

# DANZIGER & MARKHOFF LLP

Fall 2007

Danziger & Markhoff LLP  
123 Main Street  
White Plains, NY 10601  
  
Telephone 914.948.1556  
Fax 914.948.1706  
www.dmlawyers.com

## *In this issue:*

Avoiding Pitfalls in Ongoing Plan Administration	1
Protecting Accounts and Assets for your Children	1
Negotiate Before you Sign your Office Lease	3
In Our Firm	4

## **Avoiding Pitfalls in Ongoing Plan Administration**

There is little a sponsor of a retirement plan can do to avoid being picked for a random IRS audit. If problems are discovered by an IRS auditor, required corrections can involve additional mandated contributions, penalties and interest.

The better approach is to have ongoing communication with your plan advisor to avoid situations that may cause problems in event of an audit. The following are just a few examples of what we mean:

*Improper Plan Loans to Participants:* The law imposes restrictions on the amount and time-period of plan loans to a participant. For example, loans in excess of \$50,000 are deemed distributions taxable to the borrowing participant. Clients should call us before borrowing to confirm that the plan loan satisfies IRS requirements.

*Late Repayment of Plan Loans:* Plan loans must be repaid according to an IRS-specified minimum repayment schedule. Clients are not doing their employees a "favor" if they permit installments of loan repayments to fall in arrears. Such delays, if not timely corrected, can result in deemed loan defaults which can subject the entire loan to current tax and penalties and can potentially jeopardize the qualified status of the plan. Our office should be contacted immediately if a loan repayment is late.

*Inappropriate Plan Investments:* IRS rules prevent a related party from transferring assets into, or purchasing assets from, a plan. IRS also restricts the types of assets in which plan funds may be invested. *For example*, a loan from the plan

*(Continued on page 4)*

## **Protecting Accounts and Assets for your Children**

### *Protecting custodian accounts*

A number of clients have accumulated funds in custodian accounts for their children with the intention of using the funds for college. However, in many instances, the parents were able to pay the tuition from current income, leaving

a substantial balance in the custodian account.

The funds in the custodian account become property of the child when he or she attains age 21. At this point, the parents have two concerns: first, that the account

*(Continued on page 2)*

## Protecting Accounts and Assets for your Children

*(Continued from page 1)*

will be at risk in case the child marries and the marriage ends in divorce, and second, that the child may spend the money frivolously.

Our approach in either case is to have the child transfer his or her custodian account to an irrevocable trust created by the child, with the parents as trustees. The trust's income

and principal will only be paid to the child in the discretion of the parents. Upon the child's death, the assets are distributed to the child's children. The important point is that the account cannot be distributed to the child's spouse.

If the parents decide at some point that the trust is no longer necessary, they can, in their role as trustee, consent to collapse the trust and distribute the assets to the child.

The trust's income will be taxed to the child. The trust does not have to file separate income tax returns and does not have to apply for a taxpayer identification number.

Upon the child's death, the trust will count as an asset of his or her estate for estate tax

purposes. No marital deduction will be available in the child's estate because the trust property cannot pass to the child's spouse. The trust agreement provides that the trust is to bear its own share of the child's estate taxes.

***The virtue of such a trust is that the child has given up control of the assets to his or her parents.***

The virtue of such a trust is that the child has given up control of the assets to his or her parents. In exchange, the trust helps earmark the assets as "separate property" for equitable distribution purposes and insulates the assets from any divorce proceeding. Since it is frequently awkward for parents to recommend a prenuptial agreement, this is a more palatable alternative. Of course, such a trust will not protect earned income or other assets not in trust from spousal claims. Also, the child now cannot use the custodian account to purchase sports cars or take lavish vacations.

The trust has estate tax consequences at the child's death and should be drawn with these in mind. We have prepared this type of trust for numerous clients, and both clients and children have been pleased with the result.

*Protecting your assets from your children's creditors after you die*

Instead of relying on your children to plan for their own protection against potential creditors' claims, there are techniques which you can employ to prevent creditors from reaching the inheritance you leave to your children.

Rather than leaving your inheritance outright to the child, you should consider leaving the inheritance in the form of "generation-skipping trusts" for your children. These trusts provide income to the children and distributions of principal with the consent of another trustee. When the child dies, the trust will be distributed to grandchildren.

The advantage of the trust is that since the child does not have control of the assets (the trustee has the control), creditors cannot attach the trust principal. As a side benefit, this technique enables you to "dictate from the grave" that your estate will not pass to your son-in-law or daughter-in-law upon your child's death if that is the desired result. ■

*Please contact Michael Markhoff, Esq. or Stanley E. Bulua, Esq. to further discuss protecting your custodian accounts and your children's assets from creditors.*

## Negotiate Before You Sign Your Office Lease

As a business owner, your office lease is one of the most significant legal/business documents you will sign. Despite this, far too many business owners fail to have their lease reviewed before they sign, either because they are under time pressure, they are busy with other aspects of opening a business or because the lease looks like a standard form lease. They are often not aware that all leases are landlord-friendly and that risks to the tenant are often difficult to discern.

However, the risks that a prospective tenant faces can often be alleviated by careful review and negotiation with the landlord before the lease is signed.

One example of a potential risk is the continuation of lease obligations in the event of death or permanent disability. In the event of the death or permanent disability of a sole practitioner, his commercial lease will continue to be an obligation of his (or his heirs), either pursuant to the lease itself or pursuant to a personal guaranty that most landlords require. However, if asked at the outset, some landlords will agree to have the lease provide

for early termination in the event of the death or disability of a sole practitioner under certain circumstances.

Likewise, a poorly-worded assignment clause may cause problems. Many commercial leases deem a transfer of stock in a professional corporation to constitute an assignment of the lease requiring the landlord's consent. However, in a group consisting of multiple shareholders, stock will almost certainly be transferred as part of

the natural progression of retirement of older practitioners and the buy-ins of younger practitioners. To allow such transitions, the assignment clause of the lease

must be properly worded. Otherwise, such transitions could require the landlord's consent and, in the absence of such consent, could constitute a breach of your lease.

Another recurrent problem involves damage to the building in which your office is located. A typical New York State office lease has a standard clause which states that if the building is damaged to an extent where your office is not usable, the owner of the building is the only person with the right to

terminate the lease. Thus, as a tenant in that building, you could find yourself in a situation where you need to obtain temporary office premises for an extended period of time until the building owner makes repairs. You will not have the option to terminate the lease and move permanently to another location. However, if you raise this issue when you first review the lease some landlords will agree to revise this section to allow the *tenant* to unilaterally terminate the lease if there is damage to the building and certain conditions are met.

As these examples illustrate, there is much more to a lease than just the agreed-upon price. There are often lease provisions which present the unwary prospective tenant with risks that may prove to be both expensive and time-consuming. Only careful review of the lease before you sign will protect you from such risks. ■

*Please contact David P. Gesser, Esq. if you have any questions or if we can assist you in reviewing any lease you are considering signing.*

***There are often lease provisions which present the unwary prospective tenant with risks that may prove to be both expensive and time-consuming.***

## Avoiding Pitfalls in Ongoing Plan Administration

*(Continued from page 1)*

to your business is prohibited. Similarly, investments in “collectibles” such as artwork, coins, etc., even if they appreciate in value, result in a prohibited transaction, subject to penalties.

**Timing of 401(k) Contribution Deposits:** Under Department of Labor rules salary reduction contributions must be deposited into the plan’s account as soon as possible. In many cases, DOL is imposing a 3-day deadline. If you cannot deposit the 401(k) funds into the plan within a reasonable period of time, you should check with us to see what protective steps to take.

**Ineligible Participants:** Allowing employees to participate before

the date otherwise allowed under the plan is a violation of plan provisions, and requires corrective action under the IRS EPCRS correction program. Here again, the best bet is to contact us before making decisions affecting the plan.

**Excluding Eligible Employees:** Clients sometimes decide that a “part-time” or “seasonal” employee is to be excluded from the plan. However, eligibility in a plan usually involves counting *Hours of Service*, and it is possible for a part-time or seasonal employee to satisfy the Hours of Service requirement and, thus, be eligible for plan participation.

The worst thing you can do is to determine that an individual is not eligible, and then to exclude that person’s name from the in-

formation submitted to us each year. This prevents us from discovering (and helping correct) what was done. In the event of an audit, the plan could face penalties and added costs.

We can only protect you if you contact us whenever planning anything different in administering your plan, so that we can help you achieve your goals within the framework of applicable IRS rules.■

*We encourage you to contact your Pension Consultant on our staff, or Ira Langer, Esq., Jay Fenster, Esq., Andrew E. Roth, Esq. or Irwin N. Rubin, Esq. if you have any questions concerning these issues.*

## In Our Firm

### **Congratulations to Harris Markhoff, Michael Markhoff and Stan Bulua!**

*We are thrilled to announce that Harris Markhoff, Michael Markhoff and Stan Bulua were selected by their peers for inclusion in The Best Lawyers in America® 2008 (Copyright 2007 by Woodward/White, Inc. of Aiken, SC). Harris was selected in the areas of corporate law and trusts and estates, Michael was selected in the area of trusts and estates and Stan was selected in the area of taxation. Selection to Best Lawyers is based on an exhaustive peer-review survey by more than 25,000 leading attorneys throughout the United States.*

*We are also delighted to announce that Harris Markhoff was also selected for inclusion in New York Super Lawyer magazine in the area of taxation. Only 5% of attorneys practicing in New York received this honor.*

*Stan Bulua has also been featured in the October 2007 issue of Mann on the Street, a magazine for Wall Street and financial institutions.*

Let us know if you would like to receive future issues of our newsletters by e-mail. All we need is your e-mail address. Please either fax your request to our office, attention: Paula Peck at (914) 948-1706 or e-mail Ms. Peck at [Ppeck@dmlawyers.com](mailto:Ppeck@dmlawyers.com).

This publication is intended for general information purposes only. It is not intended to constitute individual legal advice to any specific client.