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LEGAL UPDATES FOR BUSINESSES

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With the COVID pandemic continuing to result in new and growing financial and tax questions and problems; producing so many changes in the rules and regulations related to the business and tax environment, creating supply chain and technology problems, and presenting so many remote work and related employee issues, every business today faces challenges never before seen. We at Schenck Price are dedicated to assisting our clients and friends in developing the legal and business strategies and frameworks that form the foundations for successful and long-term success. In this edition of our business newsletter, we hope to provide you with information on just a few of the current and future issues we all face. Please don't hesitate to reach out whenever we can be of assistance.

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Employment

Key Considerations for Employers in Reopening the Workplace

By Cynthia L. Flanagan, Esq.

The COVID-19 pandemic continues to be fluid, requiring employers to navigate new rules and regulations that are highly dependent on sector and jurisdiction. As more and more employers are comfortable in calling their workforce back to the office, it is important that employers be mindful of critical considerations in developing their return-to-work policies.

1. Establishing and Identifying the Workplace: Employers with employees in multiple jurisdictions need to identify and understand the specific rules and regulations applicable to each location. States and municipalities may have different regulations governing the workplace based on where the employee is physically located. Of particular importance is understanding the paid and unpaid leave laws in effect for the workplace location and whether remote workers are covered by local or state leave protections that differ from the employer's office location.

2. Scheduling and Hybrid Workplaces: In developing a hybrid workplace program, focus should be on clearly delineating the expectations and rules for remote workers.

Personnel considerations include establishing clear workhours of remote workers, how remote workers will be managed and developed, the metrics for reviewing and managing remote work performance, training capabilities in the onboarding process, and any accommodation for disabled workers. Equally as critical is establishing technological procedures and requirements for safeguarding employer's information in the remote workplace.

3. Complying with Workplace Safety Requirements: Employers should identify and comply with the cleaning and disinfecting guidance applicable to their workplace. Review the federal guidance from the Centers for Disease Control (CDC) and Occupational Safety and Health Administration (OSHA) and the state and public health agency guidelines applicable to the location of the particular office location. Not only should employers establish protocols and have written policies that comply with the cleaning and disinfecting guidance, but employers should have a designated safety individual or team who has management responsibilities for implementing and overseeing compliance.

4. Government Vaccination Mandates: The federal government has announced that all workers at most health care settings, all federal executive branch employees, and all federal contractors will be required to be fully vaccinated against COVID-19 and that all workers at businesses with 100 or more employees will be required to be fully vaccinated or subject to weekly COVID-19 testing. New Jersey has announced that all workers in preschool to Grade 12 schools, all workers in certain health care facilities and high-risk congregate settings, all workers at state agencies, authorities, and colleges and universities and all childcare workers will be required to be fully vaccinated against COVID-19 or be subject to COVID-19 testing at minimum one to two times per week. Employers not subject to either the federal or state mandates will need to decide whether to require its workforce to be vaccinated and whether to offer an alternative testing option. Subject to certain restrictions, the Equal Employment Opportunity Commission has approved employer-mandated vaccine requirements.

5. Distinguishing between the Vaccinated and Unvaccinated: Employers may distinguish between vaccinated and unvaccinated employees and should consider this information when designing and implementing workplace safety measures. Policies concerning social distancing in the office should consider whether to have unvaccinated employees wear a mask. Employers should review the requirements of client or business partners and whether unvaccinated employees' job duties are impacted. Temporary reassignment of duties or modifications may be necessary if an unvaccinated employee is not permitted to attend off-site client meetings.

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Tax

Build Back Better Act and Related Tax Changes

By Douglas R. Eisenberg, Esq.

As former President Barack Obama once said, "elections have consequences." This truism is still as valid today as it was then. As it relates to proposed tax legislation as detailed below, taxes will be increased so that additional revenue is created to help pay for the myriad of new spending on "infrastructure" and the like. As of this writing, nothing is certain as the two wings of the Democratic party struggle to come to an agreement.

The following summary is presented as the ideas that have been discussed as a framework for legislation. We shall see what actually transpires.

	CURRENT LAW IN 2021	PROPOSAL
Ordinary Income Tax Rates		
Tax Rates	Top Rate 37%	Increases to 39.6% for individuals and married couples with taxable income which exceeds $400,000 and $450,000, respectively. Additional tax of 3% on income exceeding $5,000,000.
Qualified Business Income Deduction	20% deduction for "Qualified Business Income."	For single taxpayers with $400,000 of income and $500,000 for married couples the deduction would be further limited.
Rates on Capital Gains / Dividends	Top return of 20% plus 3.8% net for investment income 1-year holding period. (Long Term Capital Gains)	Increases to 28.8% (with net investment income) for individuals with taxable income in excess of $400,000 and married couples over $450,000.
Surtax on Net Investment Income	3.8% above $200,000 AGI (single); $250,000 (married); Trusts with income over $12,400.	Modification to also count income derived in ordinary course of trade or business.
Estate/Gift Exemption	Current flat top tax rate of 40% with $11.7 million lifetime exemption, per person.	a) Lifetime exemption reduced to $5 million. b) Also makes change to Grantor Trust transfers and sales. c) Changes to valuation discounts for passive assets.
Corporate Tax Rate	Top rate of 21%	Graduated rate of 18% on first $400,000; 21% on income from $400,000 to $5,000,000; 26.5% on income in excess of $5,000,000 and in excess of $10,000,000 flat rate of 26.5%.
Pass-Through Rates	Top rate of 37%	See above (Tax Rates)
Other Changes	a) Modification of Foreign Derived Intangible Income (FDII) and Global Intangible Low Taxed Income (GILTI); b) Modifications to Retirement Plans and Required Minimum Distribution (RMD).	

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Mergers & Acquisitions

Understanding the Place of the Earnout in Mergers and Acquisitions

By Jason J. Waldstein, Esq.

Congratulations, you are a business owner who has built a successful business, and your business has caught the eye of a suitor. The suitor approaches you with an offer to buy your business, and the offer includes an upfront cash payment, plus future cash payments that the suitor calls an "earnout".

Conversely, you are a business owner who is looking to expand its business with an acquisition, and you have identified the ideal target to acquire. You ask the target to present you with an offer to buy its business, and when it does so, the offer includes an upfront cash payment, plus future cash payments that the target calls an "earnout".

You ask yourself, what is an "earnout"?

An "earnout" is a contractual mechanism in a merger or acquisition agreement, which provides for contingent additional payments from a buyer of a business to the

seller thereof. Earnouts are typically "earned" if the business acquired meets certain financial or other milestones after the acquisition is closed.

Sounds simple, right? Unfortunately, earnout provisions are not simple and instead tend to be amongst the most hotly contested provisions in the course of the negotiation of a merger or acquisition agreement.

There is not a typical or boilerplate earnout provision, but there are some basic considerations that factor into negotiating the earnout provision.

First, the milestones which, if reached, trigger payment of an earnout, need to be clearly set out in the agreement. Often, these are financial milestones, such as reaching a certain EBITDA, gross revenue or gross profit level during a prescribed period of time, but they can also be non-financial, such as procuring a certain number of customers or a regulatory approval within a predetermined time period.

Next, the parties need to specify how the milestones are measured. This includes determining whether there is a single earnout or multiple, staged earnout payments over time.

Then, and this is usually the consideration that is the most contentious, the control over the earnout business needs to be agreed upon. Sellers and buyers will likely have vastly different perspectives when it comes to this consideration. The buyer will often want maximum flexibility with respect to how it can operate the acquired business post-closing, especially as circumstances and the business environment changes. The seller, on the other hand, will often want to maximize its control over decision-making that can impact the earnout. The seller also usually asks the buyer for commitments to fund the earnout business properly or consistent with past practice, and even to take steps intended to maximize the ability to achieve the earnout benchmarks.

When it comes to this consideration, the buyer will ask the seller to agree to various obligations and covenants of the buyer to protect the possibility that the earnout will be paid and maximized. The seller will, at the very least, ask for an obligation of the buyer to operate the acquired business in good faith and to deal with it fairly. The seller will often ask for a requirement that the buyer not take affirmative actions (or omit to take action) for the purpose of preventing or reducing the earnout payments. The seller will often ask for an obligation of the buyer to use commercially reasonable efforts to operate the acquired business in a manner that will maximize the earnout payment. The seller may ask for an agreement that the buyer will provide ongoing financial and other support to the acquired business. To these asks, the buyer will likely resist and ask that its obligation be subject to only using "commercially reasonable efforts."

An "earnout" is not used in every merger or acquisition, but when it is used, it is usually an important component, one in which the devil is truly in the details.

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Health Law

Biden Administration Issues Federal COVID-19 Vaccination Mandates for Federal Employees, Certain Private Employers and Healthcare Employers

By Brian M. Foley, Esq.

On September 9th, President Biden announced his "Path Out of the Pandemic: COVID-19 Action Plan" (the "Plan"). As part of the Plan, the President signed Executive Order 14042, that requires all federal executive branch employees and all employees of federal contractors to be fully vaccinated against COVID-19. The Plan also calls for mandatory vaccination for all employees of private sector employers with 100 or more employees, and for all healthcare workers in settings that receive Medicare or Medicaid reimbursement.

Federal Employees

The Executive Order requires all federal executive branch employees to be fully vaccinated unless the employee is entitled to a legal exemption. There is no option for federal employees to obtain regular testing in lieu of being fully vaccinated. Federal employees must be fully vaccinated by November 22nd.

Federal Contractor

The Executive Order also mandates that all employees of contractors that do business with the federal government must be fully vaccinated. Again, there is no option for federal contractor employees to obtain regular testing in lieu of being fully vaccinated. The requirements apply to all federal contractors' or subcontractors' ("Covered Contractors") employees in covered workplaces, even if such employees are not working on a federal government contract.

The Executive Order also directed the Safer Federal Workforce Task Force (the "Task Force") to issue guidance on COVID-19 workplace safety protocols for Covered Contractors. On September 24th, the Task Force issued its guidance, which included provisions requiring Covered Contractors to ensure that all employees are fully vaccinated for COVID-19, unless the employee is legally entitled to an accommodation, because of a disability (which includes medical conditions) or because of a sincerely held religious belief, practice, or observance. The Covered Contractor must also ensure that all employees comply with masking and physical distancing requirements for individuals who are not fully vaccinated in covered workplaces prior to being fully vaccinated.

The Covered Contractor is required to review its employees' documentation to prove vaccination status. The employees must provide the Covered Contractor employer with one of the following documents: a copy of the record from a healthcare provider or pharmacy, a copy of the COVID-19 Vaccination Record Card (CDC Form MLS-319813), a copy of medical records documenting the vaccination, a copy of immunization records from a public health or state immunization information system, or a copy of other official documentation verifying the name of the vaccine, dates of administration, and the name of the healthcare professional or clinic site that administered the vaccine. Digital copies of such records are acceptable. The Covered Contractor must also designate a person or persons to coordinate COVID-19 workplace safety efforts at the Covered Contractor workplace. Covered Contractor employees must be fully vaccinated by December 8th.

Private Sector Employers

The Plan also calls for all private sector employers with one hundred (100) or more employees to ensure that their employees are fully vaccinated or produce a negative test result on a weekly basis, before going to work.

Private sector employers with 100 or more employees will be required to allow their employees paid time off to obtain the vaccines and paid time off to recover from any adverse side effects of receiving the vaccines. Employees that do not comply with the vaccine mandate or the paid time off requirements may be fined up to fourteen thousand dollars ($14,000) per violation.

The Department of Labor, Occupational Safety and Health Administration ("OSHA") is developing an Emergency Temporary Standard ("ETS") to implement this requirement. The ETS is not available yet but is expected any day. It is estimated that the ETS will impact over 80 million employees.

Healthcare Workers

As part of the Plan, the Centers for Medicare and Medicaid Services ("CMS") is taking action to require COVID-19 vaccinations for workers in most healthcare settings that receive Medicare or Medicaid reimbursement. These settings include hospitals, dialysis facilities, ambulatory surgery centers and home health agencies. This is in addition to the vaccine requirements for nursing facilities recently announced by CMS. The requirements will apply to hospital and nursing home staffs, clinic staffs, individuals providing services under arrangements, volunteers and staff who are not involved in direct patient, resident, or client care. The CMS regulations are expected to be published shortly.

The foregoing is a summary of recent federal developments related to mandatory vaccinations for COVID-19. There are also state requirements which may be different and must also be considered. We also expect litigation challenges over the mandates, as they are presented. As noted, the ETS for private sector employees and the new requirements for healthcare workers will be issued any day, and both are expected before the end of the year. Schenck Price will continue to monitor such developments and provide additional guidance as it becomes available.

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Insurance

Business Interruption Insurance: Response to COVID-19 Pandemic

By Jason A. Rubin, Esq.

Business interruption insurance has always been a valuable tool to protect against a loss of income when a business is prevented from using and occupying its leased or owned premises following a casualty or physical loss. In the case of leasing, prudent landlords include a requirement in the lease for their tenant to carry business interruption insurance in an amount sufficient to cover a year (or more) of rental payments to guard against the tenant being unable to maintain rent payments due to an inability to operate its business. In situations where it is not an express requirement of the lease a tenant would be wise to maintain business interruption coverage to prevent a default for nonpayment of rent during a period following a casualty or other loss.

Over the past year and a half when businesses were unable to continue operations as a result of government directives or orders, or other factors, relating to the COVID-19 pandemic, many businesses and by extension their landlords have learned that this vital coverage for COVID-19 related losses did not apply to such losses. The prevailing basis for the denials of coverage has been that either the claimants' policy contained a "virus or pandemic exclusion" or that the COVID-19 pandemic did not result in a physical loss covered by the standard business interruption policy. In some cases, this has been financially devastating for businesses that were relying on their business interruption policy to help them sustain the losses incurred during the pandemic.

The New Jersey legislature acted in an effort to provide clarity and prevent the difficult situation caused by those that were relying on such coverage to only receive a denial of a claim. On May 20, 2021, New Jersey passed a law requiring insurance companies carrying policies insuring against loss or damage to property to provide their customers with a one-page summary prepared by the New Jersey Department of Banking and Insurance (DOBI) providing guidance regarding the coverages offered by typical commercial insurance policies, including business interruption policies. A link to the summary is found below at the end of this article. Insurance companies are required to provide this summary to their customers by November 13, 2021. The intent is to provide businesses with clear information on what types of losses are covered by their policies and perhaps more importantly, common examples of what losses are not (such as business losses due to a pandemic). At a minimum, this provides businesses with a realistic view on the scope of their coverages so they can be in a position to better plan for losses caused by uninsured perils such as a virus or pandemic.

In recognition that this law perhaps does not do enough, another bill was introduced in response to the COVID-19 pandemic and was approved by the Assembly Financial Institutions and Insurance Committee in June 2021. This law would allow business interruption insurers in the state to add a rider for virus and pandemic coverage. Insurers already have the ability to file policy forms with the DOBI for approval of additional coverages, but the purpose of the bill is to expedite the approval process to allow for this crucial coverage to be available in the marketplace as soon as possible.

Every business should perform an annual review of its insurance coverages with its agent or broker to confirm that its polices are sufficient to insure against loss both ordinary and catastrophic. In light of the widespread loss caused by the COVID-19 pandemic, the importance of including a review of the scope and nature of both the business interruption insurance a business currently has in place, as well as the additional coverages that might otherwise be available, has never been more important, particularly as the marketplace evolves over the next 24 months.

Link to summary prepared by the New Jersey Department of Banking and Insurance can be accessed here.

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Redevelopment

Proposed Legislation Could Threaten Future of Redevelopment Projects in New Jersey

By James E. Polles, Esq.

If enacted into law, A1571/1576 (the "Legislation") could threaten developers and real estate investors with increased project costs for redevelopment projects in New Jersey. Specifically, amongst other proposed changes in the way development projects will be financed, impactful redevelopment projects subject to a Financial Agreement – those agreements between a municipality and a redeveloper allowing for the payment of a lesser amount of taxes on improvements, for up to thirty years from project completion – would require the prevailing wage rate to be paid to the workforce used on all such projects. The Legislation could have a profound effect on the redevelopment of blighted properties in municipalities, that would not otherwise be redeveloped by private capital without some level of financial incentive.

Importantly, the Local Redevelopment and Housing Law, N.J.S.A. 40A:12A-1 et seq. (the "LRHL") provides a mechanism for redevelopment entities, such as municipalities, to determine if properties meet criteria to be designated as "areas in need of redevelopment," which, amongst other powers, triggers a redevelopment entity's ability to enter into financial agreements with redevelopers to redevelop properties. The premise is that these "areas in need of redevelopment" would not otherwise be redeveloped with private capital, without a financial incentive to do so.

The Long Term Tax Exemption Law, N.J.S.A. 40A:20-1 et seq. (the "LTTE Law"), works in tandem with the LRHL, and is the mechanism by which redevelopers that undertake significant improvements to an "area in need of redevelopment" engage in negotiations with municipalities to make a payment in lieu of taxes ("PILOT"): typically, an annual service charge in the form of a percent of the annual gross revenues of the redevelopment project. The PILOT would be considerably less than, and in lieu of, full taxes assessed on a project's improvements, with payments to begin upon the issuance of a certificate of occupancy or completion issued to a project and continuing for up to thirty years. The incentive and benefits are clear for both parties – municipalities encourage private equity to (re)develop property that would not otherwise be developed by private capital, and developers can account for a key, fluctuating cost in a *pro forma agreement*, i.e., municipal taxes.

The Legislation would significantly impact redevelopment projects, in that every contract in excess of the prevailing wage contract threshold amount, for which a public body (i.e., municipality) has also authorized a tax abatement for the property or premises (other than certain, non-profit organizations), must contain a provision that in the event it is found that any worker employed by the contractor or any subcontractor has been paid a rate of wages less than the prevailing wage contract threshold amount, then the public body may terminate the contractor's or subcontractor's right to proceed with the work.

The practical effect of the Legislation is that certain redevelopment efforts by municipalities could be stymied, or altogether thwarted, due to the significant added cost of paying prevailing wage for labor on projects that are likely, already significantly hindered from a cost standpoint due to, amongst other reasons, significant environmental remediation costs. In addition, redevelopment projects focused on providing 100% of affordable residential housing on-site will likely need to find even more creative ways to have projects financed. Finally, significant infrastructure improvements could be impacted with ever-increasing costs, not only to installation and/or replacement of aged infrastructure, but due to the requirement to pay prevailing wage to workers. Developers and investors should be ever vigilant in tracking the Legislation, while trying to sharpen their pencils to build contingencies in project budgets, wherever possible.

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