



## **Business and Employment Law Update**

First Quarter, 2007

### **PERSONNEL RECORDS RETENTION**

By Amy Robinson

As another year ends and a new one begins, those pesky administrative and general “housekeeping” issues that we tend to put on the back burner most of the rest of the year start to burn a little hotter. So one of the common questions that we see this time of year sounds something like this: “Okay, so tell me again how long I have to keep these personnel records around?”

This gives us an opportunity to address the issues of both (a) what records or information should be retained by employers as part of a “personnel file” and (b) how long these items should be retained.

The personnel file. If you are a state and federal employer you have much (if not too much!) guidance on this, as the records and retention schedules are a matter of statutory law. However, if you are a private employer, you probably consider the personnel file to be the place where you tuck away anything and everything related to the employee. This is a fairly typical approach, but can get an employer into hot water, because often they are not aware that many of the items stashed away in “the” personnel file are required to be kept separately.

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### **PITFALLS IN TRANSFERS OF REAL ESTATE**

By Jay Janousek

Transfers of real estate by deed are common in estate planning, trust and estate administration and business transactions. For example, a client may transfer his residence to his revocable trust established as part of the client’s estate plan or a client may transfer her apartment building to a corporation, limited liability company or partnership for management or limited liability purposes. These transfers are often the final stage of the planning process and often little thought is given to the preparation of the deed or the impact

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## Personnel Records Retention, Continued...

Information that *should not* be included in the main personnel file.

1. Medical and disability-related information. The Americans with Disabilities Act (ADA) requires that disability-related information be kept in a separate file to ensure that information related to an employee's disabilities or requests for accommodation do not factor in to other personnel decisions.
2. Information about the employee's 401k contributions. If this information is kept separately, the employer is less likely to be accused of making employment decisions based on the employee's contributions, or lack thereof, to the benefits program.
3. I-9 Employment Eligibility Forms. These must be kept separate, and federal law imposes a \$1000 fine for each form not maintained in a separate file.
4. Internal memorandums and notes related to harassment or discrimination complaints and investigations. For a variety of reasons, only the actual disciplinary records that result from an investigation should be included in the employee's main personnel file.

Retention. Most employment related claims have a three (3) year statute of limitations. That means that as a general rule, we recommend that all personnel records be retained for at least 3 years after the employee's termination. This includes:

- Job advertisements. Note: The Age Discrimination in Employment Act (ADEA) requires advertisements to be retained for at least 1 year after posting or advertisement.
- Job applications. This includes the applications of those not hired.
- Performance evaluations and disciplinary records.
- I-9 Forms. Note, federal law requires these be retained for 3 years after the date of hire and 1 year after termination, but we believe the best practice is to retain for 3 years after termination.
- FMLA-related documents including the dates/hours of FMLA leave, the notices given the employee and employer, and records of any dispute with an employee over FMLA leave.

## Personnel Records Retention, Continued...

- Disability/Accommodations Requests. The Americans with Disabilities Act (ADA) requires such records to be retained for 1 year from request, but, again, the best practice is 3 years from termination.
- Payroll information, which should include the employee's name, social security number, home address, date of birth, sex, occupation, timecards and/or work schedule, regular rate of pay, a record of earnings (including straight time and overtime), dates of payment, and the date and basis for termination.

There are a few records which should be kept longer than 3 years after separation, specifically:

- Employment contracts, restrictive covenants (e.g. Non-Competition and/or Non-Solicitation Agreements), and handbook acknowledgements should be retained for 6 years following the employee's termination due to statute of limitations issues for contracts claims.
- OSHA/WISHA requires reports and records of on-the-job injuries or illnesses be retained for 5 years following the end of the calendar year that the records cover. **\*\*Note:** The law requires these be retained for *30 years* if exposure to toxins is involved.

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## Transfers of Real Property, Continued...

the transfer will have on existing insurance or lending instruments.

There are three common questions that should be addressed in practically every transfer of real estate: (1) Does a mortgage exist on the real estate; (2) Has a review of the title insurance policy been undertaken; and (3) Has a review of the home owners or business insurance been undertaken?

If a mortgage exists on the real estate, the mortgage holder should be contacted to confirm that the terms

of the mortgage permit the transfer and that the debt will still be payable under its present terms. It is very common for the mortgage to contain a “due on transfer” clause that would cause the entire obligation to become payable upon the unauthorized transfer of the property. It is an unhappy circumstance when, after the lengthy process of preparing and paying for a set of legal documents, the client finds that the property is subject to a mortgage and the client’s lender is unwilling to permit transfer or is only willing to permit it after the client enters into a new obligation and is subjected to additional aggravating paperwork.

Although title insurance issues don’t arise often, review of a client’s title insurance policy should be undertaken to determine if such insurance coverage will continue when the real estate is transferred.

The change in ownership from individual to trust or entity, even though the same parties exist on both sides of the transaction, may only be a technicality now, but to an insurer who is later asked to pay on the policy it is likely to be just the loophole through which the insurer will escape and potentially leave the client looking to the lawyer who assisted with the transaction. We have found that title insurance companies are willing to add the new owner (the trust or entity) as an additional insured to the title policy for a small fee.

Similar to title insurance and for the same reasons, the existing home owners or business insurance provider should be contacted to make sure coverage will continue once the real estate is transferred. A slip and fall case is always an unwelcome event, but it becomes even more so if the client finds that the insurer is unwilling to extend coverage because the client’s new entity is determined not be covered under the prior policy.

It is easy to get caught up in strategizing with a client over estate planning matters or the formation of business entities, however, as in most things, the devil is often found in the details. Care must be taken whenever real estate will be transferred and, if nothing else, it is important that the transfer be considered in the initial planning phase and not simply as a detail to be addresses at the end.

## CREATING AND EXTENDING LIENS ON REAL PROPERTY

By Sallye Quinn

One of the best ways to protect or enforce a debt owed is to create a lien on real property. There are a number of ways to create real property liens, both voluntary and involuntary. This article addresses the most common ways to create and extend real property liens.

Deed of Trust. A deed of trust is the most common real property security device. In order to provide notice to third parties of the existence of the obligation secured, to secure the priority of the lien created by the deed of trust and to enforce the deed of trust against subsequent purchasers, the deed of trust must be recorded in the county where the real property is located. A deed of trust can be nonjudicially foreclosed, although the foreclosing party can also chose to foreclose it as a mortgage, in which case the right to a deficiency judgment is preserved. Deeds of trust do not need to be renewed. The deed of trust is not extinguished until the obligation secured by the deed of trust is satisfied, the deed of trust or a prior lien is foreclosed, or the parties agree to remove the lien created by the deed of trust through a reconveyance.

Mortgage. A mortgage is typically used as a security device in the context of agricultural property, because agricultural property cannot be nonjudicially foreclosed. For the same reasons set forth above regarding deeds of trust, a mortgage should always be recorded in the county where the real property is located. A mortgage must be foreclosed judicially. Like a deed of trust, a mortgage does not need to be renewed. The mortgage is not extinguished until the obligation secured is satisfied, the mortgage or a prior lien is foreclosed, or the parties agree to remove the lien.

Judgment Lien. A judgment lien commences on real estate owed by the judgment debtor in the county where the judgment was rendered upon entry of a judgment from superior court or federal district court. In order to create a lien on real property in another county, the creditor must file an abstract of the judgment in the county where the real estate is located. If the judgment was entered in a state district court, a certified copy of the transcript of the

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## Creating and Extending Liens, Continued...

docket of the district court must be filed with the clerk of the superior court in the county where the judgment was issued. In order to create a lien on homestead, the judgment (or an abstract of the judgment if the judgment was transferred from district court to superior court) must be recorded. A judgment lien runs for 10 years and may be extended for an additional 10 years if, within 90 days of the expiration of the original judgment, the creditor applies to the court that rendered the judgment for an order granting an additional 10 year period during which execution may issue.

This article is not exhaustive of all situations where real property liens can be created and does not discuss liens created by a real estate sales contract or a mechanic's lien. If you would like more information on the types of liens discussed, or not discussed, in this article, please feel free to contact the attorneys at Barron Smith Daugert, PLLC.

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### SERIES – BOILER-PLATE CONTRACT PROVISIONS

#### Termination, Agreement Term and Renewal

By Kirsten Barron

The next subject in the series addressing the “boiler-plate” provisions of contracts is termination, agreement term and renewal. While this is a straight forward subject, there are a few issues that deserve careful attention.

*Do the term and the termination provisions make sense?*

Often you will find a contract section entitled “Term,” and it is followed by language such as “the term if this contract shall begin on the date of this agreement and shall continue for two (2) years.” Later in the “boiler-plate” section of the contract, you may find a provision that says that “this agreement may be terminated by either party on thirty (30) days written notice.”

Basic contract interpretation requires that all provisions be given meaning. In this scenario, the termination provision of the contract has undercut the term provision of the contract so that contract

can be terminated on thirty (30) days written notice – not after two years. The parties who signed this agreement do not have a two year agreement.

*What is a reasonable termination provision?*

Many contracts are entered into with the expectation that they continue for a certain period of time. Given that, termination before the expiration of the terms should usually only occur when one of the parties fails to comply with or meet the terms of the agreement. This is often referred to as termination for cause. I think it is a good idea for both parties to have this sort of remedy in the event of a breach by the other party. Often the word “material” is used to describe the breach. This also makes sense given that minor breaches of an agreement often do not impact the performance of the agreement in a significant way.

I also suggest to clients that a right to cure or fix the material breach should be included in the termination provision. If you end up in court over a breach of the agreement and the exercise of termination rights, giving the other party the opportunity to cure will likely make your case more persuasive to a judge or jury.

*Do renewal provisions make sense?*

The answer to this question is – it depends on what side of the table you are sitting on. If I am a company that licenses a software product, I may want renewal of the contract for as long as possible. On the other hand, if I am a user of the software product, I may find a better product and want to change to that product. My commitment under a renewal provision may prohibit me from doing so. Renewal provisions often bind parties beyond what they intended. For this reason, we are usually opposed to automatic renewal of agreements.

The other issue with renewal provision is notice. We have seen many contracts that provide for automatic renewal unless either party gives notice of non-renewal by a certain date. It is extremely difficult to keep track of these dates, especially when signature and execution dates can all be different. Our experience is that many folks miss the notice period in which to terminate the contract and end up paying for services or products they do not need. It is important to be very cautious and

carefully consider whether an automatic renewal provision is wise.

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## RESOLUTIONS

By Debbie Nelson

As we face the new year, we begin to reflect on the past and contemplate the future. In keeping with tradition, many of us feel compelled to make a New Year's resolution (i.e. lose weight, quit smoking, spend more time with family, etc.) in an effort to improve the quality of our lives and the lives of those around us. Likewise, businesses are faced with analyzing their past and strategizing their future in an effort to strengthen and grow. Of course, each of the aforementioned takes resolve, effort and maintenance.

With tax time right around the corner, this seems like the appropriate time to reiterate the importance of maintaining corporate records. Corporations must document every major business activity, such as minutes of corporate meetings, records of company loans, or significant business decisions. If faced with litigation or an IRS audit, business owners must be able to demonstrate a "paper trail" of corporate compliance. Pursuant to RCW 23B.16.010(4) "A corporation shall maintain its records in written form...". I would encourage you to review the corporation's Bylaws, which will specify how and when shareholders' and directors' meetings are to be held.

Annual or special meetings of the members of a limited liability company ("LLC") are not required

by law; however, the LLC Agreement may also address an annual meeting and set forth specific circumstances under which special meetings may be called.

In addition, according to RCW 23B.16.010(5):

"A corporation shall keep a copy of the following records at its principal office, (a) Its articles or restated articles of incorporation and all amendments to them currently in effect; (b) Its bylaws or restated bylaws and all amendments to them currently in effect; (c) The minutes of all shareholders' meetings, and records of all action taken by shareholders without a meeting, for the past three years; (d) The financial statements described in RCW 23B.16.200(1), for the past three years; (e) All communications in the form of a record to shareholders generally within the past three years; (f) A list of the names and business addresses of its current directors and officers; and (g) Its initial report or most recent annual report delivered to the secretary of state under RCW 23B.16.220."

If you do not already practice these steps in maintaining your corporate records, why not make a New Year's resolution to review your records to ensure that you are in compliance with statutory requirements and corporate formalities. Of course, if your records need to be organized or updated, we are happy to assist you with that project.

Remember, corporate formality must be observed to preserve the integrity of the corporation and to shield officers, directors, and shareholders or related businesses from personal liability.

We wish you a safe and prosperous New Year.

Contributors to this publication are Kirsten Barron, Sallye Quinn, Amy Robinson, attorneys and Debbie Nelson, paralegal, in Barron Smith Daugert's Business Department, and Jay Janousek, an attorney in the Estate Planning Department.

## A PERSONAL NOTE FROM THE DEPARTMENT:

By Kirsten Barron

We hope that you enjoy this newsletter and find it helpful in your business operations. When we sit down to draft the articles for our newsletter, we draw from the day to day experiences with our clients that may be particularly interesting or informative. If there is a topic you would like us to address, please let us know.

I often use this space to provide you with interesting client stories – with permission, or the happenings at the firm. This edition is devoted to the happenings at the firm.

When we sat down as a law firm at our annual retreat last year to talk about our goals and visions – it was not to rapidly grow a law firm – rather it was to focus on our mission of providing excellent service to our clients. We did not expect to be announcing the addition of three new lawyers, however, as you all know better than me, if opportunity knocks then open the door!! We are pleased to announce the addition of Jay Janousek, Dennis Williams and Steve Brinn to our firm. Each brings unique talents to the firm that increases the range of services we can provide to our clients. What is most interesting is that all three of these attorneys were previously with the law firm. We are very glad to have them back after interesting adventure in other endeavors. More detailed information about each is available on our website at [www.barronsmithlaw.com](http://www.barronsmithlaw.com).



**Jay C. Janousek** counsels individuals and families in estate planning and trust and estate administration, including wills, revocable and irrevocable trusts, business succession, charitable planning and gift and estate tax planning.

**Dennis R. Williams** brings with him a well established practice, counseling clients in the areas of estate planning, business transactions and taxation. We are delighted to welcome Dennis back to our firm and especially look forward to the benefit of his experience and expertise in tax law.

**Steve Brinn** returns to the firm and brings a wealth of business knowledge from his experiences as a senior executive with Trillium, LuminIQ and Clario Medical. Steve will be focusing on strategic business planning and financing.

We are still in the first quarter and it has been a busy and exciting year. We are hopeful that these new opportunities increase our ability to better serve you. As always, we appreciate your questions and feedback.

*Kirsten Barron*