

QWarterly Chronicles

Fall 2008

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TAX PROPOSALS OF THE PRESIDENTIAL CANDIDATES

Fall 2008 is rapidly approaching and that can only mean two things: 1) Football (both collegiate and professional); and 2) The Presidential Election. Given the present state of the world we live in there is an amazing number of issues for the candidates to wrestle with. One of the issues near and dear to all of our hearts (and wallets) is what will happen to our taxes. Both major candidates have articulated their position on this issue if they were to win the election. While each one of us will be impacted differently, we want to provide you with a short summary of each candidate's position on a few important tax areas.

Estate Taxes

To paraphrase Mark Twain, the reports of the death of estate taxes has been greatly exaggerated! Presently the estate tax is scheduled to be repealed for the year 2010 with a reversion to the old system (Tax Payer Relief Act of 1996) on January 1, 2011. Neither candidate is supporting the permanent repeal. Instead, the candidates are proposing adjustments to the estate tax. As presently constituted, the Federal Estate Tax exclusion will raise to \$3,500,000 on January 1, 2009. Senator Obama, has adopted the Democratic Party's platform to "defer" or freeze the exclusion of \$3,500,000 and a top tax rate of 45% continuing into the foreseeable future. Senator

McCain's plan proposes raising the exclusion to \$5 million per person and cutting the top federal estate tax rate to 15%. In addition, both Senators support retaining the "stepped-up basis" for inherited property – music to the ears of every professional and client alike.

Capital Gains

Senator McCain would strive to keep the current structure of tax rates on capital gains and dividends. Senator Obama, on the other hand, has proposed raising the long-term capital gains rate to 20% if your income is over \$250,000.

Income Taxes

Senator McCain's proposal would not change the current system. He favors a 35% top income tax rate and keeping Social Security taxes at the current level. Senator Obama has proposed a top income tax rate to 39.6%. He also proposes higher Social Security taxes for those with incomes over \$250,000.

No one can predict which candidate will win. However, many people have been known to vote with their "wallets". None of these proposals will be signed into law without debate, and of course, Congressional approval. Make your vote count.

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ARBITRATION AND MEDIATION CLAUSES - BENEFICIAL OR NOT?

Arbitration clauses and mediation clauses in contracts can enable businesses to resolve business disputes relatively quickly, fairly and cost-effectively. Arbitration and mediation clauses can allow businesses to control the costs and risks of resolving business disputes. Arbitration and mediation hearings normally involve lower costs, no jury, and no complex rules of evidence.

In today's economic environment most companies cannot afford to incur the time, expense, and adverse business consequences caused by litigation. Yet, in every business relationship there is a potential for disputes over contracts, services provided, or the interpretation of operating agreements that govern the relationship between business partners. When these conflicts arise, businesses can incur substantial expenses and delays involved in traditional litigation through the courts.

The best time for businesses to implement strategies to avoid the adverse effects of litigation is before disputes arise. Therefore, when contracts are negotiated business owners should consider including arbitration clauses or mediation clauses which establish procedures to resolve disputes that may arise during the contractual relationship. This enables a business to

create dispute resolution procedures that can limit costs and risks.

An arbitration clause is a contract clause that requires the parties resolve their disputes through the arbitration process rather than filing litigation with the courts. Typically, an arbitration clause specifies the parties to a dispute will select a single arbitrator to hear a dispute and issue a decision to resolve the dispute. The arbitration clause normally specifies the dispute shall be arbitrated by a particular association, such as the American Arbitration Association or the Alternative Resolution Center. Some of these arbitration associations have developed expedited arbitration programs which allow disputes to be fully resolved within 60 to 90 days.

There is a strong presumption by the courts in favor of the validity of arbitration clauses. The courts wish to encourage

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BILLS TRAVEL THROUGH THE MAIL AT TWICE THE SPEED OF CHECKS.

“Clauses”

parties to resolve their disputes outside of the court system. The Federal Arbitration Act (9 U.S.C. section 2) and the California Arbitration Act (California Code of Civil procedure section 1281, et. seq.) provide that arbitration clauses are “valid, enforceable and irrevocable”. CCP section 1281. Under these statutes, a court can only set aside the arbitrator’s decision if: (1) the decision was procured by corruption, fraud or undue means; (2) the decision is issued by a corrupt arbitrator; (3) the decision is affected by prejudicial misconduct by an arbitrator; or (4) an arbitrator acts beyond his or her powers set forth in the arbitration clause. 9 U.S.C. section 10(a); CCP section 1286.2 (a).

Mediation is a process where parties to a dispute meet with a mutually-selected neutral mediator who assists the parties in the negotiation of their differences. The mediator does not

assess blame or render a binding opinion on the chances of success if the case were litigated. Rather, the mediator acts in an attempt to bring together the opposing parties by defining issues, eliminating obstacles to communication, and moderating and guiding the process to eliminate confrontation and ill will. The mediator will normally seek concessions from each party during the mediation process to determine whether the dispute can be resolved. The mediator’s fee is divided equally among the parties involved, and evidence of anything stated or presented during the mediation cannot be admitted as evidence in any subsequent arbitration or court action. California Evidence Code sections 703.5 and 1115-1128.

The mediation process offers advantages to all the parties. Mediation is generally less expensive when contrasted to the expense of litigation. Mediation provides a

THE *BRINKER* COURT REACHES A DECISION

In our winter 2008 issue, Jeffrey Gillard addressed labor laws in California in regards to meal periods and rest breaks. A recent California Court of Appeal decision in *Brinker Restaurant Corporation v. Superior Court* (4th District, July 22, 2008) finally provided guidance for California employers regarding their obligations to provide meal periods and rest breaks.

The appellate court recognized California labor Code section 512 requires employers may not work an employee for a period of more than five hours without “providing” the employee a meal period of at least 30 minutes. To “provide” a meal period means employers must make “available” the meal period to employees. Employers are *not* required to ensure that the meal periods are actually taken as this would place an undue burden on employers,

SIGN ON A FENCE: SALESMEN WELCOME! DOG FOOD IS EXPENSIVE!

“Clauses”

timely way of resolving disputes, particularly when parties simply want to get on with business or their lives. Parties who negotiate their own settlements through mediation have more control over the outcome of a dispute, rather than having an arbitrator, judge or jury decide the issue. Studies have shown parties who reached their own agreement in mediation are more satisfied with the solutions, and these parties are more motivated to follow through and comply with the terms of the resolution. Mediated settlements can also preserve business relationships between parties so these relationships can continue into the future.

Like arbitration clauses, mediation clauses are generally enforceable. By using such a clause, the parties to the contract agree to mediate any future disputes. Since mediation is essentially a consensual process, a settlement is unlikely if one party is forced to participate. Therefore, a mediation clause recognizes that both parties have considered, and are

open to, the mediation process. When disputes then arise among parties who have previously recognized the value of mediation, there is usually no need to force one party to participate.

Mediation clauses can also be used in conjunction with arbitration clauses in contracts. Mediation clauses and arbitration clauses can be used in a “layered” fashion to allow the parties to avoid court actions. A contract can set forth a mediation clause which

allows the parties to initially submit their disputes to a mediator. Thereafter, if the disputes are not fully resolved at mediation, an arbitration clause can direct the parties to submit any remaining disputes to arbitration. This provides the parties with avenues in which to resolve disputes, and avoids protracted long-term disputes which can have serious economic consequences.

Since the business community bemoans the snail’s pace and expense of over-crowded court proceedings, arbitration and mediation clauses should be included in most business contracts. Business owners should work with their legal counsel in drafting arbitration clauses and mediation clauses that will serve their business objectives. Review your business contracts today to determine whether you have included these clauses in the contracts that you use for your business.

James F. Henshall

Office Hours:

Our normal office hours are 8:30 a.m. to 5:30 p.m. Monday through Friday, Saturday by appointment only.

Closures:

*Thursday, November 27
Friday, November 28
Thanksgiving*

*Thursday, December 25
Friday, December 26
Christmas*

*Thursday, January 1
Friday, January 2
New Year’s*

**SIGN ON A PLUMBER'S TRUCK:
WE REPAIR WHAT YOUR HUSBAND FIXED.**

**SHAREHOLDER AGREEMENTS:
THE BEST CORPORATE INVESTMENT YOU CAN MAKE**

A shareholder agreement is a contract between the shareholders of the corporation and the corporation that addresses certain corporate matters and transactions (sometimes within the purview of the board of directors) and provides the manner for handling or deciding them. Although probably one of the most important documents for controlling, protecting and ensuring the business growth of a privately owned company, it is frequently neglected or overlooked until after its need arises.

Depending on the matters covered by its provisions, a shareholder agreement can be an efficient and economic vehicle for: a) preventing the corporation's shares from being transferred to or coming into the control of third parties; b) resolving and preventing shareholder disputes; c) preventing the personal circumstances of an individual shareholder from affecting the corporation and/or its other shareholders; d) limiting or expanding the powers of the corporation's shareholders and/or its board of directors; and e) defining the procedures and limits within

which the company operates. Even so, many persons forming a corporation for business or investments purposes often postpone entering a shareholder agreement at the onset and shareholders of already established privately held corporations never enter one simply because they do not realize the preventive benefits and savings that it ultimately provides to the corporation and its shareholders.

With respect to a newly formed company, shareholders still get along and money is often scarce, so setting up a corporate safety net is often looked upon as a non-essential expense. However, it's the most prudent investment and use of funds that a corporation and its shareholders can make. Problems frequently develop as a company grows and matures, and corporate debts and responsibilities generally arise that can tear shareholders apart. In these cases, a shareholder agreement provides an effective structured manner for quickly resolving shareholder disputes. With already established corporate

businesses, the death, divorce or bankruptcy of a major shareholder can have a significant, if not detrimental, effect upon a corporation that has no shareholder agreement in place. In such cases, a shareholder agreement provides the corporation or existing shareholders the right to purchase shares in advance of anyone else and/or can legally deny third parties the right to vote or participate in corporate shareholder decisions, thus preventing third party or outside control of the business.

A shareholder agreement with provisions taking into account the various circumstances and general contingencies that can arise in most corporate settings should cover the needs of most corporations and its shareholders. If your corporation does not have a shareholder agreement in place or if you are thinking about incorporating your business, don't delay or take a chance that you will later regret. Give us a call so we may assist you in ensuring the success and protection of your interests.

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QWLLP QUARTERLY CHRONICLES

About Quinlivan Wexler LLP

Patrick “Rick” C. Quinlivan and **Daniel “Danny” J. Wexler** bring almost 55 years of combined legal experience to Quinlivan Wexler LLP. With careful selection and addition of talented professionals to the firm, QW has grown over the years to the point where we now boast of many specialty areas to suit the needs of our clients.

Located near South Coast Plaza, QW engages in a general civil practice that includes civil litigation, business and corporate law, estate planning, probate, conservatorships and elder law.

The breadth of our litigation experience assures our clients’ representation by lawyers who fully understand the techniques, not only of trial advocacy, but of negotiations and persuasion as well. So, while being very meticulous about doing our homework, planning ahead, and writing precise contracts to prevent litigation, we are also fully prepared to litigate when it is in the best interests of our clients.

“Breaks”

particularly those employers who are not able to remain in contact with their employees throughout the day. However, employers may not “impede, discourage, or dissuade” employees from taking meal periods. The *Brinker* court also held an employer does not need to provide a meal break for each five hour period worked, but rather *after* five hours have been worked. Therefore, if employees work between five to ten hours, they are

entitled to only one meal break, regardless of when they take it. The statute does not require a meal period for every five consecutive hours worked, as long as a meal period is provided after the first five hours worked.

The *Brinker* court also provided guidance on rest breaks for employees. If an employee works four or more hours per day, he or she is entitled to a rest break after four hours of work. Only those employees who work more than three and one-half

hours, but less than four hours, are entitled to a rest break before the four-hour mark.

In light of these recent events, employers should check their current labor practices to make sure that they are in compliance, check that managers and supervisors are making the employees aware of the employer’s policies, and make certain that employees are not being discouraged from taking the meal and rest breaks.

James F. Henshall