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Estate Planning

By David G. Fisher

As a transactional lawyer whose practice includes estate planning, one area of the law that has been mostly unchanged over the past twenty years is the federal estate tax laws. The old adage that Uncle Sam won't only tax you during your lifetime, but will also tax you again when you die, has been a reality for many years. In 2001, President Bush signed into law legislation that changed federal estate tax laws by reducing federal estate taxes over a period of years and eventually repealing the federal estate tax all together.

For many years, federal estate tax laws in our country provided everyone with a certain "unified credit" against estate tax. This means that someone only has to pay estate taxes if their estate is over a certain threshold. This threshold was originally \$600,000 in the 1990's, later increasing to \$1,000,000. The 2001 Legislation provided for this unified credit to increase gradually from \$1,000,000 in 2001, to \$3,500,000 in 2009. Then, in 2010, there would be no estate tax at all, and in 2011, the unified credit would return to \$1,000,000 going forward. Most thought when the law was passed in 2001 that Congress would have 10 years to revisit the law and prevent the estate tax from totally going away for those dying in 2010. Do you think this happened - of course not. As a result, for those who die in 2010 there is no estate tax. Many practitioners believe when Congress revisits this law, they will make the estate tax retroactive to the beginning of 2010. There are questions as to whether making the

estate tax retroactive to the beginning of 2010 is constitutional, thus creating even more uncertainties for our estate planning clients.

As the law stands now for those dying in 2010, there may be problems with the way one's estate is distributed because of the language used in the estate planning documents in place that were prepared based on the prior law. For example, a common way of maximizing the estate tax savings is to establish a trust that is divided into two shares, one for the benefit of the decedent's spouse (qualifying for the unlimited marital deduction for estate tax purposes) and one for the benefit of the decedent's children (utilizing the maximum amount of the unified credit). The formula used in

dividing a trust as such usually ties the amount to be distributed to each share to the amount of the unified credit. As discussed above, there is not a unified credit this year, so depending how the division formula of the trust is drafted, it is possible that all the assets in the trust could end up

in the trust for the decedent's children, thus unintentionally disinheriting the decedent's spouse. This would of course not be the intention of the decedent, but could be a reality based on the current status of the federal estate tax laws, coupled with estate planning documents drafted in the past under prior law. Under such a scenario, a simple amendment to the trust could resolve these problems.

In addition to repealing the estate tax for 2010, the 2001 Legislation also made substantial changes to the traditional "stepped-up" basis for property received



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Overtime and Salaried Employees: Are Your Exempt Employees Really Exempt?

By Jason Bergwall

As the economy continues to struggle, lawsuits filed by employees claiming they were not properly paid for overtime have become increasingly common. Often these suits involve employees who were paid a regular salary and were believed by their employers to be “exempt” from the overtime requirements of the Fair Labor Standards Act (FLSA), which governs how the majority of American workers are compensated. Employers are often shocked to learn that a salaried “manager” or “supervisor” was, in fact, not exempt from the overtime requirements of the FLSA and is owed compensation beyond the employee’s salary for hours worked in excess of forty hours per week.

The FLSA mandates that workers be compensated at a rate equal to one and one-half times their regular rate of pay (often referred to as “time and a half”) for every hour worked in excess of forty hours per week. There are, however, certain occupations that are exempt from this requirement. Most notably, the primary exempt occupations are classified under one of three main categories: executive, administrative and professional occupations.

The executive exemption generally applies to employees in a management position who oversee two or more full time employees and have authority to make business decisions including hiring and firing other employees. It is important to note that just carrying the title of “manager” or “supervisor” does not automatically qualify an employee for the executive exemption. Also, even if the employee meets the general requirements for the executive exemption, he or she may still not be overtime exempt if a certain amount of the employee’s work day is not spent doing traditional executive-type activities.

Administrative exemptions are often more difficult to determine than executive exemptions. Administrative employees typically work in the general non-manual running of a business enterprise. Administrative positions require employees to exercise significant amounts of independent judgment and discretion in performing their daily duties. Administrative employees will often also have authority to negotiate on behalf of a company and bind the company in certain matters. Marketing, accounting, financial services and human resources positions often fall under the administrative exemption. Employers should be on notice that, as with the executive exemption, a job title does not mean an employee qualifies as administratively exempt. If the employee does not exercise the requisite degree of discretion and independent judgment in the performance of their job duties, the employee is not exempt.

Employees qualifying for the professional overtime exemption are those performing work requiring advanced knowledge in science or learning. Doctors, lawyers, and certified public accountants often fall under the professional exemption. As with the executive and administrative exemptions, however, an analysis of the employee’s actual work duties is necessary to determine if the professional exemption applies. Just having an advanced degree in a certain field does not guarantee overtime exemption. An employee with a doctorate in physics whose job duties include installing home theater systems likely does not qualify for the professional exemption.

The executive, administrative and professional exemptions are not the only overtime exempt positions enumerated by the FLSA. Other occupations including, but not limited to, commissioned sales,

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from an estate of someone dying in 2010. This change only adds to the complexity and uncertainty of estate planning going forward, and should be carefully considered when preparing your estate plan under current law.

So, you ask, what should you do regarding your estate plan based on the current uncertainty of federal estate tax laws? We advise that if you have a potentially taxable estate under any of the above scenarios that you meet with your estate planning lawyer as soon as possible to discuss the best strategies for your estate plan according to your own particular needs, regardless of whether you currently have estate planning documents in place. The estate planning attorneys at Peterson & Myers, P.A. have worked with many clients this year to address the uncertainties that lie ahead regarding estate taxes.

For those of you who do not have an estate tax issue under any of the scenarios above, it is nevertheless a good idea to review your Will, Living Will, Health Care Surrogate Designation and Durable Power of Attorney every couple years to make sure they still meet your desires. If you do not have the above estate planning documents, or the ones you have in place are out of date or do not accomplish your desires, it would be a good idea to talk to an estate planning attorney to have new estate planning documents prepared.





New Office Opens in Lake Wales

Peterson & Myers is proud to announce the opening of its new office in Lake Wales. Although the firm had out-grown its former location at 130 East Central Avenue, the firm remains in downtown Lake Wales, where it has been a cornerstone of the area since opening in 1948. In celebration of this event, the firm recently held an open house at its new location at 100 W. Stuart Avenue, which was attended by over 300 members of the local community. At approximately 14,000 square feet, the new Lake Wales office has multiple conference rooms available to conduct mediations, conduct seminars and cater to client meetings. Peterson & Myers continues to be the largest law firm in Polk County and its legal practice includes the areas of real estate, business transactions, complex litigation, land use and environmental law, eminent domain and healthcare. For more information, call (863) 676-7611 or visit our website at www.petersonmyers.com.



Peterson & Myers Attorneys Receive Peer Review Ratings

Peterson & Myers, P.A. is proud to announce that shareholder, Jonn D. Hoppe, has recently received an AV-Rating from the Martindale Hubbell



Hoppe

Peer Review Rating system. Additionally, junior partner Joshua K. Brown has received a BV-Rating.

The Martindale-Hubbell Peer Review Ratings system is based on the confidential opinions of members of the Bar and the Judiciary, including both those who are rated and those who are not. Martindale-Hubbell representatives conduct personal interviews to discuss lawyers under

review with other members of the Bar. A compilation of these opinions from various sources is necessary to form a consensus, and lawyers under review are sometimes asked to provide professional references to assist with the process. In addition, confidential questionnaires are sent to lawyers and judges in the same geographic location and/or area of practice as the lawyer being rated. Members of the Bar are instructed to assess their colleague's legal ability and general ethical standards.



Brown



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agriculture, and interstate truck driving also may qualify as overtime exempt positions. As with the executive, administrative and professional exemptions, a detailed analysis of the job duties of a given employee in these positions must be performed before overtime exemption can be determined.

An overtime audit by a qualified attorney may reduce significant risk to employers. Misclassified employees bringing suit for unpaid overtime compensation are often entitled to their unpaid wages (for up to three years), liquidated damages equal to the unpaid wages, plus attorney's fees and costs associated with pursuing the litigation. When these amounts are added to an employer's own legal defense costs, the potential financial exposure

associated with a single overtime claim can be staggering. Additionally, the FLSA allows employees to bring a simplified version of a class action suit, called a collective action, against employers. Such an action potentially exposes employers to liability for wages and damages for every misclassified employee that has worked for the employer within the last three years.

Navigating the overtime exemption landscape can be a tricky matter, to say the least. Peterson & Myers, P.A. has attorneys experienced in labor and employment practice at all three of its Polk County offices who can arrange for an overtime audit or provide answers to your general employment questions. We look forward to working with you!



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Attorney Spotlight

Kevin Ashley



Kevin Ashley joined Peterson & Myers, P.A. in 2006 and became a shareholder in 2009. Mr. Ashley received his undergraduate degree with military distinction from the United States Air Force Academy in 1984, followed by a Masters of Science degree from St. Mary's University in San Antonio, Texas, in 1987. Mr. Ashley served as an officer in the United States Air Force from 1984-1992. He was the Chief of Personnel Analysis during the first Gulf War.

Mr. Ashley graduated from the University of Florida College of Law in 1995 with high honors and served as the associate managing editor of the Florida Law Review. Mr. Ashley currently serves on the Florida Supreme Court's Commission on Professionalism and is the Inn Administrator for the Willson American Inn of Court. Mr. Ashley is a member of the Polk County Trial Lawyer's Association, the Florida

Trial Lawyers Association and the American Bar Association. Before joining Peterson & Myers, Mr. Ashley was a partner in the civil litigation law firm of Gibson, Valenti & Ashley, in Lake Wales.

Mr. Ashley is board certified in civil trial law and practices in the Winter Haven office. Mr. Ashley has experience in trying cases before judges and juries in a broad range of civil matters including commercial litigation, products liability, wrongful death, personal injury, trust litigation, condemnation, flooding, and constitutional law. Mr. Ashley has also served as an appellate lawyer for clients before Florida district courts of appeal and the Florida Supreme Court.

Mr. Ashley currently resides in Winter Haven, Florida with his wife, Prudence, and their children. He enjoys traveling and reading.