Egblc Legal Report

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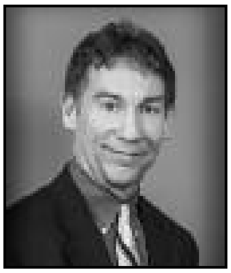
EGBLC commitment to excellence remains unchanged



While faces at EGBLC are changing, the Firm remains committed to excellence and providing quality legal services.

In late November, the Circuit Judges of the Fifteenth Judicial Circuit appointed our partner, Douglas Lee, as an associate judge. Doug takes the bench on Jan. 2, 2019, and is spending December working to transition clients to new counsel.

Fortunately, EGBLC has two new attorneys to share in that transition. Emily Vivian, a Dixon native, recently rejoined the Firm after stints in the Illinois Attorney General's Office and a small firm in southern Illinois. As she did when she previously worked for EGBLC, Emily will concentrate her practice in business law, estate planning and administration and real estate.

Daniel Kapolnek joins the Firm after graduating from the DePaul University College of Law. Dan will concentrate his practice in estate planning and administration and real estate matters, including zoning.

In the Attorney General's Office, Emily served as the Bureau Chief of Land Acquisition-Springfield and represented the State of Illinois in eminent domain actions, other land acquisitions and various contractual matters. When she returned to private practice in southern Illinois, she focused on the types of transactional work she'll perform at EGBLC.

An attorney with over 11 years' experience, Emily graduated with high honors from the Chicago-Kent College of Law. She obtained her undergraduate degree in accountancy from the University of Illinois at Urbana-Champaign.

At DePaul, Dan mentored first-year law students and participated as a fellow in the Mary and Michael Jaharis Health Law Institute. As an Institute fellow, Dan authored several articles for the Institute's monthly newsletter and twice competed in the L. Edward Bryant Jr. National Health Law Transactional Moot Court Competition.

Inside

Recent court decision raises concerns for bonus-based compensation plans

by Courtney E. Kennedy

Compensating employees largely through bonuses is risky, and a recent federal court decision reminds employers that vaguely worded policies can expose employers to large liabilities under the Illinois Wage Payment and Collection Act.

In *Sutula-Johnson v. Office Depot*, the employer revised its written compensation plan to change how it paid its sales staff. Under the old plan, the employer paid employees solely through commissions that were deemed to be earned either when a customer paid for the order or 90 days after the customer was invoiced. Under the new plan, the employer combined a salary with "incentive payments" that were to be paid on a quarterly basis and only if the employee was still employed when the incentive payments were made. After the new plan was adopted, an employee terminated her employment and sued the employer under the Act, arguing the incentive payments actually were commissions that were earned at the time of the sale.

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Federal tax reform does not obviate need for estate tax planning

by Emily R. Vivian

Those who think that the recent increases in the federal estate tax exemption eliminated the need to consider estate tax planning should think again.

As was widely publicized, the federal tax reform bill enacted last December increased and in fact almost doubled the federal estate tax exemption, from $5.49 million to $11.180 million. The increase in this exemption allows a person to transfer up to $11.180 million at his or her death and not be subject to federal estate tax. Because of the high exemption, the vast majority of people do not need advanced estate planning to minimize potential federal estate taxes.

The federal estate tax, however, is only one potential estate tax. States in which a person resides or other states in which the person owns real estate can have their own estate taxes. Indeed, Illinois has its own estate tax, which comes into play for individuals owning at least $4 million in net assets. Therefore, if a resident of Illinois dies owning more than $4 million in net assets, his or her estate may be subject to the Illinois estate tax.

Persons likely to have Illinois estates valued at more than $4 million at the time of death should seek advice from an experienced estate planner. With proper planning, it is possible for a married couple to shelter more than $8 million from the Illinois estate tax.

Proper sheltering can save hundreds of thousands of dollars in Illinois estate taxes. Assume, for example, that Husband and Wife are married. They jointly own $8 million in assets. Husband's Will leaves all his property to his Wife on his death. On Husband's death, no estate tax is due, because Husband's estate is entitled to a marital deduction for the entire amount passing to Wife. Now, however, Wife owns assets worth $8 million (this amount may increase with appreciation), and on her death, her estate could incur an Illinois estate tax of $680,634.

If, on the other hand, Husband and Wife had seen an experienced estate planning attorney, they might have been able to avoid paying any Illinois estate tax. This planning likely would involve using a credit-shelter trust (also referred to as a family trust).

A credit-shelter trust is generally funded with the maximum estate tax exemption (*i.e.*, $4 million) and is taxed on the death of the first to die (the estate tax designed to be $0). Under a credit-shelter trust, the surviving spouse receives the benefit of the assets in the trust while he or she is living, but the assets are not included in the surviving spouse's estate on his or her subsequent death. For this reason, a credit-shelter trust should be funded with assets most likely to appreciate so that the assets can go grow estate tax-free.

In this example, if Husband and Wife had availed themselves of the benefit of a credit-shelter trust, Wife's estate would consist of only $4 million on her subsequent death, and no Illinois estate tax would be due. Therefore, with adequate planning, Husband and Wife would be able to transfer an additional $680,634 to their children or other beneficiaries that otherwise would have been paid to the state in the form of estate tax.

Compensation . . .

Continued from page 1

The federal appellate court hearing the case held in favor of the employee. In its ruling, the court wrote that the critical question was whether the employer's incentive payments were commissions or bonuses, as commissions and bonuses are treated differently under the Act.

Under the Act, commissions are compensation for services performed and therefore are earned in the month the employee performed the work to make the sale. Employers must pay commissions at least monthly and include commissions as part of employees' final compensation on separation from employment.

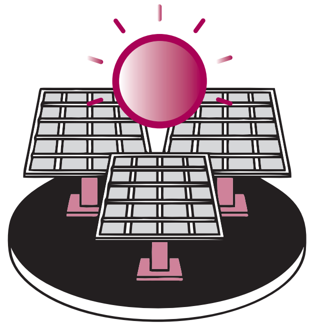
In contrast, bonuses are compensation given in addition to required compensation for services performed. Bonuses are more open-ended and provide employers with considerable discretion in imposing conditions and delaying payment.

In *Sutula-Johnson*, the court held the incentive payments were more like commissions than bonuses. Therefore, the court said, the employer could not pay these amounts only quarterly or require continued employment as a condition of receiving payment. In reaching its decision, the court essentially ignored what the employer called the payments and instead focused on the form and structure of the payment plan.

The primary lesson in *Sutula-Johnson* is that employers who wish to design bonus plans must do more than label certain payments "bonuses." Instead, they should carefully and clearly write the plans to distinguish between compensation that is earned and compensation that is discretionary.

New solar farm legislation will benefit rural communities

by David W. Badger



Gov. Rauner recently signed two bills that will help ensure solar development benefits to farmers and rural communities across the state.

Senate Bill 2591 establishes guidelines to protect Illinois farmland with regard to the installation and development of solar energy systems. This law requires solar energy developers to enter into an Agricultural Impact Mitigation Agreement with the Illinois Department of Agricultural at least 45 days before construction begins.

The mitigation agreements require developers to compensate landowners for the impacts on agricultural use and to return the land to farmable condition after the installation's useful life. In addition, the mitigation agreements address security for decommissioning, establish certain construction guidelines and cover issues such as topsoil replacement, decompaction, repair of damaged tile lines, prevention of soil erosion and conservation practices.

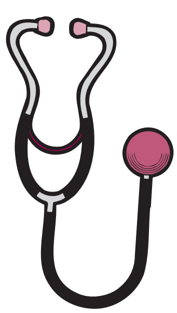
The aim of Senate Bill 2591 is to create agreements similar to ones now required for wind energy farms and certain pipeline and transmission lines. In fact, the requirement for the mitigation agreements directly stems from the state's experience with wind farm development. The provisions of the law also can be useful in negotiating leases or other agreements with solar project developers.

Senate Bill 486 sets a standard real estate tax assessment value for large solar installations, thereby creating certainty around the property taxes that solar farms will pay. This requirement is geared to help fund schools, public roadways and other critical services within the state.

According to the Illinois Solar Energy Association, which assisted in the development of both bills, each megawatt of ground-mounted solar installed in Illinois will generate an average of $6,000-$8,000 per year in property tax revenue. The ISEA predicts the industry will install up to 2,000 MW of ground-mounted solar farms by 2021, which, by its own predictions, will create approximately $250-$350 million in property tax revenue over a 25-year lifespan. Under Illinois' funding formula, approximately 70% of this revenue will be dedicated to funding public schools.

Congress, Illinois legislature relax ABLE account requirements

by Daniel R. Kapolnek



Congress and the Illinois General Assembly recently enacted legislation making ABLE accounts an even more attractive estate planning tool for individuals with disabilities.

ABLE – Achieving a Better Life Experience – accounts are tax-advantaged savings accounts for individuals with disabilities. These accounts allow an individual who receives Social Security, Social Security Disability or Medicaid to have access to an account containing benefits up to $100,000 to use on qualified expenses such as education, housing or other basic living needs. ABLE accounts may be funded through contributions from the individual account owner, friends and family. To qualify, an individual must show that his or her disability emerged prior to age 26.

Recent federal and state legislation significantly impacted ABLE accounts in Illinois. Working ABLE account owners, for example, now can contribute up to the amount of their gross wages or the poverty limit (whichever is higher) on top of the prior $15,000 personal contribution limit. For example, an account owner who makes $35,000 per year can contribute up to $27,060 (the $12,060 poverty limit plus the $15,000 personal contribution limit) into the account.

Further, while federal law allows state agencies to place a claim on a deceased's ABLE account to recover the value of Medicaid benefits that were paid to the account owner, a new Illinois law prevents the state's Department of Health and Family Services from exercising this option in many cases.

ABLE advocates' next target is the federal law that requires states to recover the value of Medicaid benefits from the estates of individuals who received Medicaid at age 55 or older or who received coverage for certain long-term services and supports. These advocates are working with the Illinois Treasurer's Office to craft legislation that shields ABLE accounts from this federal requirement.

Life insurers working out new incentive plans for insureds

by Gary R. Gehlbach

Life insurance historically has been a key component of financial and estate plans. While proof of fitness and leading a healthy lifestyle have not been required or even factors for obtaining life insurance, that may be changing.

John Hancock recently announced it is discontinuing underwriting traditional life insurance. John Hancock, however, is not foregoing the life insurance business. Instead, it is focusing on persons who are able to demonstrate they live healthy lifestyles.

The use of monitoring devices, such as Apple Watches or Fitbits or apps on a smartphone, apparently will not be required of insureds to remain insurable. However, insureds will have incentives to exercise regularly and sustain good eating habits. In turn, discounts will be afforded to insureds who can prove they have met certain exercise targets and diets. Additionally, gift cards and other perks will be available for those insureds who provide evidence of workouts and healthy food purchases.

John Hancock will begin converting its traditional life insurance policies to the new model soon. Persons with good lifestyles will pay less for coverage while those who are unable to meet established benchmarks will pay more.

With this major life insurance company no longer providing traditional life insurance, look for other companies to do likewise. With the increase in longevity in our country leveling off and even decreasing – significantly attributable to the rapid increase in obesity – actuarial data used to support life insurance premiums are being adjusted and insurers maybe resetting the industry.

In Print and At the Podium

Mr. Gehlbach, a member of the Illinois State Bar Association's Real Estate Law Section Council, recently published an article in the Section Council's newsletter on a landlord-tenant issue . . . **Mrs. Vivian** was named vice president of Equity Legal Services, Inc., a 501(c)(3) non-profit organization that provides free legal services for low income individuals . . . As a member of KSB Hospital's board of directors, **Mr. Lee** in April participated in a medical mission trip to Cusco, Peru . . . As a recent of the Chair of the ISBA's Trust and Estates Section Council, **Mr. Gehlbach** helped draft a bill that Gov. Rauner has now signed, the effect of which is to provide that, on the dissolution of a marriage, the designation by either spouse of the other as a beneficiary under a life insurance policy before the dissolution will be deemed revoked, with some exceptions. This change in Illinois law takes effect Jan. 1, 2019 . . . **Mrs. Foulker** is for her eighth time assisting in the United Way of Lee County fundraising campaign . . . **Mr. Lee** was re-appointed chair of the Finance Council of St. Anne Parish . . . **Mr. Gehlbach** and **Mrs. Vivian** recently presented to Illinois attorneys on real estate business transactions and the Illinois Uniform Commercial Code . . . **Mrs. Vivian**, a member of the ISBA Standing Committee on Government Lawyers, recently published an article in the Committee's newsletter regarding the future of public sector unions.

Deals and Decisions

Mr. Lee successfully represented a wind farm developer in obtaining special use permits and variances for a large project in Bureau County . . . **Mr. Gehlbach** and **Mr. Kapolnek** successfully assisted clients in annexing and rezoning several commercial real estate properties . . . **Mrs. Considine** has represented clients in five adoptions during the past two months and has several more adoptions in process . . . **Mr. Lee** recently assisted a client in acquiring real estate and assets to expand its business into two new markets . . . **Mrs. Considine** assisted a local professional in defending against a licensing complaint filed with a state regulatory body . . . **Mrs. Foulker** in July completed a divorce for a same-sex couple . . . **Mr. Lee** obtained a verdict for a client seeking to recover a down payment from a customer . . . **Mrs. Considine** is representing several clients seeking to modify child support under the Illinois statute that took effect in 2017 . . . **Mr. Lee** assisted a client in preparing a mechanic's lien and shortly thereafter recovering all amounts that were due . . . **Mrs. Considine** represented a local municipality involved in an intergovernmental conveyance of real estate.

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