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### *A POTPOURRI*

#### **EMPLOYEE IS OBLIGATED TO MITIGATE DAMAGES**

#### **IN THE EVENT EMPLOYER BREACHES CONTRACT**

In the event an employer breaches an employment contract, the terminated employee is obligated, unless excused by a provision in the employment contract, to mitigate damages by using reasonable and diligent efforts to secure other employment.

Whether an employee has fulfilled his obligation to mitigate turns on the reasonableness and diligence of the employee's efforts and the similarity of new employment. The duty to mitigate requires that an unemployed former employee read the placement advertisements, registered with employment agencies or online employment services, and pursued reasonable leads in the search for employment.

A former employee is required only to make reasonable efforts. He or she is not held to the highest standard of diligence and need not be successful in finding other employment in order to establish reasonable diligence.

To prove a former employee failed to mitigate damages, a former employer must show that the former employee failed to exercise reasonable diligence to mitigate his or her damages, and there was a reasonable likelihood that the former employee might have found comparable work by exercising reasonable diligence.

Former employers are relieved of an obligation to prove the availability of comparable employment when the evidence shows the former employee made no reasonable efforts to find new work. Comparable employment is that which affords virtually identical promotional opportunities, compensation, job responsibilities, working conditions and status as the previous position. The former employee is not necessarily required to accept lesser employment or relocate.

A portion of our practice includes the representation of both employers and employees in employment disputes, including breach of contract matters. Please call us if you have a question or need legal assistance in connection with any employment issue.

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## **ATTORNEY APPROVAL CLAUSE: MODIFICATION OR COUNTEROFFER?**

Residential real estate contracts frequently provide that the attorney for the seller or for the buyer may modify the contract in certain respects or disapprove the contract under certain circumstances. There is no “standard” attorney approval provision, so sellers, buyers, realtors, and attorneys must pay careful attention to particular provision in the given contract and to the timing, notice and other conditions established therein.

In a recent Illinois case, the contract permitted the parties’ attorneys to approve, disapprove, or make modifications to the contract “other than stated purchase price” within five days after the buyer’s acceptance. The provision stated that any notice of disapproval or modification could not be based solely on the purchase price set forth in the contract. After the contract was submitted to the seller, the buyer’s lawyer sent a letter to the seller’s lawyer requesting certain modifications to the contract. The seller’s lawyer responded that the proposed modifications were rejected and that the seller’s lawyer disapproved the contract, without setting forth the reason for the disapproval. The next day, the buyer’s lawyer sent a letter purporting to accept the seller’s rejection of the proposed modifications.

The seller took the position that his lawyer’s first letter to the buyer’s lawyer terminated the contract; once rejected, the buyer’s lawyer could not “reinstate” the contract by accepting the rejection of the proposed modifications sent by the seller’s lawyer. The buyer filed suit seeking specific performance of the contract. The trial court dismissed the buyer’s complaint, finding the buyer’s proposed modification constituted a counteroffer that was not accepted by the seller, and noting that the buyer’s proposed modifications did not concern the purchase price. The appellate court reversed the trial court. First, the appellate court held that the request for modifications was neither a rejection of the contract nor a counteroffer. Moreover, because the seller’s disapproval of the contract did not state the reason for the disapproval, there existed a question of fact as to whether the disapproval was for a reason other than the purchase price. Therefore, the appellate court remanded the case to the trial court for further proceedings.

In another recent case, the appellate court reversed a trial court’s damage award to the seller, which resulted from a dispute regarding the buyer’s declaration that the contract was terminated when the seller’s attorney failed to respond to a written notice from the buyer’s attorney. On appeal, the buyer argued that his attorney requested modifications to the contract within the time period agreed to by the parties and that the attorney had the right to declare the contract void when the seller’s attorney failed to respond within 10 business days. The appellate court agreed, holding that the 10 business day response period set forth in the contract applied, and the contract ended when the seller’s attorney failed to respond within that period.

These two cases demonstrate that communication is the key with respect to attorney approval provisions, inspection provisions, and the manner in which modifications, notifications, and disapprovals are given under such provisions. If the parties are unable to work out their differences through contract negotiations, the manner in which notices were given, the particular language used, and the timeliness of the notices can be critical and may result in the loss of significant earnest money deposits or liability for failure to complete the contract. Please do not hesitate to telephone us if you have any questions regarding attorney approval or inspection provisions.

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## **INCORPORATED PROFESSIONALS MUST CAUTIOUSLY PLAN THEIR ESTATES**

Unincorporated professionals, like all other citizens, should be sure their estate plans are in order and up to date. Furthermore, if lawyers, doctors, dentists and certain other professionals choose to incorporate, they must do so pursuant to the Professional Service Corporation Act (“PSCA”) or Medical Corporation Act. Accountants, architects, professional engineers and certain other professionals may be incorporated under the PSCA or the Business Corporation Act of 1983 (“BCA”). Such incorporated professionals must be especially careful in preparing their estate plans.

The PSCA provides that all shareholders, directors, officers, agents (except the registered agent), and employees (except ancillary personnel, corporate secretary, and incorporator) must be licensed in the State of Illinois to render the same professional service or related professional services for which the corporation is formed. Accordingly, no person who is not licensed in that category of professional service or related professional services may have any part in the ownership, management, or control of the corporation. Non-licensed individuals may, however, serve as shareholders, directors, officers, employees, and agents for purposes of dissolution.

The heirs of a deceased professional licensed under the PSCA are often required to open a probate estate in order to sell the assets of the practice. Typical estate planning techniques such as trusts cannot be used to avoid probate because of the prohibition against non-licensed individuals owning stock in a professional corporation.

There is a way, however, to avoid probate. The Uniform Transfer on Death Security Registration Act (“TOD”) allows a practitioner to register securities in a “beneficiary form,” which indicates the present owner of the security and the intention of the owner regarding the person who will become the owner of the security upon the owner’s death. The securities are automatically transferred to the named beneficiary upon the owner’s death. Because a TOD beneficiary has no ownership interest, the requirements of the PSCA are satisfied during the life of the owner. While the unlicensed successor could not continue the professional practice unless he or she possessed the same professional license, the unlicensed successor would be able to sell the assets of the practice without probate. Registration is accomplished by designating a “pay on death” or “POD” beneficiary. The owner may cancel or change the beneficiary designation at any time.

A professional corporation must provide for the purchase or redemption of the shares of any shareholder upon his or her death or disqualification in its articles of incorporation, bylaws, or by separate agreement. If the shareholders fail to determine a price for the purchase or redemption, the PSCA provides for a default purchase price equal to the book value as of the end of the month immediately preceding the death or disqualification of the shareholder in accordance with the accounting methods used by the corporation. Book value is rarely a good measure of share value, as it may not reflect goodwill or the true fair market value of the hard assets. For cash basis taxpayers, for example, book value would not reflect the accounts receivable of the corporation. Accordingly, to avoid unfairness it is important in a professional corporation to have a buy-sell agreement in place with an agreed-on method for calculating share value.

Please do not hesitate to contact us if you are a professional and have any questions about your ownership interest in your professional corporation and its treatment in your estate plan.

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## **DON'T SWEAT THE SMALL STUFF?**

### **INATTENTION TO LEGAL DOCUMENTS MAY HURT YOU**

Clients don't like to get bogged down with "legal details" and often gloss over "boilerplate" in contracts or other legal documents. If they are lucky, they incur no harm; unfortunately, inattention to detail in legal matters may have significant adverse results. This is illustrated by the recent case of *Roths v. Daimlerchrysler Corp.*

*Roths* involved a spousal claim to retirement benefits. Charles Roth retired from Chrysler on December 31, 1971. Before retiring, he elected the surviving spouse retirement benefits option under Chrysler-UAW Pension Plan ("Plan"), while then married to Freeda Roth. Freeda died in 1979, and the surviving spouse election was cancelled by the pension board. Charles married Colleen Roth in 1980. He began receiving an unreduced pension in 1980, and continued receiving it until his death in 2005.

The Plan provided that "[n]o election provided hereunder shall become effective under any circumstances for any retired employee whose completed election form is received by the Board of Administration after the first day of the month in which the retired employee has been married one year." Roth did not elect the surviving spouse option within the period prescribed in the Plan.

Roth submitted a complete election form on or about June 15, 1993, which was denied by the Pension Board as untimely. In February 1996, Roth wrote a letter to the Pension Board asserting that he had "found" a surviving spouse election form signed and dated April 18, 1980, which was the date that he married Colleen Roth. He stated that he signed the election form on April 18, 1980, had just recently found it within his personal effects, realized that he had not sent it in as required, although he believed he had already sent it in, and did not know that a failure to timely file would bar post-death continuation of benefits for his current spouse.

After Charles' death in April 2005, Colleen applied for surviving spouse benefits. Her application was denied. She filed suit in state court, claiming breach of contract. The proceedings were removed to a federal court by Daimlerchrysler because employee benefits claims are governed by federal statute, i.e., the Employee Retirement Income Security Act of 1974 ("ERISA"). The court concluded that it could review a state claim based on the same set of circumstances as an ERISA claim.

The court then reviewed the applicable statutes of limitations. It concluded that a six year limitations period applied to contract claims under Michigan law. This same period was applied to Colleen's ERISA claims. As a result, her claims failed. The court concluded that the Roths failed to comply with Plan requirements, they each had full knowledge of such failure, and they failed to take legal action within applicable statutes of limitations periods.

This case highlights the potential ramifications of a failure to pay attention to the details of legal documents. Roth was retired. He was married. He should have periodically met with his attorney and accountant to review his retirement and legacy plan prior to and after his retirement. Had he done so, he probably would have been alerted by one of his advisors of his omission.

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**EMPLOYER'S E-MAIL POLICY DESTROYS ATTORNEY-CLIENT PRIVILEGE**

Dr. Norman Scott (“Dr. Scott”) entered into an employment agreement to be the chairman of the Orthopedic Department (the “Department”) of Beth Israel Medical Center, Inc. (the “Hospital”). The agreement provided a minimum annual salary of \$1.75 million various severance benefits if the Hospital terminated Dr. Scott’s agreement without cause.

In early 2004, the Hospital advised Dr. Scott that it would be closing the division in which the Department was located and that his employment would be terminated. A month later, Dr. Scott participated in a public protest of such closure. Thereafter, the Hospital terminated Dr. Scott for cause on the grounds that his participation in the public protest and his alleged attempts to induce several of the Department’s physicians to leave the Hospital constituted breaches of his agreement and of his duty of loyalty to the Hospital. Dr. Scott filed suit for breach of contract alleging he was entitled to \$14,000,000 in severance benefits because he believed he was terminated without cause because of the closing.

As the parties were litigating Dr. Scott’s claims, Dr. Scott’s attorney forwarded correspondence to the Hospital’s attorney stating that the Hospital was in possession of e-mail correspondence between Dr. Scott and his counsel which Dr. Scott sent from his computer at the hospital regarding the pending litigation and that such e-mails were subject to the attorney-client privilege. The Hospital responded it believed that any potential privilege attached to the communications had been waived by Dr. Scott as a result of his use of the Hospital’s e-mail system.

The Hospital’s e-mail policy, which was contained in the Hospital’s Human Resource Policy and Procedures Manual, provided that all of the Hospital’s computer systems were property of the Hospital and should be used for business purposes only. Moreover, all information and documents created, received, saved or sent on the Hospital’s computer or communications systems were the property of the Hospital. Finally, the policy provided notice that “(e)mloyees have no personal privacy right in any material created, received, saved or sent using [the Hospital’s] communication or computer systems” and that the Hospital “reserves the right to access and disclose such material at any time without prior notice.”

In determining whether Dr. Scott’s communications were subject to attorney-client privilege, the Court noted the attorney-client privilege is inapplicable if: (1) the employer maintains a policy banning personal or other objectionable use of its computer system, (2) the employer monitors the use of the employee’s computer or e-mail use, (3) third parties have a right of access to the computer or e-mails, and (4) the employer notifies the employee, or the employee was aware, of the use and monitoring policies. Thus, based upon the Hospital’s policy and Dr. Scott’s knowledge of the same, the Court found Dr. Scott’s e-mail communications with his counsel through the Hospital’s computer system were not subject to the attorney-client privilege.

Dr. Scott’s case provides a warning to employers and employees alike. Employers should be sure that they adopt a computer policy which allows them access to employee e-mail and communications so that the employer may monitor the same. Conversely, employees should not conduct their personal business on their employers’ computer systems.

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## WHAT IS THE PROPER WAY TO AMEND OR REVOKE A LIVING TRUST?

*“By signed instruments delivered to the Trustee, during my life, I may revoke this agreement in whole or in part from time to time in any respect.”*

This seemingly simple statement, included in a living trust agreement, caused a significant amount of litigation over the attempt by Clarice Dauberman (“Clarice”) to change the distribution of her trust assets.

Clarice had two children, Carol and Andrew. Andrew died in 1990, leaving one son, Scott. After Andrew’s death, Clarice signed a will in which she directed that after her death 75% of her assets would be distributed to Carol and 25% to Scott. In 1997, she signed a living trust which provided that 100% of her assets would be distributed to Carol. Thereafter, Clarice wrote a letter to Carol that read something like this: “Dear Carol, I love you very much and don’t want to upset you, but I want Scott to have his father’s share. Love, Mom.” After writing the letter, Clarice placed it in a sealed envelope and gave it to her housekeeper, with instructions that she should deliver it to Carol after her own death.

After Clarice’s death, Carol received the letter and, according to Mary, shared its contents with Mary, as well as her plan to distribute the assets 50% to herself and 50% to Scott, seemingly in accordance with her mother’s living trust. Carol then discovered Clarice’s 1990 will wherein she would have received 75% of the estate rather than 50%. Carol then stated she would only distribute 25% of the assets to Scott. Scott filed a declaratory action claiming that Clarice’s handwritten letter constituted an amendment to the trust by which Scott would receive 50% of the assets of the trust.

The issue was whether Clarice’s handwritten note constituted an amendment to the trust in view of the trust provision quoted at the beginning of this article. The court said three requirements must be met in order for the handwritten note to be a valid amendment of Clarice’s trust: (1) there must be a signed instrument; (2) it must be delivered to the trustee; and (3) such deliver must have occurred during her lifetime.

The court in this case held the note – signed “Mom” – was a signed instrument; since Clarice was the trustee and authored the note, and she effectively delivered to herself as trustee; and these actions all took place while Clarice was alive.

While Clarice’s intent that Scott receive 50% of her assets seemingly prevailed, it came at quite a cost to Scott and Mary who were forced to litigate the issue. Trust amendments can be accomplished simply and quickly, and usually at a relatively nominal cost, by communication with an attorney, and then following the prescribed procedures. If you have any questions regarding an amendment of a trust agreement or any part of your estate plan, please do not hesitate to telephone us.

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## **ANNUAL MEETING SEASON BEGINS**

It's that time of year again – time to begin preparations for annual meetings of shareholders and directors. Public companies are now in the throes of preparing and distributing proxy statements and related materials, but closely held companies should begin to prepare for meetings, too.

The Illinois Business Corporation Act of 1983 (“Act”) establishes the general requirements for calling and conducting annual meetings; however, it provides substantial flexibility to companies by permitting them to establish their own rules and procedures consistent with the law. Meetings may be held at a company's registered office or any other location within or outside the state, as determined by the company. The time and date for meetings is left up to the company and generally is set by its by-laws or by resolution of the board of directors. Failure to hold an annual meeting will not result in a dissolution of a company's charter or affect the validity of any corporate action, but a consistent failure to conduct meetings may have serious ramifications, especially if a company fails to maintain other structural and financial formalities. In such cases, the protection provided by the corporate shell may be lost and officers, directors and shareholders may be subject to personal liability for actions or omissions between one another and involving third parties.

According to the Act, if an annual meeting is not held within the earlier of six months following the end of a company's fiscal year, or fifteen months after its last annual meeting, and a notice of meeting is not provided by the company within sixty days following a written request by a shareholder, any shareholder entitled to vote at a meeting may apply to the circuit court for an order to fix a time and place for a meeting. Additional court orders may issue if necessary to set up a proper meeting.

Any shareholder may participate in and initiate actions at a meeting. This may be done in person or by telephone, the internet or any other electronic means that enables all attendees to communicate with one another. Since January 1, 2006, a company may be required to permit a shareholder with voting rights to physically attend the meeting if space is available. Of course, the shareholder must comply with any procedural and other requirements established by the company to conduct an orderly meeting and may be subject to ejection for failure to do so. A company may also modify the Act's provisions relating to required attendance through corporate rules and by-laws.

If you need any assistance in preparing and distributing materials relating to your annual shareholder and directors meetings, please contact us. Annual meetings provide a convenient opportunity to review actions taken during the preceding year, as well as those contemplated for the ensuing year, to ensure appropriate documentation is established to evidence authority and a record of actions approved and implemented by the company and its management.

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## THE ILLINOIS EMPLOYEE CLASSIFICATION ACT

Construction contractors who regularly engage independent contractors to perform some or all of their contracts with customers should review their independent contractor agreements to ensure they comply with the Illinois Employee Classification Act (“Act”), which became effective January 1, 2008. The Act applies to all private and public construction performed within the State of Illinois, including moving construction-related materials to or from a job site. The term “construction” includes the alteration, improvement, renovation, repair, maintenance or addition to any building, structure, highway, road, bridge, parking facility or real property.

The Act presumes all individuals working for a contractor are employees unless: (1) the individual is free from the contractor’s control or direction over the performance of the services provided, (2) the services performed are outside the usual course of services performed by the contractor, and (3) the individual is engaged in an independently established trade, occupation, profession or business. Subcontractors, as defined in the Act, are also exempt from compliance.

The Act includes fines of up to \$1,500 per day for each violation found in an audit by the Illinois Department of Labor, which enforces the Act. Fines can be increased to \$2,500 for repeat violations in a five year period. A willful violation of the Act can result in the doubling of fines, punitive damages and criminal prosecution. Finally, a private cause of action may be filed by an individual damaged by a violation of the Act and such a party may recover compensatory damages and up to \$500 for each violation of the Act, and in the case of unlawful retaliation, all legal and equitable relief and attorney’s fees and costs.

If you have any questions about the application of the Act, or if you need assistance auditing independent contractor agreements, please telephone a member of the Firm.

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From *The Lawyer Joke Book*:

Mr. Milkums was briefing his witness, Ms. Harrison, before calling her to testify.

“You must swear to tell the absolute truth,” the lawyer instructed. “Do you understand?”

“Yes, I’m to swear to tell the truth.”

“Have you any idea what will happen if you don’t tell the truth?”

Harrison looked up.

“I expect our side will win.”

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