BARKER KOUMAS & OLMSTED
A PROFESSIONAL LAW CORPORATION

Legal Update

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NATIONAL DRUG ABUSE SURVEY GIVES SOBERING NEWS TO EMPLOYERS

By Christopher W. Olmsted

Workplace substance abuse is more common than you may think. A recent survey may cause more employers to implement drug testing programs. Most of the nation's approximately 16.4 million current illicit drug users and approximately 15 million heavy alcohol users hold full-time jobs, according to a new study by the Substance Abuse and Mental Health Services Administration (SAMHSA). A recent SAMHSA press release, quoted at length below, summarizes the study, entitled "Worker Substance Use and Workplace Policies and Programs."

The study showed that an annual average of approximately 9.4 million current illicit drug users, (including 7.3 million current marijuana users) and 10.1 million heavy alcohol users were employed full-time in 2002-2004. Among full-time workers using these substances, 3 million met criteria for illicit drug dependence or abuse, and 10.5 million were dependent on or abused alcohol.

SAMHSA rather obviously observes that substance use can pose significant risks to workers' health. Employers are also hurt by an unaccountable loss of productivity. "Illicit drug use and heavy alcohol use are associated with higher levels of absenteeism and frequent job changes," the report said. For example, nearly twice as many current illicit drug users skipped

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one or more days of work in the past month compared with workers who did not abuse drugs. Drug users were also far more likely to report missing two or more work days in the past month due to illness or injury compared with workers who did not abuse drugs.

The report says the highest rates of current illicit drug use were among food service workers (17.4 percent) and construction workers (15.1 percent). Highest rates of current heavy alcohol use were found among construction, mining, excavation and drilling workers (17.8 percent), and installation, maintenance, and repair workers (14.7 percent).

"The high rates of drug and alcohol use in hazardous industries is cause for concern," said Elena Carr, drug policy coordinator at the U.S. Department of Labor (DOL). "Clearly businesses can ill-afford the risk of having workers operating meat slicers, backhoes, or other dangerous equipment while under the influence of alcohol or drugs."

Substance users also had far higher job turnover rates. Among full-time workers who reported current illicit drug use, 12.3 percent said they had worked for three or more employers in the past year, compared with 5.1 percent of non-abusing workers.

Another major finding was that current drug users were more likely to work for employers who did not conduct drug or alcohol testing programs. Nearly a third of current illicit drug users said they would be less likely to work for employers who conducted random drug testing.

Overall, approximately 30 percent of the full-time work force reported that random drug testing took place in their current employment setting. Workers in the transportation and material-moving (62.9 percent) and protective services (61.8 percent) occupational categories were the most likely to report working for employers who conducted random testing.

The government's survey is indeed sobering, and should encourage every employer to at least evaluate the pros and cons of adopting a drug testing policy.

"Clearly businesses** can ill-afford the risk of having workers operating meat slicers, backhoes, or other dangerous equipment while under the influence of alcohol or **drugs."

Take Away Tips

Free Employer Assistance: SAMHSA offers a helpline, 1-800-Workplace (1-800-967-5752), for employees and businesses dealing with problems related to substance abuse. Visit http://www.workplace.samhsa.gov/

Before Implementing Your Drug Policy: Due to federal and California constitutional privacy rights, workplace drug testing policies should be carefully formulated with advice of legal counsel. Are significant differences between the legal standards for pre-employment testing, random (suspicionless) testing, and suspicion-based testing. To find out how Barker Koumas & Olmsted can assist in implementing your policy, contact Chris Olmsted at (619) 682-4040 or cwo@barkerkoumas.com.

ACCOMMODATION OF EMPLOYEES IN ALCOHOL OR DRUG REHABILITATION PROGRAM

Employers are never required to tolerate drug abuse on the job. However, under certain circumstances, some California employers must accommodate employees who enroll in alcohol or drug rehabilitation.

Labor Code Section 1025 provides: "Every private employer regularly employing 25 or more employees shall reasonably accommodate any employee who wishes to voluntarily enter and participate in an alcohol or drug rehabilitation program, provided that this reasonable accommodation does not impose an undue hardship on the employer."

Section 1025 contains an important caveat: "Nothing in this chapter shall be construed to prohibit an employer from refusing to hire, or discharging an employee who, because of the employee's current use of alcohol or drugs, is unable to perform his or her duties, or cannot perform the duties in a manner which would not endanger his or her health or safety or the health or safety of others."

*"**Employers are** never required to tolerate drug abuse on the job. However, under certain circumstances, some California employers must accommodate employees who enroll in alcohol or drug **rehabilitation."***

"FORCED TO FOREGO" STANDARD FOR MEAL PERIODS ADOPTED

By Elizabeth J. Koumas

In July, 2007, a federal district court in Northern California addressed several wage and hour issues, including rest and meal periods, in the case of *White v Starbucks.*

The court examined the meal and rest period rules, including those set forth in Labor Code statutes.

The court also found that the employee could not pursue a rest period claim against the employer where the employee chose to forego the rest break.

The court expressly noted that employers must only "authorize and permit" employees the opportunity to take a break, and need not compel them to do so.

The court rejected the meal period standard advocated by the employee, which urged that employers "must affirmatively enforce meal periods requirements." The court viewed that argument as imposing a strict liability standard upon employers.

Borrowing language from the Supreme Court's decision in *Murphy v Kenneth Cole* case, the court instead held that in order to prevail "the employee must show that he was forced to forego his meal breaks as opposed to showing that he did not take them regardless of the reason."

The court commented that it would not be persuaded by an interpretation of the law that would permit "employees to manipulate the process and manufacture claims by skipping breaks or taking breaks of fewer than 30 minutes, entitling them to compensation of one hour of pay for each violation. This cannot have been the intent of the California legislature, and the court declines to find a rule that would create such perverse and incoherent incentives."

MARRIED COUPLES: DO YOU HAVE AN OUTDATED BYPASS TRUST?

By David J. Barnier

If you are married, the terms of your living trust may include a term that severely hinders the surviving spouse's use of the family assets while providing no benefit to you. What may have been an appropriate form of living trust when the trust was set up may now be outdated due to changes in the estate tax laws.

A Refresher Course On Bypass Trusts

A living trust accomplishes one major goal—the avoidance of probate. Utilizing a living trust allows ownership of property to be transferred at death by a successor trustee rather than through probate. Probate is a required step when a person passes away with more than $100,000 in assets. Probate almost certainly will result in a delay and increased costs to the beneficiaries. While an attorney and/or an accountant is usually necessary to facilitate a distribution under a living trust, the required steps will be reduced and court involvement (along with related costs) avoided.

"A living trust accomplishes one major goal—the avoidance of probate."

For a single person, there are not many options for the framework of a living trust.

However, for a married couple, there are a handful of options related to coordinating the spouses' distribution plans depending upon which spouse passes away first. There are also options related to estate tax, which is owed at a high rate (over 40%) on any assets that exceed the estate tax threshold, which currently is $2,000,000.

Placing assets in a living trust does not protect those assets from estate tax consideration. A living trust gives the trustors (i.e., the creators of the living trust) full control over these assets. While probate is avoided with a living trust, estate tax laws still apply to living trust assets.

The Bypass Trust—Why It Is Used, and Why It May Not Be Useful To Many Coupls Under New Estate Tax Laws

A decade ago in 1998, when a person passed away, estate tax was owed on all assets exceeding $625,000. Again, this law applied even if assets were held in a living trust.

A useful mechanism to avoid this estate tax involved transferring the dying spouse's (the first spouse to die) assets to an irrevocable "bypass trust." Bypass trust assets, which would usually be about 50% of the couple's total assets, would only be available for the surviving spouse's "health, education, maintenance, and support." By limiting the surviving spouse's use of these assets to these four purposes, these assets by law would not be subject to the estate tax.

For example, if a couple had $1,000,000 in assets when the first spouse died in 1998, the dying spouse's $500,000 in assets would be set aside in a bypass trust. When the second spouse died, only $500,000 in assets would be subject to estate tax, and therefore estate tax would be avoided because neither spouse died with more than $625,000 in assets (this simple example assumes that the assets did not change and that the estate tax threshold was the same at the times of each death).

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Under this same situation, had the dying spouse left all assets to the surviving spouse, the surviving spouse would have died with $1,000,000 in assets, and the estate would have had to pay over $150,000 in estate tax. In 1998, it was worth limiting the surviving spouse's access to half of the couple's assets in order to avoid such a large amount of estate tax.

Today, the estate tax threshold is $2,000,000. This amount will increase to $3,500,000 in 2009, after which Congress is likely to amend the estate tax laws. With these increased thresholds, many couples who were affected by estate tax in 1998 are no longer affected. A bypass trust was appropriate for the couple in 1998, but not anymore.

Setting aside assets in a bypass trust does not prevent the surviving spouse from using these assets. "Health, education, maintenance, and support" are terms broad enough to cover a lot of expenses. Typically, a family residence was placed into the bypass trust and the surviving spouse was allowed to live in the house despite the house being owned by the bypass trust. The liquid assets would be made available for unlimited use by the surviving spouse. However, if the house is owned by the bypass trust, the surviving spouse likely would not be entitled to cash out any equity in the property.

There is another benefit to a bypass trust besides the avoidance of estate tax. Some couples, especially couples with children from prior relationships, wish to ensure that their children receive their assets. Rather than give all assets to their spouse and risk that no assets will be distributed to their children, a spouse might desire to lock away their assets in a restrictive bypass trust such that the surviving spouse can only use those assets for expenses stricter than health, education, maintenance and support. The surviving spouse will not be able to revise the terms of the bypass trust, which could provide for distribution of these assets to the first-to-die spouse's children when the second spouse dies. If this consideration is relevant, a bypass trust may still be a useful tool to accomplish a couple's goals, as the tying up of assets is desired in order to preserve an ultimate distribution scheme.

However, for two spouses who each want to leave all assets to their spouse and to give the spouse full discretion to use these assets and to modify the ultimate distribution terms, a bypass trust only presents problems if there are no estate tax considerations because the couple's assets do not approach the estate tax threshold.

Questions To Consider

What is the best plan for a married couple that wishes to give full control and discretion of the couple's assets? What can be done to maintain flexibility in anticipation of changing estate tax laws and changing levels of wealth?

The solution for many couples is a "disclaimer trust." A disclaimer trust provides that when the first spouse dies, the surviving spouse can decide at that time whether to lock any assets away in an irrevocable bypass trust. Depending upon the estate tax threshold amount and the couple's asset situation when the first spouse dies, it may be useful to lock some or all of the dying spouse's assets away in order to avoid estate tax when the second spouse dies. A disclaimer trust gives the surviving spouse the option to receive all assets, which would then be subject to estate tax, or to lock away some or all of the dying spouse's assets into an estate tax avoiding bypass trust.

How do I know if I have a bypass trust?

Look at your trust for the section that describes what happens when the first spouse passes away. If your trust states that when the first spouse dies, multiple trusts are to be created, this probably means that you have bypass trust terms that will lock away the dying spouse's assets. Bypass trust terms often include "A Trust" and "B Trust" or "Marital Trust" and "Survivor's Trust."

How often should I have my/our estate plan reviewed?

Attorneys are famous

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"Some couples,** especially couples with children from prior relationships, wish to ensure that their children receive **their assets."

COURT INVALIDATES NO-HIRE PROVISION

By Christopher Olmsted

A recent case titled *VL Systems v. Unisen* reaffirms the fundamental California public policy prohibiting restraints on an employee's freedom to work for competitors.

VL Systems, Inc. (VLS) and Star Trac Strength (Star Trac) entered into a short-term computer consulting contract. One of the provisions in the contract provided that Star Trac would not hire any VLS employee for 12 months after the contract's termination. Obviously VLS was concerned that its client might steal away key talent.

VLS completed the IT work. In spite of the contract clause, within 12 months Star Trac hired David Rohnow, a VLS employee who had not performed any work for Star Trac, and indeed, had not been employed by VLS at the time the Star Trac contract was performed. VLS sued for breach of contract, and the court awarded it $28,500 in damages.

Star Trac filed an appeal, arguing the no-hire provision was unenforceable. The appellate court agreed, reversing the trial court award. The court relied on California Business and Professions Code section 16600 (section 16600), which states: "Except as provided in this chapter, every contract by which anyone is restrained from engaging in a lawful profession, trade, or business of any kind is to that extent void."

The court acknowledged that in many instances, parties to a contract can give away legal rights. However, this particular fundamental public policy is not such an instance, particularly where the rights of a third party are impacted. The court noted that in this instance, Mr. Rohnow was a third party not involved in the Star Trac/VLS contract, and did not even work for VLS at the time.

"California Business and Professions Code Section 16600 strictly prohibits No-Hire and Non-Competition agreements ."

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for drafting long, complex documents (like this very one). Living trusts can be long and confusing. However, within these trust documents, the distribution terms are usually pretty simple to understand. You are capable of reviewing these terms yourselves and confirming that the terms are clear. If they are not clear, then they need to be clarified. If your desires have changed, you will likely be able to recognize that the current version of the trust does not reflect you current distribution desires.

The same is true for successor trustees, who would be the persons responsible for handling affairs when you die. You should be able to identify the names of the persons designated, and therefore be able to confirm that your trust accurately reflects your current wishes.

However, while you are likely capable of confirming that your distribution terms are up to date, you may not be able to recognize subtle issues such as the bypass trust issue discussed in this article. Checking in with an estate planning attorney every year is likely more than adequate. Some attorneys would say that checking in every three years is adequate. In any event, if you have any questions or just want to go over your current estate plan, most attorneys (including this one) are more than happy to spend a few minutes reviewing your document, summarizing its terms for you, and identifying any potential pitfalls such as a potentially problematic bypass trust term.

Please do not hesitate to contact me if you would like a review of your estate plan and some answers to any questions that you have. You will not be charged for the review, summary, and answers to questions.

MECHANIC'S LIEN DEADLINE REFRESHER COURSE

By David J. Barnier

REQUIREMENT 1: THE 20-DAY PRELIMINARY NOTICE

Except in situations in which your contract is directly with the owner of the property, you must serve a 20-Day Preliminary Notice on the owner and the general contractor in order to preserve mechanic's lien rights. The 20-Day Preliminary Notice must be served by Certified Mail and must be deposited within 20 days after the first day on which you provide labor, materials, equipment, etc. to the project. If your 20-Day Preliminary Notice is late, you can still preserve mechanic's lien rights. A tardy 20-Day Preliminary Notice will still be effective to preserve mechanic's lien rights for the period of time beginning 20 days prior to the date of mailing of the preliminary notice, forward.

REQUIREMENT 2: RECORDING THE MECHANIC'S LIEN

A mechanic's lien cannot be recorded until you have substantially completed your obligations under the contract. If you record a mechanic's lien prematurely, you are likely to lose all mechanic's lien rights. If you are not paid and you terminate work, you may be entitled to record a mechanic's lien at that time due to your being excused from further performance on the basis of such non-payment.

The deadline to record a mechanic's lien is determined by the date of completion of the work of improvement. The "work of improvement" may involve work being performed by other contractors, which may have the effect of extending the deadline to record a mechanic's lien until long after you have finished your work.

For a subcontractor, the deadline to record a mechanic's lien is 90 days after completion of the work of improvement, or, if a valid notice of completion is recorded, within 30 days after the recording of the valid notice of completion by the owner or general contractor.

To be valid, a notice of completion must be recorded within the 10-day period following actual completion of the work of improvement, and must otherwise comply with the format requirements for a notice of completion.

For a prime contractor, the deadline to record a mechanic's lien is likewise 90 days after completion of the work of improvement, or, if a valid notice of completion is recorded, within 60 days after the recording of the valid notice of completion.

A notice of completion may be challenged on the basis of an unclear completion date. A mechanic's lien claimant is not required to acknowledge the validity of a notice of completion. An attorney should be consulted immediately if there is a question as to the validity of a notice of completion.

If there is a cessation of work for 60 days, then the mechanic's lien clock starts to tick. After the 60-day cessation, both a prime contractor and a subcontractor have an additional 90 days to record a mechanic's lien. If a valid notice of cessation is recorded within 10 days after the day of cessation, these deadlines are shortened to 30 additional days for a subcontractor and 60 additional days for a prime contractor.

REQUIREMENT 3: FILING A LAWSUIT TO ENFORCE THE MECHANIC'S LIEN

For any mechanic's lien, a lawsuit must be filed within 90 days of the date on which the mechanic's lien was recorded, otherwise the mechanic's lien becomes invalid.

In the event that a mechanic's lien is recorded and expires 90 days later, you can still record a new mechanic's lien so long as the new mechanic's lien is timely under the rules described above.

"A mechanic's lien cannot be recorded until you have substantially completed your obligations under the contract."

MANAGING UNEMPLOYMENT INSURANCE CLAIMS

By Christopher Olmsted

As California employers are well aware, the EDD's Unemployment insurance Program provides short-term wage replacement to unemployed workers and is funded by employer payroll taxes. A recent EDD publication points out that "since this tax works like an insurance premium, an employer may pay a lower rate when former employees make fewer claims on the employer's account.

The EDD offers the following steps that may help reduce your UI tax rate:

- Maintain a stable workforce to decrease claims.
- Keep records to justify your actions.
- Provide employees with copies of your business policies.
- Provide clear, specific answers to telephone questions from the EDD personnel.
- Appeal the EDD's decision if you believe it is contrary to fact or law.
- Make timely responses to EDD notices.

In addition to the EDD's suggestions, we also suggest that in the event of a claim, a brief call to employment law counsel. Counsel familiar with EDD regulations can often help pinpoint those instances where former employees are disqualified from receiving benefits, and can help identify the facts that should be offered in support of your case.

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UPCOMING SEMINARS

LEARN MORE ABOUT THE FMLA

This fall, Chris Olmsted and Elizabeth Koumas will present a day long training seminar on FMLA, CFRA, and other protected employee leaves.

Date: October 25, 2007

Time: 8:30 a.m. to 4:30 p.m.

Location: TBA downtown San Diego

Topics Include:

- Federal Family And Medical Leave Act (FMLA) And California Family Rights Act (CFRA)
- California Pregnancy-Related Disability Law Length Of Leave Entitlement
- Interaction Between Family Leave Laws And Disability Laws
- Workers' Compensation
- Strategies For Handling Employee Leaves
- Other Protected Leaves

The seminar will be presented through Lorman Educational Service. For a complete agenda, and for registration information, contact Christy Corpuz at (619) 682-(619) 682-4040 or cgc@barkerkoumas.com.

Register Now! Contact Christy Corpuz at (619) 682-4040 or cgc@barkerkoumas.com