Egbl Legal Report

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New Form 990 inquiries challenge tax-exempt organizations

by Douglas E. Lee

Tax-exempt organizations that file IRS Form 990 soon will face increased scrutiny from the federal government, which is spurring many boards to adopt comprehensive policies designed to ensure more accountability and transparency.

With a few exceptions, tax-exempt organizations with more than $1 million in annual revenues and $2.5 million in assets are required to file Form 990 for the 2008 tax year. Those thresholds will change to $500,000 and $1.25 million for the 2009 tax year and to $200,000 and $500,000 for the 2010 tax year. Organizations with fewer revenues and assets generally need file only the Form 990-EZ, which so far does not include the probing questions that have larger organizations scrambling.

In Part VI of the new Form 990, the IRS asks several questions concerning the organization's governance and management. These questions include whether the organization has written policies concerning:

- conflict of interest;
- whistleblowing;
- document retention and destruction;
- executive compensation;
- expense substantiation;
- review of the Form 990 prior to filing;
- compliance with public inspection requirements for the Form 990;
- acceptance of gifts; and
- participation in joint ventures.

While the IRS is not requiring such policies, it has suggested that a lack of appropriate governance policies will raise an organization's audit profile and make an audit more likely.

In addition, organizations are required to complete one or more of 16 schedules, depending on the organization's activities. These schedules seek information about an organization's:

- public charity status and public support;
- contributors;
- political campaign and lobbying activities;
- fundraising; and
- grants.

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Disability Act amendments expand protections for employees

by Douglas E. Lee

On Sept. 25, 2008, President Bush signed the ADA Amendments Act ("ADAAA"), which is designed to expand the definition of disability and to overturn U.S. Supreme Court decisions that had limited protections for employees.

While the ADAAA, which takes effect Jan. 1, 2009, continues to define "disability" as "a physical or mental impairment that substantially limits one or more major life activities," it defines "major life activities" to expand the ADA's protections.

"Major life activities" now will include "caring for oneself, performing manual tasks, seeing, hearing, eating, sleeping, walking, standing, lifting, bending, speaking, breathing, learning, reading, concentrating, thinking, communicating, and working." The ADA also will cover problems with "major bodily functions," which include "functions of the immune system, normal cell growth, digestive, bowel, bladder, neurological, brain, respiratory, circulatory, endocrine, and reproductive functions."

Employers justifiably are concerned that employees now will be considered "disabled" if they suffer from insomnia, dyslexia, stuttering, attention deficit disorder and

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EGBL names new partner, adds associate

As part of its continuing efforts to serve its clients better and more efficiently, Ehrmann Gehlbach Badger & Lee in April named Dana M. Considine a partner with the firm and in June hired Emily R. Vivian as an associate.

Dana, who joined EGBL as an associate in 2003, concentrates her practice in all aspects of family law, civil litigation including collection and landlord-tenant, criminal law and municipal law.

She is a native of Amboy, where she resides with her husband Kasey. She graduated from Amboy High School as valedictorian in 1997. She is a 2003 graduate of Drake University Law School, where she was named to the Dean's List. She is a member of the Illinois Bar Association, the Lee County Bar Association, the Ogle County Bar Association, the American Bar Association and the American Association for Justice.

Emily concentrates her practice in trust and estate planning and administration, real estate and business law.

She is a native of Dixon, where she resides with her husband Jeremy and their son Henry. She is a graduate of the Chicago-Kent College of Law and the University of Illinois, where she earned a degree in accountancy. After graduating from law school, Emily practiced for two years with a firm in Peoria. She is a member of the Illinois State Bar Association and the Lee County Bar Association.

EGBL is pleased and proud to be able to offer Dana's and Emily's services to its clients and looks forward to long relationships with both of them.

Tax-Exempt . . .

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Given the IRS's renewed interest in accountability and transparency, tax-exempt groups ignore the Form 990's prodding at their peril. Most tax advisers and attorneys are advising their larger tax-exempt clients to begin reviewing and preparing the suggested policies as soon as possible. EGBL shortly will be providing the tax-exempt organizations it represents more detailed information about the new Form 990 and the challenges it presents. In the meantime, clients with questions should not hesitate to contact us.

Ignoring child support order proves costly for employer

by Rolfe Ehrmann

The Illinois Supreme Court recently entered a judgment against Harold Miller, Sr., in the amount of $1,172,000 as a penalty for failure to pay child support totaling over $12,000. Interestingly, however, Harold Sr. is not the deadbeat dad we often read about. Instead, he is the deadbeat dad's employer.

Harold Sr. is an architect who employed his son. The son was involved in a divorce requiring him to pay $82 per week in child support. Harold Sr. received the notice normally sent to employers requiring him to deduct the child support and to forward it to the Statewide Disbursement Unit. Oddly, although Harold Sr. did withhold the child support, he failed to forward it to the SDU.

Illinois law imposes a $100 per day penalty on any employer that fails to withhold child support or fails to forward it to the SDU. Although there is a seven-day grace period, the penalty is even more severe than it appears.

The penalty applies per day and per each payment missed. Therefore, after the grace period, an employer that fails to withhold or pay child support owes the recipient $100 per day for each day of the first week, $200 per day for the two missed payments of the second week, and so on, so that by the 10th week the employer is incurring a penalty of $1,000 per day.

For Harold Sr. the failure to forward child support was chronic and ultimately amounted to a total of $12,382 in unpaid child support. Given the compounding nature of the penalty, the penalty calculated and assessed by trial court totaled $1,172,000. Harold Sr. claimed the penalty was unconstitutionally severe, but the Illinois Supreme Court disagreed, saying the statute could and should be enforced literally.

The lesson for any employer served with a notice to withhold child support is to obey the notice. If the notice is not followed, the statute requires the court to assume the employer intentionally failed to withhold or pay. Every employer, no matter how small, therefore should create a system to ensure that child support is withheld and paid.

The lesson for a support recipient who is not receiving child support although an employer has been served with a notice to withhold is that he or she may be entitled to a substantial amount of money from the employer. The clear policy of the law, as Harold Sr. learned the hard way, is to hold employers responsible for child support collection problems.

Thorough estate planning requires anticipation of contingencies

by David W. Badger

In our daily practices, we strive to use our experience and training to assist clients in identifying, considering and addressing problems they have not anticipated.

This is especially true in estate planning. We encourage clients to think about the unexpected when we are assisting them in the planning for wills and trusts. We know from experience that having a client spend a small amount of time and careful thought in the planning stage to address unexpected events can pay huge dividends.

One such unanticipated event (which unfortunately occurs with some regularity) is the death of a child. We urge clients to consider how they wish to dispose of their property if this occurs. For many individuals the answer is simple: The gift for the child should go to the children of the child. That disposition can be easily stated in a will or trust.

Our clients also need to consider that the beneficiary designations they have selected for life insurance, annuities and payable on death accounts might not provide for that alternative gift to the child of the deceased child. In those instances, the perceived efficiencies of the direct beneficiary designations can cause a significant distortion of the client's estate plan, and the client is not then available to be asked what disposition he or she truly desires.

Another area we regularly address is when the child is the parent in a blended family. In the absence of a special direction, the law generally does not treat stepchildren equally with children. Therefore, if a client has stepchildren whom the client wants to have treated equally with natural born children, that desire needs to be specifically addressed in the will or trust.

Finally, we also are able to address with our clients the management of a gift, which although originally intended for a child who is an adult, would pass to a minor if the child is not living. We can, in consultation with the client, provide for the appropriate management of that minor's gift until the minor reaches the age of majority.

Careful consideration by clients of the alternative disposition in the event an original will or trust beneficiary is not living is one of the hallmarks of careful and prudent estate planning. While the unexpected does not happen often, it occurs with enough regularity that thoughtful estate planning considers the alternatives.

New tax laws changes rules regarding home sales

by Emily R. Vivian

On July 30, 2008, President Bush signed the Housing Assistance Tax Act of 2008, which restricts tax-free home sale gains for those who benefit from the exclusion after they convert their principal residence to a vacation home or rental property.

Currently, if a taxpayer has owned and used property as his or her principal residence for at least two of the five years preceding the sale of the home, the taxpayer may exclude from income up to $250,000 of gain from the sale of the home. In most cases, the exclusion amount increases to $500,000 for married taxpayers who file jointly.

After the Act takes effect on Jan. 1, 2009, however, gain from the sale of a principal residence will not be excluded from income to the extent the property was not used as the taxpayer's principal residence. Taxpayers therefore will be required to calculate the amount of gain that is allocated to periods when the property was not used as their principal residence.

To calculate this gain, the total amount of gain is multiplied by the percentage of time the property was not used as the principal residence. However, nonqualified use does not include any portion of the five-year period that is *after* the last date the property is used as the principal residence.

In addition, nonqualified use does not include any period during which the taxpayer or spouse is serving on qualified official extended duty (not to exceed an aggregate period of ten years), and nonqualified use does not include any other period of temporary absence due to change of employment, health conditions or other unforeseen circumstances as may be specified by the IRS (not to exceed an aggregate period of two years).

Because the Act is intended to restrict gain exclusion when property is transferred from a nonqualifying use to a principal residence, the new restrictions do not restrict gain exclusion when property is transferred from a principal residence to a nonqualifying use.

Disability . . .

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other conditions not previously covered. Including bending and lifting within the coverage of the ADA also likely will be problematic for employers.

The definition of "major life activities" overturns the U.S. Supreme Court's 2002 definition of the term. The ADAAA also overturns the Court's 1999 decision that the determination as to whether an individual is disabled should be made when considering mitigating measures, such as hearing aides, prosthetics and medication. Now, with the exception of eyeglasses and contact lenses, mitigating measures cannot be considered when determining whether an employee is disabled.

These recent changes suggest employers should review job descriptions and disability policies and procedures to ensure they comply with the new law. Additionally, employers should review all denials of disability status and all rejected accommodations under the new standards so that any required changes can be made.

New mortgage foreclosure laws protect owners, tenants

by Douglas E. Lee

Illinois has responded to the dramatic increase in mortgage foreclosures by enacting two laws designed to protect homeowners and tenants.

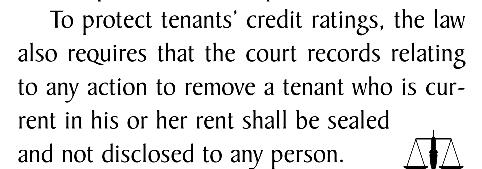
Public Act 95-0961, which took effect Sept. 23, 2008, requires mortgage lenders foreclosing on residential property to attach to the summons that is served with the foreclosure complaint a "Homeowner Notice" informing the owners of, among other things, their rights to live in the property until a judge orders otherwise, to bring the mortgage current within 90 days and to obtain a written payoff amount from the lender. The precise form of the Notice is set forth in the statute. The Notice must be in at least 12-point type and in English and Spanish. The Spanish translation is to be prepared by the Illinois Attorney General and to be available on the Attorney General's website.

Public Act 95-0961 also requires lenders to respond to all written requests for payoff information within ten business days and to provide in that response all information necessary to calculate the payoff for the next 30 days, all charges the lender anticipates incurring in the foreclosure in the following 30 days and specific contact information.

Public Act 95-0933, which took effect Aug. 26, 2008, provides that, unless a tenant's interest in residential real estate was terminated before a judicial sale, the purchaser of the property at the sale must allow the tenant to remain in the property for at least 120 days, provided the tenant is current in his or her rent.

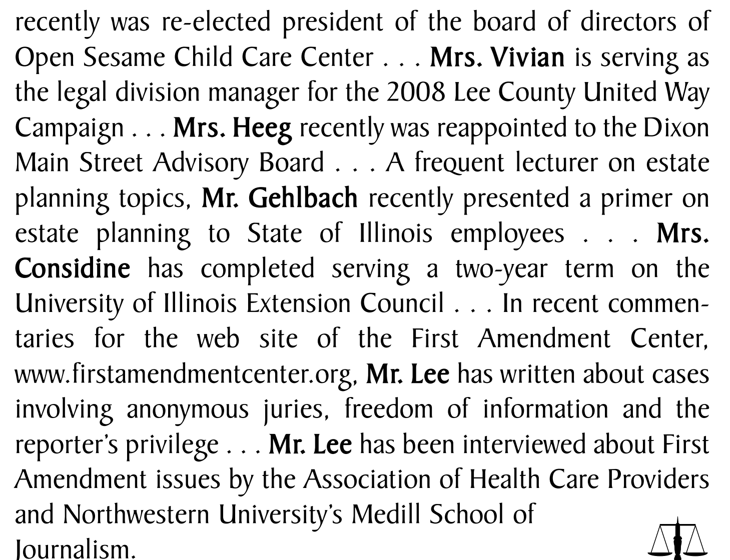
Under the new law, a purchaser of foreclosed property has up to 90 days after the sale is confirmed to file a petition to remove a tenant. If the tenant is current in his or her rent or has made good-faith efforts to make payments to the appropriate party to remain current, the tenant must be allowed to remain in the property for 120 days or until his or her lease expires, whichever period is shorter.

To protect tenants' credit ratings, the law also requires that the court records relating to any action to remove a tenant who is current in his or her rent shall be sealed and not disclosed to any person.



In Print and At the Podium

Mr. Gehlbach is chair of the Illinois State Bar Association's Real Estate Law Section Council, a position he previously held in 1994-95. He is also the current secretary of the *Illinois Bar Journal* Editorial Board and was recently appointed to the Legislation Committee of the ISBA. As an associate editor of the ISBA *Real Property* newsletter, he continues to publish articles of interest to real estate practitioners . . . **Mrs. Heeg** spoke at Heritage Square about the importance of health care advanced directives . . . **Mr. Lee** presented an employment law update at the North Central Illinois Works annual Employers Conference . . . **Mrs. Vivian** recently published articles about the tax law changes pursuant to the Housing Assistance Tax Act of 2008 and about new regulations concerning tax-deferred like-kind exchanges for the ISBA *Real Property* newsletter . . . **Mrs. Considine** is currently serving as a member of the board of directors of Dixon Habitat for Humanity, Inc. . . . **Mr. Lee** recently was re-elected president of the board of directors of Open Sesame Child Care Center . . . **Mrs. Vivian** is serving as the legal division manager for the 2008 Lee County United Way Campaign . . . **Mrs. Heeg** recently was reappointed to the Dixon Main Street Advisory Board . . . A frequent lecturer on estate planning topics, **Mr. Gehlbach** recently presented a primer on estate planning to State of Illinois employees . . . **Mrs. Considine** has completed serving a two-year term on the University of Illinois Extension Council . . . In recent commentaries for the web site of the First Amendment Center, www.firstamendmentcenter.org, **Mr. Lee** has written about cases involving anonymous juries, freedom of information and the reporter's privilege . . . **Mr. Lee** has been interviewed about First Amendment issues by the Association of Health Care Providers and Northwestern University's Medill School of Journalism.



Deals and Decisions

Mr. Lee recently argued on behalf of a client in the Seventh Circuit U.S. Court of Appeals . . . **Mr. Ehrmann** successfully suppressed evidence illegally obtained by local police . . . **Mrs. Considine** has completed several guardianships through a local service agency . . . **Mr. Lee** recently obtained two favorable verdicts in bench trials involving real estate matters, one resolving a property line dispute and one voiding a purported transfer of property rights . . . **Mrs. Heeg**, as counsel for the bankruptcy trustee, obtained a ruling that a debtor was unable to use the bankruptcy system to discharge any of his debts . . . **Mr. Lee** successfully represented a client seeking a permit from the Lee County Board to construct a fertilizer facility . . . **Mr. Lee** has represented a number of physicians in negotiating employment contracts with local and regional health care providers . . . **Mr. Lee** recently assisted clients in the buying and selling of local businesses.