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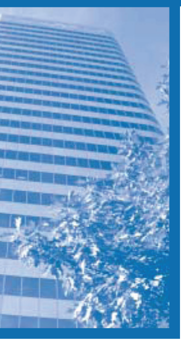

Inside This Issue:

Our Practice Areas:

BUSINESS & CORPORATE

- Appellate Practice
- Business Services
- Construction Law
- Copyright/Trademark
- Creditors' Rights
- Criminal Defense
- e-Commerce
- Employment Law
- Government Contracts
- Immigration
- Land Use, Zoning, & Local Government
- Landlord/Tenant
- Lending Services
- Litigation
- Mergers and Acquisitions
- Nonprofit Organizations
- Real Estate Services
- Title Insurance
- Tax Services

INDIVIDUAL SERVICES

- Alternative Dispute Resolution
- Domestic Relations
- Negligence/Personal Injury
- Wealth Management & Asset Protection
- Wills, Trusts & Estates

Health Savings Accounts

by Ronald A. Feuerstein, Esquire

Given the ever-escalating cost of providing employee health care benefits, some clients should consider a more cost-effective method of providing these benefits; in the form of an,health savings account (HSA). For eligible individuals, HSAs offer a tax-favorable way to set aside funds (or have their employer do so) to meet future medical needs. Here are the key tax-related elements:

- contributions you make to an HSA are deductible, with limits,
- contributions your employer makes are not taxed to you,
- earnings on the funds within the HSA are not taxed, and
- distributions from the HSA to cover qualified medical expenses are not taxed.

Who is eligible? To be eligible for an HSA, you must be covered by a "high deductible health plan" (discussed below). You must also not be covered by a plan which (1) is not a high deductible health plan, and (2) provides coverage for any benefit covered by your high deductible plan. It is permissible, however, to be covered by a high deductible plan along with separate coverage, through insurance or otherwise, for accidents, disability, dental, vision or long-term care.

For 2010, a "high deductible health plan" is a plan with an annual deductible of at least $1,200 for self-only coverage, or at least $2,400 for family coverage. For self-only coverage, the 2010 limit on deductible contributions is $3,050. For family coverage, the 2010 limit on deductible contributions is $6,150. Additionally, annual out-of-pocket expenses required to be paid (other than for premiums) for covered benefits cannot exceed $5,950 for self-only coverage or $11,900 for family coverage.

An individual (and the individual's covered spouse) who has reached age 55 before the close of the tax year (and is an eligible HSA contributor) may make additional "catch-up" contributions for 2010 of up to $1,000.

A high deductible health plan does not include a plan if substantially all of the plan's coverage is for accidents, disability, or dental, vision, or long-term care, insurance for a specified disease or illness, or insurance paying a fixed amount per day (or other period) of hospitalization.

HSAs may be established by, or on behalf of, any eligible individual.

Deduction limits. You can deduct contributions to an HSA for the year up to the total of your monthly limitations for the months you were eligible. For 2010, the monthly limitation on deductible contributions for a person with self-only coverage is 1/12 of $3,050. For an individual with family coverage, the monthly limitation on deductible contributions is 1/12 of $6,150. Thus, deductible contributions are not limited by the amount of the annual deductible under the high deductible health plan.

Taxpayers who are eligible individuals during the last month of the tax year are treated as having been eligible individuals for the entire year for purposes of computing the annual HSA contribution.

However, if an individual is enrolled in Medicare, he is no longer an eligible individual under the HSA rules, and so contributions to his HSA can no longer be made. Contributions may be made to an HSA by or on behalf of an eligible individual even if the individual has no compensation, or if the contributions exceed the individual's compensation. Contributions made by a family member on behalf of an eligible individual to an HSA (which are subject to the limits described above) are deductible by the eligible individual in computing adjusted gross income.

Rollovers from IRAs, FSAs, and HRAs. For a limited period (beginning Dec. 20, 2006, and ending December 31, 2011) an eligible individual can make a one-time transfer of amounts from a health flexible spending arrangement (health FSA) or health reimbursement

Health Savings Accounts
Continued from Page 1

arrangement (HRA) to an HSA. The amount transferred is limited to the lesser of (i) the account balance of the individual's health FSA or HRA as of September 21, 2006, or (ii) the account balance of the health FSA or HRA on the transfer date.

Similarly, on a once-only basis, taxpayers can withdraw funds from an IRA, and transfer them tax-free to an HSA. The amount transferred can be up to the maximum deductible HSA contribution for the type of coverage (individual or family) in effect at the time of the transfer. The amount so transferred is excluded from the taxpayer's gross income, and is not subject to the 10% early withdrawal penalty.

Employer contributions. If you are an eligible individual, and your employer contributes to your HSA, the employer's contribution is treated as employer-provided coverage for medical expenses under an accident or health plan and is excludable from your gross income up to the deduction limitation, as described above. Further, the employer contributions are not subject to withholding from wages for income tax or subject to FICA or FUTA. The eligible individual cannot deduct employer contributions on his federal income tax return as HSA contributions or as medical expense deductions.

An employer that decides to make contributions on its employees' behalf must make comparable contributions to the HSAs of all comparable participating employees for that calendar year. If the employer does not make comparable contributions, the employer is subject to a 35% tax on the aggregate amount contributed by the employer to HSAs for that period.

Contributions are comparable if they are either: (1) the same amount; or (2) the same percentage of the annual deductible limit under the high deductible health plan covering the employees. For these purposes, comparable participating employees (1) are covered by the employer's high deductible health plan and are eligible to establish an HSA; (2) have the same category of coverage (either self-only or family coverage); and (3) have the same category of employment (either part-time or full-time). Treasury Regulations provide detailed guidelines for comparable contributions.

An exception to the comparable contribution requirements applies for contributions made on behalf of nonhighly compensated employees. Under this exception, an employer may make larger HSA contributions for nonhighly compensated employees than for highly compensated employees.

Employer contributions are also excludable if made at the election of the employee under a salary reduction arrangement that is part of a cafeteria plan (i.e., a plan which allows you to elect to use part of your salary towards a variety of benefits). Although contributions to an employee's HSA through a cafeteria plan are treated as employer contributions, the comparability rule does not apply to contributions made through a cafeteria plan.

Earnings. If the HSA is set up properly, it is generally exempt from taxation, and there is no tax on earnings. However, taxes may apply if contribution limitations are exceeded, required reports are not provided, or prohibited transactions occur.

Distributions. Distributions from the HSA to cover an eligible individual's qualified medical expenses, or those of his spouse or dependents, are not taxed. Qualified medical expenses for these purposes generally mean those that would qualify for the medical expense itemized deduction. If funds are withdrawn from the HSA for other reasons, the withdrawal is taxable. Additionally, an extra 10% tax (20% for distributions made after Dec. 31, 2010) will apply to the withdrawal, unless it is made after reaching age 65, or in the event of death or disability.

Distributions from an HSA exclusively to pay for qualified medical expenses are excludable from the gross income of the account beneficiary even though the beneficiary is no longer an "eligible individual," e.g., the individual is over age 65 and entitled to Medicare benefits, or no longer has a high deductible health plan.

As you can see, HSAs offer a very flexible option for providing health care coverage, but the rules are somewhat involved. Please contact Ron Feuerstein if you would like to discuss this topic further.

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The PTO Answers the Call to Trademark Bullying
by Alain J. Lapter, Esquire

Small business owners are inundated with complex issues that arise on an almost daily basis. Whether it be finances, inventory, sales, employee issues, leases, utilities, cashflow, etc., small business owners are undoubtedly consumed with pressing issues vital to the day-in and day-out operations and success of their venture, not to mention their livelihoods.

It is not far-fetched to consider that the last thing these individuals need to focus their attention on is trademark bullying. Unfortunately, trademark harassment or mere over-zealousness by rights-owners is a growing trend. For certain companies and individuals, this litigious behavior is commonplace and more often than not conducted without regard to the validity of their claims of infringing activity.

On the copyright side, courts have long recognized this pressing matter. A recent decision out of California demonstrates a positive trend toward protecting small business owners and individuals from harassment, as well as costly and sometimes frivolous legal action. In Lenz v. Universal Music Corp., 572 F.Supp. 2d 1150 (N.D. Calif. 2008), the court was asked to consider the growing trend of User-Generated Content ("UGC") on the Internet and its implications on copyrights. Due to technological advancements, consumers are able to create UGC with much more ease in this day and age. Sharing these works, some of which incorporate protected visual and auditory works, can occur instantaneously thanks to websites like Facebook, YouTube and MySpace. In light of the upsurge of UGC, some rights-owners have resorted to sending these social networking websites blanket take down notices, demanding that they remove any UGC material incorporating their work. These wholesale demands are not only onerous for the website operators but over-reaching in that the demands do not take into consideration whether the incorporation of their works into the UGC could be considered fair use under the Copyright Act. This was the question before the court in Lenz.

The court held that a copyright owner who seeks to enforce a Digital Millennium Copyright Act ("DMCA") take down request must "consider the fair use doctrine in formulating a good faith belief that 'use of the material in the manner complained of is not authorized by the copyright owner, its agent, or the law.'" Id. at 1154. Perhaps somewhat diluting its good intentions, the court further held that the "good faith" requirement should be judged from the copyright holder's perspective. Therefore, so long as the copyright holder made even a rudimentary evaluation of fair use, the "good faith" requirement was substantiated. Nevertheless, on a positive note and in a salient effort to avoid the silencing of UGC, the court imposed a significant new DMCA duty on the copyright holder, who must now expressly preempt fair use arguments before rebutting fair use defenses.

The PTO Answers the Call to Trademark Bullying
Continued from Page 2

While the notion of "fair use" also exists with respect to trademarks, a court has not yet handed-down a Lenz-like decision in the trademark context. Fortunately, the powers that be at the U.S. Patent and Trademark Office ("USPTO") have taken notice and understand that action is needed. To that end, the USPTO is seeking comments on the following: "the extent to which small businesses may be harmed by litigation tactics by corporations attempting to enforce trademark rights beyond a reasonable interpretation of the scope of the rights granted to the trademark owner......."

The USPTO is looking for "feedback from U.S. trademark owners, practitioners, and others regarding their experiences with litigation tactics, especially those involving an attempt to enforce trademark rights beyond a reasonable interpretation of the scope of the rights granted to the trademark owner. The USPTO also is eliciting suggestions to address any allegedly problematic litigation tactics." The agency requests that commentators address the following points:

"1. Please identify whether you are a trademark owner or practitioner, and the general size and nature of your business or trademark practice, including the number of trademark applications and registrations your business has, or your practice handles. Please note that the USPTO will fully consider any comments you submit, even if you choose not to identify yourself in a particular manner.

2. In approximately the last 5 years, please describe any instances of which you have first-hand knowledge where a small business may have been the target of litigation tactics attempting to enforce trademark rights beyond a reasonable interpretation of the scope of the rights granted to the trademark owner.

3. Please describe situations where you have been involved in receiving a cease-and-desist letter. Anecdotal information might include, but is not limited to, a description of whether the letter resulted in the small business ceasing its use of one or more marks, or whether the sender of the cease-and-desist letter withdrew or abandoned its demands against the small business owner.

4. Please describe situations where you have been involved in trademark litigation in state or federal courts. Anecdotal information might include, but is not limited to, a description of whether the lawsuit settled on the basis of the small business agreeing to cease its use of one or more marks, or on the basis of the plaintiff withdrawing or abandoning its trademark-related allegation(s). Alternatively, relevant information might include whether such lawsuits resulted in a court judgment and the nature of the judgment (such as requiring the small business to cease its use of one or more marks, assessing monetary liability (damages, lost profits, or attorneys' fees) against the small business, requiring the plaintiff to pay the defendant's attorneys' fees, or imposing sanctions against the plaintiff under Rule 11 of the Federal Rules of Civil Procedure).

5. Please describe situations where you have been involved in opposition/cancellation proceedings instituted at the USPTO against small business owners. Anecdotal information might include, but is not limited to, a description of whether the proceedings settled on the basis of the small business agreeing to abandon its application(s) for one or more marks, or whether the proceedings settled on the basis of the plaintiff withdrawing or abandoning its notice of opposition or cancellation petition. Alternatively, relevant information might include a description of whether such proceedings resulted in a decision by the USPTO Trademark Trial and Appeal Board ("TTAB") refusing to register/canceling one or more marks owned by the small business, or whether such proceedings resulted in the TTAB imposing sanctions against the plaintiff under Rule 11 of the Federal Rules of Civil Procedure.

6. Do you think trademark "bullies"[1] are currently a problem for trademark owners, and if so, how significant is the problem?

7. Do you think aggressive litigation tactics are more pervasive in the trademark area than in other area of the law?

8. Do you think the USPTO has a responsibility to do something to discourage or prevent trademark bullying? If yes, what should the USPTO do?

9. Do you think the U.S. courts have a responsibility to do something to discourage trademark bullies? If yes, what should the U.S. courts do?

10. What other U.S. agencies may have a responsibility to do something about the problem?

11. Do you think Congress has a responsibility to do something to discourage or prevent trademark bullying? If yes, what should Congress do?

12. Please provide any other comments you may have."

The official announcement can be found here: http://www.uspto.gov/trademarks/bullies_survey.jsp

Responses to these questions, or any additional comments, can be sent to to TMFeedback@uspto.gov, with the subject line "Small Business Study." The USPTO requests all responses to be submitted no later than January 7, 2011.

While it remains to be seen what if any measures the USPTO or Congress will eventually implement to thwart the continued bullying of trademark owners, their recognition of a problem is certainly a step in the right direction.

The Intellectual Property Team at Bean Kinney & Korman can assist you in drafting your important comments to the PTO. If you need assistance, please contact Alain J. Lapter by telephone at (703) 525-4000 or by email at alapter@beankinney.com.

To Protect Your Business From Employees Who Leave – Require a Non-compete Provision in Employment Agreements

by Alan C. Bowden, Esquire

Businesses in need of protecting their trade secrets, customer lists and other proprietary information from an employee who decides to leave the company should include non-compete and non-solicitation provisions in the employee's employment agreement. These provisions should specifically identify the kind of information the company considers proprietary and narrowly define the type of employer for whom the employee is restricted from working, the geographic area considered to be off limits to future employment and the time frame for which these restrictive convenants apply.

A Fairfax Circuit Court Judge recently dismissed all claims of a small business owner who brought a number of business tort claims against an employee for misappropriation of trade secrets, breach of fiduciary duty and civil conspiracy. The employee worked for the company for two years before deciding to leave and join his sister-in-law in a newly-formed business which was a direct competitor of the company.

The complaining business did not have a non-compete

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To Protect Your Business From Employees Who Leave - Requires a Non-compete Provision in Employment Agreements
Continued from Page 3

or a non-solicitation agreement in place when the employee decided to leave the company. Consequently, the employer was unable to bring breach of contract claims against the employee and unable to keep him from working with one of its direct competitors. Additionally, when the employee left, he downloaded his personal files from his work computer as well as several company documents related to company contact lists and the company's process for soliciting prospective new clients.

Upon learning of the employee's actions, the company sent the employee a cease-and-desist letter and the employee then returned the proprietary files to the company. Nonetheless, the company filed a suit against the employee for several business tort claims associated with his taking the company's proprietary information when he departed the company. However, all claims against the employee were dismissed, as the Court found the employee's testimony compelling that he did not share the information with his competitor and did not purposefully download the proprietary information. The Court further opined that the employee did not have a non-compete provision in his employment contract and that he was free to work for a competitor of the company.

For more information on this topic, please contact Alan C. Bowden by telephone at (703) 525-4000 or by email at abowden@beankinney.com.

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