BARRON | SMITH | DAUGERT PLLC

ATTORNEYS AT LAW

BUSINESS AND EMPLOYMENT NEWSLETTER

FIRST QUARTER, 2010

PERSONAL LIABILITY FOR UNPAID WAGES, STATUTORY PENALTIES AND ATTORNEY'S FEES

By Kirsten Barron

You are most likely aware that employers in Washington who fail to timely pay wages to an employee are liable for statutory penalties equal to twice the unpaid wages plus attorney's fees. This liability may attach even when the employing entity is seeking bankruptcy protection. Additionally, officers and senior managers remain personally liable for the unpaid wages, statutory penalties and attorney's fees.

If the employer is unable to pay wages, the employee can also recover the wages, double damages and fees from "any officer, vice principal or agent" of the employer. "Vice principal" includes a manager who exercises control over the direct payment of the wages and acts pursuant to that authority in failing to pay wages. Both the employer and individual officer or manager are liable for double damages and fees if found to have willfully withheld wages. Willfulness may be found when the refusal to pay is "volitional," even if it is not malicious, such as when the employer simply does not have the revenue to cover wage obligations.

In *Morgan v. Kingen*, 210 P.3d 995 (Wash. 2009), our State Supreme Court reaffirmed that officers face personal liability for unpaid wages under Washington's MWA, even when the corporation is liquidated in bankruptcy court. The officers sought to avoid personal liability, simply claiming it is not willful to not have enough money to pay wages and were in bankruptcy. The Court ruled that the Chapter 7 liquidation of the corporation did not provide the officers a means to avoid personal liability. The officers controlled how the corporation's money was used and made such decisions as whether to file for bankruptcy or close the business and pay debts, and the Court held that the choice not to pay wages was willful and intentional.

The Ninth Circuit Court of Appeals has ruled similarly, holding that individual managers who exercise "control over the nature and structure of the employment relationship" or "economic control" over the relationship may be personally liable.

Continued on Page 4

IN THIS ISSUE

LPs AND WUILPA	2
E-MAIL RETENTION	2
COBRA PREMIUM SUBSIDY EXTENDED	3
CORPORATE OFFICERS AND UNEMPLOYMENT	3
CONTRIBUTION BETWEEN GUARANTORS	4
TERMINATION MEETINGS	5
DISCRIMINATION CHARGE STATISTICS	6
PERSONAL NOTE	7

Barron Smith Daugert – Innovative, Responsible and Cost Effective Legal Solutions.

This publication is provided as a service to our clients and those with whom we do business. We hope that it provides you with useful information. This publication is not intended to nor does it provide legal advice. For the application of the law to your specific facts and circumstances, please call us.

LPs AND WULPA?

By Debbie Nelson

Following the trends of other states, on April 23, 2009 Washington passed a bill adopting and replacing the Washington Revised Uniform Limited Partnership Act, with the new Washington Uniform Limited Partnership Act (WULPA). RCW 25.10.

The WULPA contains changes to many aspects of limited partnership law to update and modernize the statute and to conform the provisions more closely to statutes governing other business entities in Washington. Uniformity!

The focus of this article is the addition of general partner protection from liability by electing to be a limited liability limited partnership.

Shield from Liability

A traditional limited partnership is a form of business organization that consists of one or more general partners and one or more limited partners. General partners manage the business and are jointly and severally liable for the debts and obligations of the limited partnership; limited partners are not liable for those debts and obligations beyond the amount of their respective capital contributions, except in limited circumstances where the limited partner participates in control of the business.

Effective January 1, 2010, the WULPA provides for a new entity type, a limited liability limited partnership (an LLLP, also referred to as a Triple LP), which gives general partners protection for most of the liabilities of the LLLP. RCW 25.10.401(3) states "[a]n obligation of a limited partnership incurred while the limited partnership is a limited liability limited partnership, whether arising in contract, tort, or otherwise, is solely the obligation of the limited partnership. A general partner is not personally liable, directly or indirectly, by way of contribution or otherwise, for such an obligation solely by reason of being or acting as a general partner."

Before an entity elects to become an LLLP, the parties should consider the fact that by electing to be a Triple LP, the limited partnership is also liable for a general partner's actionable conduct – not the general partner. RCW 25.10.391 states:

(1) A limited partnership is liable for loss or injury caused to a person, or for a penalty incurred, as a result of a wrongful act or omission, or other actionable conduct, of a general partner acting in the ordinary course of activities of the limited partnership or with authority of the limited partnership.

(2) If, in the course of the limited partnership's activities or while acting with authority of the limited partnership, a general partner receives or causes the limited partnership to receive money or property of a person not a partner, and the money or property is misapplied by a general partner, the limited partnership is liable for the loss.

LLLP Election

With this new law, LPs can elect to become an LLLP by filing an amendment of the application for registration with the Secretary of State's office. Of course, an entity can initially be formed as an LLLP by making the election during the formation process.

If you are interested in discussing whether or not an election to become an LLLP is right for your business, please give us a call. We will be happy to talk with you about it. We are also available to assist you with the election should you choose that option.

RECENT DECISION REGARDING E-MAIL RETENTION

By Megan Byma

Judge Shira Scheindlin's recent decision in *Pension Committee of the University of Montreal Pension Plan et al. v. Banc of America* is the first major decision on e-mail retention for 2010. It updates the negligence standards established in the *Zubulake v. UBS Warburg LLC* decisions from 2003 and 2004.

P*ension Committee* details the lack of preservation efforts of the plaintiffs, resulting in the probable loss of relevant data, which resulted in further discovery, monetary sanctions, etc. Judge Scheindlin discusses the duties of preservation, requirements of parties, and the appropriate remedies for failure to protect electronically stored information. In particular, here are a few key points to employ if litigation is anticipated: (1) issue written instructions on how to preserve documents and electronically stored information; (2) make sure that all accountable individuals have sufficient knowledge of the technology and programs being used in the preservation of such material; and (3) preserve records of former employees that are in your possession, custody, or control. Destroying relevant information can lead to costly sanction, additional discovery and even loss of claims.

To read the full decision, go to http://www.nylj.com/nylawyer/adgifs/decisions/011910 scheindlin.pdf.

COBRA Premium Subsidy Extended and New Notices Requirements Under the American Recovery and Reinvestment

By Kirsten Barron

You may recall that we recently addressed COBRA subsidies for employees involuntarily terminated between September 1, 2009 and December 31, 2009. The COBRA subsidy program first introduced by the American Recovery and Reinvestment Act of 2009 (ARRA) was extended on December 2009 as a part of the Department of Defense Appropriations Act, 2010 (DDAA).

The extension applies to individuals who were involuntarily terminated up to February 28, 2010 and provides that they continue to pay 35% of the premium for COBRA coverage. The DDAA also extended the duration of subsidized coverage 15 months – up from 9 months.

We note that the subsidy expires when the individual is eligible for other group health plan coverage or Medicare.

The DDAA creates a "transition period" or "picks up those that fall between dates" for certain individuals who exhausted the 9 months of subsidized coverage originally granted under ARRA but are within the 15 months of the new extension. An individual whose maximum number of months of subsidized coverage is exhausted (generally 9) under ARRA may pay subsidized premiums for retroactive coverage during the transition period for up to the 15 months.

The COBRA subsidy extension also creates additional notice requirements for all qualified beneficiaries who experience any qualifying event from September 1, 2008 through February 28, 2010, and who have not already received a COBRA election notice. The general Notice can be found at http://www.dol.gov/ebsa/COBRAmodelnotice.html

Exempting Corporate Officers From Unemployment Insurance

By Debbie Nelson

If this article looks familiar to you—you're right, we ran a similar article last year. Since clients have recently enquired about this topic, we wanted to address it again.

Prior to January 1, 2009, when a for-profit corporation opened an account with the Employment Security Department ("ESD") corporate officers were **automatically exempt** from unemployment insurance coverage unless the corporation elected coverage.

As of January 1, 2009, officers of for-profit corporations who open an account with ESD in Washington are **automatically covered** by unemployment insurance unless the corporation specifically exempts them. RCW 50.04.165. Exemption requests made when the corporation first registers with ESD, i.e. at incorporation or hiring of the first employee, are effective at the time of registration. Otherwise, you must notify ESD using the approved form (see link). The form must be signed by each exempted officer. WAC 192-310-160.

Corporations with uncompensated officers or no employees are treated differently - they do not qualify for coverage at all.

Does this apply to Foreign Corporations? Yes. The law applies to all corporations that have employees in Washington, even if the corporation is based in another state or country or if it is organized as a domestic or foreign corporation. The law applies generally to corporate officers, regardless of where they reside.

How about Nonprofits? Probably not. If a nonprofit corporation does not pay its officers, it does not need to register those officers. If its officers are not volunteers and are paid, the corporation must register them.

Who is Not Eligible? According to the new law, corporate officers are no longer eligible for unemployment benefits if they or their corporate officer family members are shareholders in the corporation and that corporation is still in business.[1] This includes corporations that have elected unemployment coverage.

Resources

Following are some important links to resources surrounding this topic:

Process and forms for *exempting corporate officers*: http://www.esd.wa.gov/uitax/corporateofficers/exempt-officers-defined.php

Cover letter about exempting corporate officers: http://www.esd.wa.gov/uitax/corporateofficers/letter.php

Question and answers about exempting corporate officers and registration requirements: http://www.esd.wa.gov/uitax/corporateofficers/faq10-07.php

[1]Corporate officers are not eligible for benefits if they 1) own at least 10 percent of stock in the corporation; 2) are related to another officer who owns at least 10 percent of stock in the corporation, even if the unemployed officer is otherwise eligible; and 3) remain officers, even if no wages are being paid. http://www.esd.wa.gov/uibenefits/apply/eligibility/corporate-officers.php

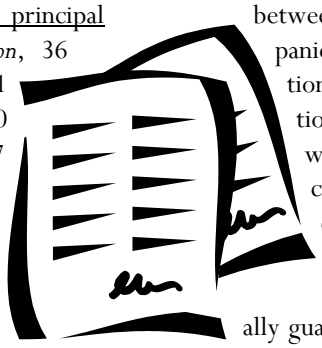
RIGHT TO CONTRIBUTION BETWEEN GUARANTORS

By Sallye Quinn

One of the many collection issues that have come out of the woodwork in the recent recession is the right of contribution between guarantors. What happens when two or more principals of a business personally guarantee the business' debt but only one of the guarantors ends up satisfying the debt? Does that guarantor have the right to seek contribution from the other guarantors? If so, how much can the paying guarantor seek -- one third of the debt from each? What if the ownership wasn't equal? Is the paying guarantor limited to seeking contribution based on the percentage of ownership? Until now, many of our clients haven't had to think through these issues. With the current economic climate, however, we have been reminded of how important it is to make sure our clients are fleshing these issues out before one of them is emptying his or her pockets for a lender.

Under Washington law, without a specific agreement on contribution rights, co-guarantors have equitable rights of contribution among each other. *Carpenter vs. Remtech, Inc.*, 154 Wn.App. 619, 226 P.3d 159 (2010). As recently stated by the Washington Court of Appeals, "[t]he right of contribution arises from the court's willingness to imply an obligation to contribute. … 'The idea is that the guarantors impliedly agreed that if there should be any liability each would contribute his just portion.'" *Id.* at 624 (quoting *Appleford v. Snake River Mining, et al*, 122 Wash. 11, 15, 210 P. 26 (1922)).

More importantly, under Washington law, guarantors are liable for contribution among themselves equally and <u>without regard to their ownership interest in the entity that is the principal debtor</u>. *See Brill v. Swanson*, 36 Wash.App. 396, 674 P.2d 211 (1984); *Brooke v. Boyd*, 80 Wash. 213, 141 Pac. 357 (1914). The Washington Supreme Court has specifically rejected a shareholder/guarantor's argument that his liability to his co-guarantors was in proportion to each shareholder's stock ownership. *Id.* So, for example, if there are four shareholders in a company, and all are guarantors of the company debt with one shareholder owning 40% of the company's stock and the remaining three each owning 20% of the company's stock, without an agreement to the contrary, all four are liable for 25% of the debt. Although the Washington Courts have only addressed the issue in the context of corporations and shareholder guarantors, the same principle is likely true for members of limited liability companies and partners of general or limited partnerships.



This issue of pro rata responsibility may come as a shock to most of our clients, who likely assume they are responsible for such debts based on their percentage of company ownership, not on a pro rata basis. This aspect of Washington law highlights the importance of a written agreement between co-owners of companies as to their contribution rights and obligations. As a practice, when we encounter clients who are owners of a company and they have guaranteed, or are about to, personally guarantee company debt, we encourage them to think through these issues. A separate contribution agreement can be an invaluable document down the road. However, if clients or their fellow owners don't want to go to the effort of creating a full contribution agreement, many of these issues can be resolved with a provision in a shareholders' agreement, limited liability operating agreement or a partnership agreement.

The ability to allocate liability based on percentage of ownership with a written contribution agreement is just one of the benefits owners get by putting down what they think is the agreement into writing. For example, because the right to contribution is based on equity, if one guarantor pays and seeks contribution, that paying guarantor is not entitled to attorneys' fees spent in seeking contribution. *Appleford*, 122 Wash. at 13. Under Washington law, parties are not entitled to recover their attorneys fees absent an

Continued on Page 6

PERSONAL LIABILITY—CONTINUED

The lessons here are clear:

♦Make sure paychecks are paid on time, unless there is a bona fide dispute as to how much an employee is owed.

♦Adopt a policy requiring employees to promptly report any problems with paychecks.

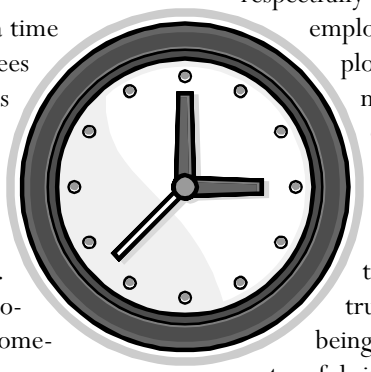
♦If you believe you are headed into bankruptcy, talk with bankruptcy counsel regarding how to address unpaid wages.

Lastly, make sure that you have enough to pay employees for the time they have worked and lay-off those for whom you do not have adequate resources to pay.

Considerations for a Termination Meeting

By Kirsten Barron

While the number of terminations (lay-offs and for cause) from our clients' businesses has begun to decrease somewhat, we are finding that employers are still faced with difficult lay-off decisions. Especially with employees who may have tenure who may be productive and hard working and employees who fill important roles but revenues do not justify keeping the position, however valuable. Given that, it is extremely important to conduct an efficient, well managed termination meeting. Here are some considerations:



First, pick a day and a time when fewer employees will have present. As far as a time, the end of the day or at lunch may be a time when a termination meeting will have more privacy. Friday is often a day chosen by employers – sometimes because they have procrastinated – but also because it provides the weekend for folks to have some time to consider alternatives. However, there are some experts who recommend a Monday termination so that the terminated employee can begin applying for unemployment and looking for a job immediately during the remainder of the week. The priority is choosing a time when fewer people are around to ensure more privacy and minimize embarrassment and potential conflict.

Second, the attendees on behalf of the employer should be the decision maker and another person who has knowledge of the decision, i.e. a supervisor or HR person. The employer needs two people in the room, but ideally the second person, while serving as a "witness," is also involved in the decision. Bringing your attorney escalates the situation and could cause the lawyer to become a witness, rather than your lawyer. If you believe you need security at the meeting, you should not have the meeting. You should notify the employee of the termination by mail.

Third, like any other meeting, you need an agenda – invite the employee to the meeting. Your agenda should be to respectfully and clearly inform the employee that his or her employment has been terminated. You may also decide to inform the employee of the basis of the decision. Generally, it is a good idea to tell the employee the truth about why they are being terminated. It is a stressful situation, so prepare some notes. Be clear and concise and factual – do not argue. If the employee questions you or tries to argue – simply end the meeting and say that this is not the time to discuss those matters. Remember, as stressful as this is for the person who does the firing, it is exponentially more stressful for the person who is being fired. That does not mean you should apologize for the decision; however, you should be empathetic, i.e. "I imagine this is very hard." Remember – this is a business decision.

Fourth – the next part of the process is very important – you must focus on getting the employee out of the office. Take the individual's keys to the office, business credit cards, passes and other access information and property. You should have your IT provider remove pass codes from your computer system during the termination so that the individual does not have access to the company's computer systems. You may want to offer to provide a taxi ride home for the employee. If possible, someone other than the decision maker should escort the employee out of the office. If the employee has minimal personal property to remove from the office, it is fine to take it on the way out, but if it is more than a few items, arrange for a time when employees are not in the office to remove the individual's property. Again, it is a good idea to have two people present for this task.

I will be candid – termination is difficult and is an art. In a termination based on poor performance, the employer can be angry at the employee. No matter how angry, these feelings must be put aside. If the employer can remain calm, professional and factual, the meeting will be much more effective.

Developers – Time Within Which to File Final Plats Extended

On March 17, 2010, Governor Gregoire signed the recently passed Substitute Senate Bill 6544 into law. The Bill amends RCW 58.17.140 and extends the time for submitting a final plat to seven years after preliminary plat approval. Currently, final plats must be filed within five years of preliminary plat approval. The amendments to the subdivision code are temporary and expire on December 31, 2014.

CONTRIBUTION BETWEEN GUARANTORS—CONT.

express contract for it or pursuant to statute. *Id.* In addition, interest is recoverable at the legal rate, not a contract rate since there is no agreement regarding interest. *Id.* at 12.

A written contribution agreement also allows the parties to flesh out other terms that would otherwise be left to equity. For instance, imagine this: there are four owners of a company. One of the owners is a marital community and each spouse of that marital community signs separate guaranties. The marital community has a 25% ownership interest in the community. The remaining three owners are single individuals, each owning 25% of the company. If the company defaults and one of the single owners pays, can that owner seek contribution from the martial community for 25% of the amount paid, or since each spouse signed a guaranty, are they each liable for 20%? It isn't an issue that we believe has been litigated in Washington to date and, most likely, clients don't want to be the test case to find out what a court would say. Instead, this is an issue that is best addressed before it happens rather than litigating about it after the fact.

A written contribution agreement also irons out all of the open issues that lawyers think are important and clients think are boilerplate. Those issues are things like jurisdiction (very important if the owners live in different states), venue (just as important when trying to keep costs down and keep things local; most of our clients like to litigate in their home county and not have to travel to, for example, King County) and governing law.

For more information on this issue, and a great form Contribution Agreement, check out *Contribution Agreements Among Guarantors (with Form)* by Washington attorney Brian D. Hulse. That article can be found at http://www.dwt.com/portalresource/lookup/wosid/intelliun-1501-5704/media.name=/01-09_HulseContributionAgreements.pdf

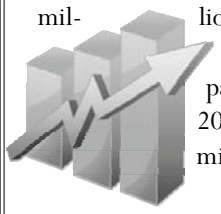
As always, we are here to discuss this with you if you wish to know more.

EEOC ANNOUNCES 2009 WORKPLACE DISCRIMINATION CHARGE STATISTICS

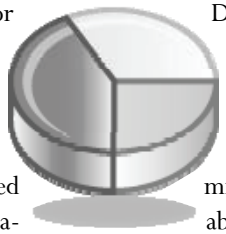
By Kirsten Barron

The U.S. Equal Employment Opportunity Commission (EEOC) recently announced its statistics for 2009.

It is no surprise that the number of discrimination complaints is high – in correlation with the number of jobs lost in 2009. The EEOC stated that 93,277 charges of workplace discrimination were filed in 2009. This is the second highest number in its history. The vast amount of the $376 million in monetary relief received by charging parties and others in 2009 was through administrative enforcement and mediation - $294 million – which we characterize as "settlement monies."



Charges against private sector employers alleging discrimination on the basis of disability, religion and/or national origin reached their highest level ever, with charges of age discrimination close behind. However, the most frequently filed charges were for discrimination based on race (36%), retaliation (36%) and sex (30%). We note that charging parties often allege more than one form of discrimination – which is why this number is in excess of one hundred percent.



There has been commentary that the increase is related not only to economic conditions, but also to new laws, such as the Genetic Information Non-Discrimination Act (GINA). The lesson to employers is that you are more likely to face an EEOC charge now than at almost any time in the past. When you terminate an employee, think carefully about your legal obligations and employment practices.

See http://www.eeoc.gov/eeoc/statistics/enforcement/index.cfm

To read past issues of our Newsletter, visit our website at:

www.barronsmithlaw.com

A PERSONAL NOTE FROM THE DEPARTMENT:

By Kirsten Barron

Tax Time!! We have just finished this generally distasteful process. I try to think about paying my taxes the same way I think about donations to the Big Brothers and Big Sisters, Food Bank or any other charity. Sometimes this is a good strategy and sometimes not so much! Suffice to say, I am always glad when it is over. Our governments have been hard at work protecting laid off workers by extending unemployment benefits, COBRA subsidies and looking after developers hard hit in these times by extending final plat approval, *see infra*. It is a complicated time right now – the very slow economic "recovery," healthcare legislation, increased state and federal government regulation and spending. It can be overwhelming trying to keep track and process what it all means.

Here is the good news (and those of you who know me, know I get to the good news) – despite the pros and cons and the benefits and burdens of all that is going on, our clients are doing pretty darn good. We have had some new business start-ups, transactions that are not "distressed sales," less calls from folks in trouble and more calls from new matters and new deals. I am energized and inspired by all of you out there doing what you do so very well. You are building, growing, pursuing your vision and keeping on keeping on!!

And on that note of building, growing and pursuing vision, we have added two attorneys. Will Honea joins us this month as a Senior Associate. He will be handling mainly real estate, land use and general business matters, including litigation. He has been in practice for 7 years and was formerly with the Army doing stuff he refuses to tell us about. Erin Crisman Glass also joins us this month as an Associate. She will be working with everyone in the firm, but is focusing her practice on estate planning. She has just passed the Bar Exam and was the State Goldmark Intern at Law Advocates here in Whatcom County in 2008, so she is already familiar with the County. We are delighted to have them both.

Also worthy of note is the official retirement from the practice of law of Gene Knapp. After 50 years of distinguished service to clients in Washington State, Gene has set sail for the family lands on Orcas Island where he resides full time and serves on the County Council. I thought he said "retired" too.

So with that – keep up the good work everyone – we certainly will!

CONTRIBUTORS AND EDITORS TO THIS PUBLICATION

Sallye Quinn is a partner in the firm and focuses her practice on business and real estate transactions and creditor's rights.

Amy Robinson is a senior associate who brings prior employment and human resource experience to the firm, and focuses her practice on employment and business matters.

Debbie Nelson is a paralegal in the department and has extensive experience in corporate legal services.

Jamie Falter is a paralegal in the department, assisting with employment matters, collections, and business and real estate transactions.

Megan Byma is a legal assistant in the business department, as well as a probate paralegal in the firm.