position of the hotel casino owner, who lost the investment he made in the name of his business and was forced to re-invest in a new name. Seek the right professional assistance to get your new business off to a correct start.

For more information, contact Ira J. Hammer at ijh@spsk.com, or (973) 631-7859.

SBA Loans — Can They Help You?

By Amy Buck Faundez, Esq.

There are two types of U.S. Small Business Administration ("SBA") loans available for small businesses. The first program is a SBA 7(a) loan and it is the SBA's primary business loan program. It has broad eligibility requirements and credit criteria to accommodate a wide range of financing needs. The maximum loan size is $5,000,000.00. The SBA does not lend directly, but instead the potential borrower submits an application to a commercial lender and the lender seeks approval from the SBA. The SBA's approval is a guarantee that it will reimburse the lender for 75–85% of the lender's loss on the loan if the borrower

defaults. The interest rate (both fixed and variable rates are available) is negotiated between borrower and lender. Generally, maximum loan maturities are 25 years for real estate, up to 10 years on equipment and 7–10 years for working capital.

The second program is a SBA 504 loan, which is an economic development program that supports American small business growth and helps communities, business expansion and job creation. The loans are typically long-term, fixed-rate loans for financing fixed assets (usually real estate and equipment). The maximum loan size is $5,000,000.00 on the SBA portion (no maximum on the project amount). 504 loans are made through Certified Development Companies ("CDCs") that are nonprofit intermediaries that work with the SBA, banks and businesses looking for financing. Under this program, the borrower is required to provide 10% of the equity in the project. A commercial lender provides 50% of the funding and has a first lien on the subject collateral. A commercial loan is not guaranteed by the SBA. The CDC provides the remaining 40% of the funding and has a subordinate second mortgage, which is backed 100% by an SBA guaranteed debenture. The debentures are sold monthly in pools to private investors. The advantage of this program is that the CDC portion (the 40% portion) is a fixed, below market rate loan for twenty (20) years.

Nearly all businesses, whether large or small, need financing from time to time. The SBA loan might fit your business needs.

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Salary History Ban Laws Aim to Close Gender Pay Gaps But Expand Risks for Employers

By Cynthia L. Flanagan, Esq.

According to the American Association of University Women analysis of data from Proctor, et al. U.S. Census Bureau, *Income and Poverty in the United States 2015*, women working full time in the United States were paid 80 percent of their male counterparts. That gap in pay follows a woman from job to job when employers base future salaries on a woman's previous salary. Employers are blamed for perpetuating the gender pay gap by capitalizing on cost savings in the pay disparity rather than closing the gap by paying men and women equally for the same position.

Several states and cities have passed salary history bans as part of a broader legislative effort to prevent employers from underpaying women. By preventing employers from relying on a woman's salary history to set pay, the laws effectively force employers to look at the market rate for each position. Employers in New York who violate the law can be fined up to $250,000. Employers located in Philadelphia will be fined $2,000 per violation, plus jail time for repeat offenses.

New Jersey, New York, Pennsylvania, and Maryland might soon join Massachusetts, New York City, and Philadelphia in barring employers from asking candidates about their salary history. New York City's law takes effect in November 2017 and Massachusetts's law is set for July 2018. The Chamber of Commerce of Greater Philadelphia's legal challenge has temporarily stopped Philadelphia's law from taking effect on May 23, 2017.

The salary history ban laws create a host of risk issues, policy inconsistencies, and expense increases for employers. While job applicants may voluntarily disclose their salary history levels to a prospective employer, employers are at risk for claims by applicants who later claim that they did not voluntarily disclose the information. Employers who hire an applicant at a higher salary might face discrimination claims by another employee in the same position earning less money who was hired prior to the salary history ban.

Unable to rely on salary histories to set pay, employers may be forced to expend resources in obtaining market data, surveys, or analytical programs to set the rate for a certain role, costs which might reduce other benefits the employer would otherwise offer to its workforce. Those employers that are unable to afford to expend additional resources are likely to simply guess at a fair salary range. Also, a wrong guess could cost the employer experienced applicants.

The salary ban laws certainly will force a greater number of employers to rely more on surveys and recruiting agencies to advise them on market rates and to assist in creating accurate salary ranges for particular position levels, depending upon several additional factors like demand and experience. However, employers will not be able to circumvent the salary history ban by relying on a recruiter to obtain that information for them. A recruiter working on behalf of an employer to fill a position is, arguably, the employer's agent and therefore cannot extract salary history from a candidate.

Employers should take measures to reduce risks and ensure compliance with the new salary history ban laws. Employers should revise applications and remove salary history questions, training human resources and managers on appropriate interview measures, and instruct recruiters not to obtain or share an applicant's salary history information.

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Real Estate and Business Owners and Operators May Be Contacted for Alleged Violations

By Sean Monaghan, Esq.

On April 12, 2017, the New Jersey Department of Environmental Protection ("DEP") issued a Compliance Notice ("Notice") that should be of interest to any owner of real property that has been remediated using an Institutional Control. Institutional Controls are a Deed Notice for soil remediation and a Classification Exception Area for ground water remediation. The DEP's new position could impose a significant annual cost on owners of real property.

Since 2009, DEP requires parties relying on Institutional Controls to enroll in the Remedial Action Permit ("RAP") program. Engagement in the RAP program can have significant, long-term implications with respect to the ownership of real property and may impact its marketability. The RAP requires not only the filing of a certification prepared by a Licensed Site Remediation Professional every other year, but where an engineering control is part of the remedy, also requires a financial assurance of $30,000 or more. The cost of monitoring and filing biennial certifications can be thousands of dollars per year.

The Notice is DEP's alert to owners who obtained or bought in reliance on a No Further Action letter issued prior to 2009 that they are required to obtain RAPs for their sites, notwithstanding their No Further Action letter. The Notice even tries to extend the obligation to mere operators on such property. The Notice states that any person who owns or operates a business at, or is a tenant at, a site for which there is an Institutional Control but no RAP is subject to enforcement action. This ignores the covenant not to sue that is part of the No Further Action letter. It also appears to overstate the requirements of the Site Remediation Reform Act and even DEP's implementing regulations.

The Notice is a warning that owners and operators of real estate and businesses may be contacted by DEP for an alleged violation of the RAP requirement. Any DEP contact should not be ignored. The Notice states that the potential minimum daily penalty is $30,000. If you own, or operate at, real property that is covered by an Institutional Control and you do not know whether the site is in compliance with the RAP requirement, feel free to contact Sean Monaghan or Richard J. Conway, Jr. to consult on an appropriate course of action.

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Tax Reform Coming?

By Douglas R. Eisenberg, Esq.

The more things change, the more they stay the same. In 1982, Ronald Wilson Reagan embarked on "simplifying" our beloved (not) tax code. However, when the Tax Reform Act was eventually passed in 1986, it was anything but simple and, as a result, the legislators were forced to call it the Tax Reform Act instead of the Tax Simplification Act. One would think that with Republicans controlling the Presidency and both Houses of Congress, tax reform should be in the offing, but nothing is a sure thing.

The other big constraint on Tax Reform is our twin fiscal problems: the projected fiscal budget deficits and our national debt. Although as a percentage of our economy, these are not as daunting as a first blush might dictate, they nevertheless present the fiscal conservatives in the Republican Party some concern. It should be noted that the same concerns existed back in 1986.

In any event, below is a summary of the current law and the latest Administration proposal to reform our current version of the Internal Revenue Code. The proposal presented was one page in length, with much of the gritty details left to be fleshed out at a later time, i.e., to be negotiated. We shall see.

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	CURRENT LAW IN 2017	WHITE HOUSE APRIL 26TH PROPOSAL
Ordinary Income Tax Rates	7 brackets with a top rate of 39.6%	3 brackets with a top rate of 35%, except for a top rate of 15% on income taxed as sole proprietorship, partnership income, or pass-through income
Deduction Phase-Outs	Applies to AGI over: $261,500 (single); $313,800 (married)	Eliminates most itemized deductions, including state and local income tax deductions. Retains home mortgage interest and charitable contribution deductions.
Non-Itemized Standard Deductions	$6,350 (single) $12,700 (married)	Doubles the standard deduction
Alternative Minimum Tax	28% minimum rate, with exemption amount of $54, 300 (single); $84,500 (married); $24,100 (Trusts)	Eliminates
Rates on Capital Gains/ Dividends	Top rate of 20%, 1-year holding period	Top rate of 20%, 1-year holding period
Surtax on Net Investment Income	3.8% above $200,000 AGI (single); $250,000 (married); Trusts with income over $12,400	Eliminates
Estate Tax and Exemption	Top tax rate of 40% $5,490,000, as adjusted for inflation	Eliminates estate tax
Gift Exemption	Top tax rate of 40% $5,490,000, as adjusted for inflation	Eliminates estate tax, but no specific proposal on lifetime gift tax exemption
Corporate Tax Rates	Top rate of 35%	Top rate of 15%
Pass-Through Rates	Top rate of 39.6%	Top rate of 15%

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