

FINANCIAL
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BULLETIN

Estate Tax Uncertainty
Pages 1, 3

New Overdraft Rules
– July 1, 2010
Page 1

The WARN Act
Page 2

Social Networking –
Workplace Implications
Page 2

Mortgage Loan
Officers Must Be Paid
Overtime
Page 3

Recovery of Debts
from Joint Tenants of
Deceased Borrowers
Page 3

Attorney Directory
About The Firm
Page 4

ESTATE TAX UNCERTAINTY

by Sarah Richardson Larson

On January 1, 2010, the federal estate tax was suspended making this the first time since 1916 the United States has had no federal estate tax. This extraordinary situation is scheduled to last one year, applying only to those who die during 2010, but does not affect lifetime gifts during 2010 as the federal gift tax law remains unchanged.

Given that the amount exempt from federal estate tax has been increasing year by year, it has become routine for people to use formulas in their wills and trusts to determine the amount of assets which are to pass to a spouse, family trust, charity, or grandchild. Common formulas refer to a marital deduction, a credit shelter amount, a generation-skipping transfer tax exemption, a charitable deduction or similar terms. The suspension of the federal estate tax in 2010 makes the implementation of these formulas problematic.

On March 11, 2010, the governor of South Dakota signed House Bill 1201. This law seeks

to add clarity by deeming that the federal estate tax laws in effect in 2009 will apply to South Dakota residents who die in 2010 if a formula was included in their will or trust. This one-size-fits-all fix may not be in everyone's best interest. Each person's circumstances should be reviewed, but especially those who have substantial estates or those who unfortunately may be at greater risk of dying during 2010.

There is another significant change for decedents dying in 2010. The long-standing rule that the tax basis on inherited assets is "stepped up" to the fair market value at the date of a decedent's death will no longer apply. With some exceptions, the decedent's income tax basis in those assets will carry over to the heirs. The exceptions allow a personal representative to allocate up to \$1.3 million in basis step-ups among the estate assets and an additional \$3 million in basis step-ups to assets passing to a surviving spouse. The federal estate tax will be reinstated in 2011 with a \$1

CONTINUED ON PAGE 3

NEW OVERDRAFT RULES - JULY 1, 2010

by Monte R. Walz

Does your bank charge a fee if a customer overdrafts their deposit account when using a debit card or ATM? If so, now is the time to prepare for the new Overdraft Rules that take effect July 1, 2010. The new rules will require prior notice to customers and time to adjust the bank's operating systems to meet the new requirements.

Beginning July 1, 2010, federal law prohibits imposing a fee for ATM or one-time point of service debit card overdrafts unless the

customer has expressly consented to paying such a fee (an "opt-in" is required). To secure opt-ins, banks are contacting consumers in advance to obtain the required documentation. This raises significant compliance, customer service and processing issues for banks who wish to continue charging overdraft fees on such transactions. A two to three month implementation process is recommended before July 1. Please contact Dixie Hieb, Monte Walz or Tiffany Miller for assistance.

[DEHS](#)

THE WARN ACT

by Sandra Hoglund Hanson

In our changing economy, employers may need to consider laying off employees. If a layoff or plant closing may be imminent, employers should keep the WARN Act in mind. (See 29 U.S.C. §§ 2101, et seq). WARN stands for “Worker Adjustment and Retraining Notification.” The WARN Act is a federal law requiring larger employers to give 60- day written notice in advance of plant closings or mass layoffs. It is intended to give displaced workers and their families transition time to seek alternate employment or training before the end of their employment.

Who and what is covered?

As a general rule, the WARN Act applies to employers with 100 or more employees, when the employer plans to lay off or terminate at least 50 employees at a single site of employment. Such employers must give written notice to employees, union representatives and government officials at least 60 days before a plant closing or mass layoff. The terms “plant closing” and

“mass layoff” are specifically defined by the WARN Act and its implementing regulations. These definitions may or may not cover particular situations.

Exceptions

There are exceptions to the WARN Act’s requirement of advance notice in certain circumstances. These exceptions include: (1) faltering company status; (2) unforeseeable business circumstances; (3) natural disasters; and (4) closure or completion of a temporary project or facility. The WARN Act also does not apply to strikes, lockouts or the completion of temporary projects.

Enforcement

The WARN Act is enforced by civil actions against employers. Violation of the WARN Act may result in liability to aggrieved employees for back pay and benefits during the period of the violation, as well as civil penalties and attorneys’ fees. [DEHS](#)

SOCIAL NETWORKING – WORKPLACE IMPLICATIONS

by Susan Brunick Simons and Jean H. Bender

With the increased use of social networking comes responsibility – for employers and employees.

Employers now have a new pool of information on both current and prospective employees. However, the fact that information is available does not mean the employer needs, wants or should know it. For example, by accessing an employee’s social networking site pre-hire an employer may gain knowledge of information it is not entitled to know or ask an applicant (race, age, disability, health history). Once a decision maker has this information, it cannot “unlearn” it, resulting in an increased exposure for claims of discrimination if the applicant is not hired. As for current employees, if the decision maker has gained this information and then takes an adverse employment action, again there is an increased exposure to a claim of discrimination.

Obtaining information through social networking sites also potentially creates greater exposure for other legal claims, such as invasion of privacy, violations of the National Labor Relations Act, the Federal Stored Communications Act and the Genetic Information Nondiscrimination Act. On the other hand, employers may be exposed to legal claims in not monitoring or accessing available information such as claims for negligent/hiring, harassment and defamation.

Employers should clearly inform their employees that activities outside of work may affect the employee’s job performance, the performance of others or affect the employer’s business interests. Therefore, these activities are a proper focus for policy and imposition of discipline in order to address the issues raised by

social networking and provide greater protection against the types of claims referenced above. In doing so, the employer must first determine, based upon the employer’s business needs, whether it wants to encourage social networking for business purposes. The employer must then develop the policy around that stated purpose.

Before drafting a policy, the employer also needs to decide what conduct will be covered by the policy (e-mail, blogging, social networking, texting, twitter). Employers should keep in mind that any social networking policy is in addition to (and not a replacement of) other policies, such as the employer’s electronic communication, harassment, and confidentiality and non-disclosure policies. All of these policies should be updated to cross-reference each other.

An effective social networking policy should identify the systems and employer equipment that is included and limit an employee’s expectation of privacy by clearly establishing the employer’s right to inspect and monitor any communications that involve the employer. In addition, a social networking policy should clearly state that the policy extends to conduct outside of the office where the communication or information can be traced back to the employer. Pseudonyms should be prohibited on any employer communication. Finally, the policy should require the employee to use a disclaimer stating no comments are made on behalf of the employer. As with any employer policy, when the policy is finalized, employees should acknowledge receipt and an understanding of the policy and its prohibitions. [DEHS](#)

million exemption and a maximum federal tax rate of 55 percent. This is a significant drop from the 2009 exemption amount of \$3.5 million and an increase from the 2009 tax rate of 45 percent.

This entire situation is subject to change by Congress. If 2010 has taught us anything, it is that it's impossible to predict what Congress may or may not do. [DEHS](#)

MORTGAGE LOAN OFFICERS MUST BE PAID OVERTIME

by Jean H. Bender

The U.S. Department of Labor ("DOL") recently reversed itself and now says that employees that perform the typical job duties of a mortgage loan officer do not qualify as bona fide administrative employees exempt from the overtime requirements of the Fair Labor Standards Act. Previous DOL opinion letters (September 8, 2006 and February 16, 2006) found such employees to be exempt administrative employees. According to the DOL, typical mortgage loan officers fail the requirement that "the primary duty is work related to the management and general business operations of the employer." According to the Department of Labor, the primary duty of mortgage loan officers is sales, and therefore they are involved in work related to the goods and services which

constitute the business's core function rather than work which contributes to "running the business itself."

In our experience, under President Obama's administration, the DOL has interpreted exemptions to the overtime requirements of the wage and hour laws very narrowly. The DOL has hired 250 new investigators and expects a significant increase in audits. If you have not recently reviewed your exempt positions to determine whether they are properly classified as exempt from overtime requirements, we strongly recommend you do so. Failure to properly classify employees can result in significant liability. [DEHS](#)

RECOVERY OF DEBTS FROM JOINT TENANTS OF DECEASED BORROWERS

by Keith A. Gauer

A recent South Dakota Supreme Court decision highlighted the options available to a creditor when a debtor passes away. In *Fitzmaurice SD State Veterans Home v. Estate of Hammer*, the South Dakota Supreme Court denied a Veterans' Home's claims against an estate.

Ernest Hammer resided in the Veterans' Home at the time of his death. When he died, he left no formal estate subject to probate. Ernest did, however, jointly own a house at his death that was automatically transferred to his surviving spouse, Mildred. When Mildred passed away less than a year later, the Veterans' Home sought to assert a claim against Mildred's estate based on the debt owed by Ernest.

The South Dakota Supreme Court overturned the Circuit's ruling in favor of the Veteran's Home, holding that a veteran's home statute allowing claims of to be asserted against the estate of a surviving spouse only applied if the decedent had passed an "estate" to the surviving spouse. Since the house passed from Ernest to Mildred by virtue of the joint tenancy, and not through an estate, the Supreme Court held that the Veterans' Home could not make a claim against Mildred's Estate.

The Court did, however, highlight another option that creditors of a decedent, including banks, may be able to utilize to pursue a claim where a decedent-borrower dies owning joint property but

no formal estate proceedings are commenced. When a borrower dies leaving joint tenancy property to others, a series of South Dakota statutes allow creditors of the decedent to make claims against a surviving joint tenant.

Subject to some limitations (including the homestead exemption), the creditor may bring an action directly against the surviving joint owner seeking to recover the amount of the debt. The statutes require any such claim to be brought within six months of the death of the decedent. Further, any recovery by the creditor is limited to the value of the joint property contributed by the decedent. The creditor must also be able to demonstrate that there are not sufficient other assets of the debtor to repay the debt. As such, if a formal probate of the estate of the decedent has been commenced, the creditor would likely first need to resort to the claims process in the probate proceeding.

In the Hammer case, the Supreme Court noted that the Veterans' Home failed to make a claim against Mildred, the surviving joint tenant, within six months of Ernest's death. As such, the Veterans' Home was unable to make a claim under the joint tenant recovery statutes. However, if your institution has a borrower who passes away owning property in joint tenancy, consider these statutes before writing off the possibility of recovering the indebtedness owed to your institution. [DEHS](#)

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ABOUT THE FIRM

Davenport, Evans, Hurwitz & Smith, LLP was founded in 1939. Since that time, the firm has grown steadily and is now one of the largest firms in South Dakota. For more than fifty years, the firm has assisted clients in banking and financial services matters. The firm acts as counsel to many South Dakota banks, financial institutions, and holding companies. DEHS also regularly acts as counsel to businesses who contract with banks, including various servicing and marketing firms.

The firm handles all aspects of banking law, from entity formation, acquisitions, and branching to operational issues involving lending, compliance, creditors' rights, payment processing (check, ACH, wire transfer), general commercial law, and trust administration. The firm represents banks in all phases of state and federal banking regulation and deals extensively with state and federal banking regulators. The firm understands that keeping up with new regulatory developments is a major challenge for banks today and helps its clients respond to that challenge effectively and efficiently.

South Dakota has become a major center for financial services, with approximately a half dozen credit card processing centers located in the Sioux Falls area alone. The firm has served as counsel to many of these entities and has particular experience and expertise in the areas of credit card and stored value card issuance, compliance, and receivables securitization.

The firm also represents its bank clients in bankruptcy matters and complex mediations, foreclosures, and commercial litigation on a regular basis. DEHS often acts as counsel to lenders in loan workouts and bankruptcy cases filed in South Dakota. The firm's banking and financial services lawyers, together with the firm's strong litigation practitioners, also handle commercial litigation such as bank shareholder disputes, complex lender liability cases, bank-marketer disputes, federal compliance cases, employment disputes and many other litigation cases. Our employment law attorneys assist clients with personnel issues, discrimination claims, and immigration matters. The firm's benefits lawyers develop both qualified and non-qualified benefit and retirement plans.

Numerous out-of-state and nationwide lenders also retain the firm for review of loan documents, compliance with state and federal law, and assistance in completing major real estate and commercial loans. The firm also assists out of state individuals and entities in the formation and operation of trust companies.

If you have any questions or desire assistance on any matter, please feel free to contact us at your convenience.