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LEGAL UPDATES FOR BUSINESSES

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Welcome to the February 2019 issue of the Schenck, Price *Legal Updates for Businesses*. In this edition our articles focus on several current issues of importance to business owners and executives. These articles are representative of our continuous desire and effort to help our business and nonprofit clients each day. We hope you will enjoy and find this edition of interest and helpful. The authors and our other Schenck, Price colleagues are very knowledgeable and look forward to assisting you with the management and growth of your organizations. Please reach out for any of us at any time for guidance with your legal needs.

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Forward Thinking: Gov. Murphy's Plan to Make New Jersey the State of Innovation

By Michael J. Marotte, Esq. & Raajen V. Bhaskar, Esq.

In October of 2018, New Jersey Governor Phil Murphy unveiled a 55-page economic development plan which, as its title suggests, is intended to make New Jersey the "State of Innovation". The Governor outlined five goals and expects that, by 2025, his economic development plan will: (1) add/create 300,000 new jobs; (2) increase median wage growth by 4% or $1,500 on average; (3) increase venture capital investment to $645 million; (4) add 40,000 more women and minority workers in STEM related jobs; and (5) increase women and minorities average annual wage by at least $15,000. The Murphy Administration has announced four umbrella initiatives to accomplish these goals, and this article provides a brief overview of these proposed initiatives.

I. The NJ Accelerate initiative has two general components: (1) streamlining the regulatory process to support the economy of the future, and (2) increasing access to resources needed for businesses to grow. For example, the Murphy administration intends to support transparent environmental, health, and labor standards while also removing regulatory bottlenecks. Murphy plans to support the State's small business community by creating a dedicated small business unit within the New Jersey Economic Development Authority (NJEDA) as well as new small business lending programs that will provide small businesses with greater access to capital. To improve access to business services across the State, the administration will create a comprehensive digital portal linked to an interactive digital permitting platform and create an interagency team to ensure incentive-receiving businesses are supported in a well-coordinated manner.

II. Under the NJ Innovate initiative, the Murphy Administration hopes to create a reliable source of public and private funds for New Jersey based startup companies in certain staple and still developing industries in the hope that an infusion of capital leads to consistent job growth in those industry sectors. The Murphy Administration has proposed creating the NJ Innovation Evergreen Fund (NJIEF), which will partner with and incentivize private venture capital firms to raise and invest funds into NJ-based startups. NJ Innovate will also attempt to redesign soon-to-expire State incentive programs to encourage redevelopment projects in targeted "Opportunity Zones."

Another component of the NJ Innovate initiative focuses on developing New Jersey's clean energy industry to play a larger role in the State's economy and position the State to be at the center of the American offshore wind industry. In addition, Murphy's plan contemplates creating a series of transit-connected innovation centers that provide affordable commercial space for entrepreneurs.

III. The NJ Talent initiative looks to foster a workforce that meets the needs of New Jersey's established staple industries as well as those it intends to grow. This initiative encompasses a collection of programs and policies designed to help residents prepare for and find work that supports and sustains families, as well as attract, retain, and develop the state's current and future workforce. This statewide professional development initiative proposes to ensure that every public high school provides a computer science program, raises the minimum wage to $15 an hour, expand the Earned Income Tax Credit, enacts a Child and Dependent Care Tax Credit, expands access to free community college, implements STEM loan forgiveness, and commits resources to the State's Apprenticeship Network and Career Network. Through the State's Department of Labor and Workforce Development, the Murphy administration will create the NJ Career Network to improve access to lifelong learning and career management opportunities for all residents.

IV. The NJ Communities initiative is intended to create an environment that will spur development in cities and downtown areas to make the State more attractive to the young workforce it hopes to attract. Under this initiative, the Murphy administration will attempt to shore up the State's mass transit infrastructure and create State incentive programs which encourage targeted long-term investment in in low-income and under resourced communities. In addition to increasing access to mass transit within the State, the Murphy administration intends to address inefficiencies within the existing transportation network through the Gateway Program and the Transportation Trust Fund.

Under the four umbrella initiatives discussed above, Gov. Murphy proposes to overhaul many of the State's tax incentive programs with a collage of existing policies infused with new approaches. Among these changes, the Governor intends to modify two soon-to-expire State tax credit programs that, collectively, award approximately $1 billion annually in incentives – the Grow New Jersey ("Grow NJ") Program and the Economic Redevelopment & Growth ("ERG") Program – with replacement programs that, in contrast to their predecessors, (1) cap tax breaks awarded thereunder at an annual amount less than $1 billion, and (2) shift the programs' focus from individual businesses to specific industry sectors.

Although these initiatives may appear independent of one another, they share a strategic focus on priming the State's economy and workforce to play a leading role in new, emerging and innovative industries such as clean energy, food and beverage, life sciences, insurance, financial and information technology, digital media, cybersecurity and advanced manufacturing, transportation and logistics, among others. Gov. Murphy's plan also fosters the development of new, small and diverse businesses in an effort to reduce the State's dependence on the economic and job growth provided in large part by national and multi-national corporations. Lastly, the Murphy administration's strategy seeks to attract and retain younger workers by incentivizing the development of communities that provide the amenities that Millennials are attracted to (e.g. walkable, vibrant, 24/7, connected, accessible etc.). While all this may excite many, Murphy's plan is only conceptual at this point. The specifics of these proposals have yet to be determined and will largely depend on cooperation from the State Legislature.

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6 Questions Related to Boards of Directors of Both For-Profit and Nonprofit New Jersey Corporations

By Edward W. Ahart, Esq.

❶ Question: Is a Board of Directors Required and What is its Role?

Answer: Yes. Both the New Jersey Business Corporation Act and the New Jersey Nonprofit Corporation Act call for corporations to have Boards of Directors or Trustees that are to be responsible for the management of the business and activities of their organizations. Boards have proven to be a time-tested method for good corporate governance. The Directors/Trustees offer broad perspectives, experience and thinking as to strategic issues, the oversight of the entity's management, and the supervision of the financial and physical resources of the organization. Failure to have and make proper use of a Board can result in serious legal consequences for both the organization and the Board members, including personal liability for the Directors/Trustees, particularly in matters involving disgruntled shareholders, employees, or creditors of the company. Watchdog groups as to nonprofits look for signals of Board and other governance practices that do not meet best practice expectations.

❷ Question: What are the major responsibilities of the Board?

Answer: The Board's overall responsibility is to manage the business and affairs of the entity. In carrying out that responsibility the Board may delegate some of its duties either to a staff or committee. Most often companies will have a President or CEO to whom most management functions are delegated. However, there are a number of responsibilities that remain with the Board in any event. These include insuring that the organization follow its primary mission and comply with the law; hiring and overseeing the President; working with the President to develop and implement the strategic direction; monitoring the organization's financial and other resources; and selecting and managing the Board itself.

❸ Question: What process must a Board follow to act?

Answer: A Board is intended to be a deliberative body, acting after consideration of the issues presented to it that are then approved by resolutions adopted by the affirmative vote or written consent of the Directors/Trustees. Unless otherwise required by statute, the specific number of affirmative votes required to approve any particular issue is determined by the organization's Certificate of Incorporation and Bylaws. Individual Directors or Trustees do not have the authority to act or speak individually for the Board unless the Board has specifically authorized that person to do so.

❹ Question: What is required for Directors/Trustees to Avoid Personal Liability?

Answer: In general Directors/Trustees will not be subject to personal liability if they discharge their duties in good faith and with the level of diligence, care and skill that ordinary, prudent people would do under similar circumstances. As to any particular issue, Directors/Trustees are allowed to rely on the opinion of the organization's attorney, or on reports of officers or committees that provide background on specific topics, or on financial data prepared by the organization's chief financial officer, or an independent accounting firm. The Directors/Trustees must avoid acting in violation of the law, or in violation of the entity's Certificate of Incorporation, Bylaws or other written rules and procedures; avoid distributing assets without having satisfied the company's obligations to creditors, employees and the like; and avoid acting in a manner that is for their own personal benefit and in conflict with the best interests of the organization.

❺ Question: What qualities and skills are required for Board members or trustees?

Answer: The qualities and skills required to serve as a Board member vary according to the needs of the particular entity involved. However, as a general statement Directors/Trustees should be individuals who are committed, willing to work hard for the organization, and who understand and support the purpose/mission of the entity. The members should serve as leaders of the Board and as spokespeople for the organization to the outside world; chair/serve on committees; work with President; and help manage the financial and physical assets of the organization. In particular organizations there may be a need for Directors/Trustees who can assist with areas such as fund-raising, marketing or making important outside connections. The best Boards are those comprised of members who bring a variety of skill sets, and together provide a strong, committed and thoughtful leadership group.

⑥ Question: Should small or closely-held corporations have advisory Boards?

Answer: This is very often an excellent idea that is widely recommended by experts in the field. Small or closely-held organizations frequently have quite small staffs and Boards, often comprised of a few friends or family members who may lack the breadth of skills, experience and thought leadership that a broader group can bring. An advisory Board that can provide broader life and business experiences, and have greater outside contacts, etc., is very often extremely beneficial. Advisory Boards have no legal authority to manage the entity as is the case with a statutory Board. However, stockholders, Board members and executives who are interested in learning and benefitting from the experiences of others are often better leaders and produce better results for their organizations.

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New Law Expanding Paid Family Leave Could Have Big Impact on Small Employers

By Cynthia L. Flanagan, Esq.

On February 19, 2019 Governor Murphy signed legislation enhancing paid family leave for New Jersey employees. In 2008, New Jersey became the third state to offer paid family leave insurance (FLI) after enacting legislation amending the New Jersey Temporary Disability Law. Only five other states, plus the District of Columbia, have paid family leave. The new law will provide New Jersey employees with some of the most expansive paid leave coverage in the country in that it would increase the amount of time workers could take leave, raise the amount of weekly benefits, and expand the program to employees of smaller employers. The increased cost of the bill's benefits will be funded by an increase in payroll taxes.

Under the current family leave insurance program, eligible employees can receive up to six (6) weeks of benefits equal to two-thirds of their pay, with a maximum benefit of $633 per week in paid leave benefits. Starting on July 1, 2020, eligible employees can take up to 12 weeks of leave and receive up to 85% of their wages (with a cap of $859 per week). The new law expands the purposes for which employees can take paid leave by redefining "family members". The definition of "family members" will allow employees to take paid leave to care for grandparents and grandchildren, siblings, adult children, and in-laws. The law also provides FLI benefits to a worker providing care for an individual whose close association is the equivalent of a family member. However, the worker is required to give evidence of that association. The new law provides paid leave benefits for domestic violence or sexual assault survivors and their family caregivers. It also expands the definition of family members under the New Jersey Family Leave Act (NJFLA) and under the New Jersey Security & Financial Empowerment Act (NJ Safe Act), which provide benefits to employees and their families who are the victims of domestic or sexual violence.

Advocates of the new law say that the current family leave program is underutilized because employees are unaware of their right to take leave, believe they will lose their jobs if they take leave or cannot afford the lower weekly benefits. The stated purpose of the new law is to protect workers against the hardships generally caused by involuntary unemployment, as it provides benefit payments to replace wages lost when a working family member must take time away from work to care for family members who are unable to care for themselves. Opponents argue that the new law will adversely impact smaller businesses, since the it lowers the exemption threshold, expands eligibility for paid leave, and increases the leave period to 12 weeks during any one year and the maximum intermittent FLI leave from 42 to 52 days. Smaller employers may need to hire replacement workers or pay overtime for the longer duration of leave. As of June 30, 2018, the new law will apply to employers with 30 more employees, whereas the current law only applies to employers with 50 or more employees.

The leave provided under the new family leave insurance program is not protected leave. Unlike the NJFLA and the NJ Safe Act, the family leave insurance program does not require employers to provide employees returning from paid family leave with the same or a comparable position.

However, given the interplay of family leave insurance with other laws including New Jersey's paid sick leave law, the federal Americans with Disabilities Act, and the New Jersey Law Against Discrimination, employers are well-advised to consult with labor & employment counsel before terminating any employee who is out on leave under the family leave insurance program.

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Lowering the Bar for Government Guaranteed Loans: The SBA'S New Rules for Small Business Owners

By Jonathan Pizarro-Ross, Esq.

The U.S. Small Business Administration's (the "SBA") 7(a) loan program is perhaps the most popular of its lending options for small businesses. The standard 7(a) loan is designed to provide more accessible financing for eligible small businesses with few assets by having the U.S. government guarantee 85% of a lender's loan up to $150,000 and 75% of a lender's loan from $150,000 to $5 million. Another popular SBA financing option, the 504 loan, allows a small business borrower to invest just 10% of project costs into a project, a lender to invest 50%, and the U.S. government to invest the remaining 40%.

Until 2018, one of the ways the SBA mandated that lenders determine whether a small business was eligible for an SBA 7(a) or 504 loan was by investigating whether an individual who owned 10% or more of the business had reasonable access to non-U.S. government financing, including his own cash assets like personal checking and savings accounts. Lenders would also have to look at the cash assets of the individual's spouse and minor children as these could be potential sources of funding. This means of determining eligibility, called the "credit not available elsewhere test", and was meant to ensure that more affluent business owners do not take advantage of SBA loans designed for businesses with much less ability to obtain conventional financing.

After considerable feedback from lenders involved in the SBA's loan programs, the SBA issued Policy Notice 5000-17057, effective April 3, 2018, raising the eligibility threshold of business ownership from 10% to 20%. Because of that change, business owners with less than 20% equity in the business are no longer subject to the "credit not available elsewhere test" and their cash assets, or the cash assets of their spouses and children, will not be considered by a lender.

The reality is that small enterprises often have relatively wealthy owners, but these enterprises are still precluded from conventional commercial financing because of the lack of assets belonging to or associated with the enterprise or the terms that conventional lenders are willing to offer them are plainly unreasonable. This new, more borrower-friendly threshold for business owners will make it easier for small enterprises to gain access to SBA financing despite having affluent individuals with low amounts of equity in the business.

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Issues Faced by Physician Private Practice Groups

By Sharmila D. Jaipersaud, Esq.

This article is to help identify three issues that arise frequently in physician private practice groups.

Managing Workload and Productivity

As a practice group grows, older partners or shareholders take on younger workers who eventually rise to partnership/shareholder level. However, in contemplating the growth of your practice, consider what that will mean for workloads, which will eventually impact productivity. Older members in the group will often feel that they worked to build the practice and have created an environment where the younger partners can grow. Younger partners often feel that they are left carrying the burden of the practice, while the older partners are no longer as productive and should retire. This leads to an unstable environment and often is an untenable situation.

When adding new partners/shareholders or when joining an established group with an ownership interest, it is important for both sides to understand clearly what their expectations are versus what is reality. If the older partner thinks he or she will no longer need to keep up productivity in a few years, then that should be discussed outright. Also, the parties should discuss what would trigger retirement and what a buy-out will look like. Younger partners should discuss what their expectations will be for productivity, call coverage and holidays.

Hiring the Right Office Manager

Your office manager will be your point person for almost every aspect of your practice. Billing issues, human resource issues, legal issues and otherwise, will be managed by your office manager. Hiring a person with experience and success in the role of office manager will prove to expand and grow your practice to new levels. It will also allow you and your partners to practice medicine, as opposed to worrying about the nitty gritty of office administration.

Alternatively, hiring someone who is a bad fit for the position can prove to limit your practice, hurt your employees and ultimately lead to you being involved with day-to-day administration, which will hurt your ability to provide services, thereby reducing productivity. You will need someone with detailed organizational skills, great communication skills, reliability, initiative, and someone who is a leader but also can be a team player when those skills are needed. You will need someone who can maintain strict confidences or risk the private details of your practice being leaked to employees, or outside third parties.

An office manager who is not mindful of billing matters can easily cause a practice to lose revenue and even worse issues. Untimely collection practices can cost a medical group thousands of dollars. Therefore, it is necessary for you to find someone that appreciates the necessity to bill in a timely manner and follow up on open billing issues quickly so that invoices do not grow stale.

Subleasing Extra Office Space

Subleasing a bit of your extra space to a third party could be a great way for you to offset some costs associated with your practice. However, failing to include key provisions in the new sublease can end up costing you a lot in the end. Both the current tenant and the sub-tenant should be fully familiar with the terms they are signing on to. If you are a tenant, seeking to sublease space, you must look at your original lease to ensure that you have the right to sublease and to understand the relevant underlying lease provisions. We are surprised by the number of clients that are unaware that subleasing space is most likely subject to landlord approval.

In addition to understanding whether you can sublease, consideration must be given to the referral relationship between the parties. Subleasing arrangements between referring physicians are subject to specific requirements to avoid the inference of kick-backs between the parties. For example, rent should never be based on volume of referrals between the parties. Details about the sublease arrangement will need to be addressed, in writing, as well.

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