August 18th, 2022

KENNERLY MONTGOMERY

Attorneys & Counselors Since 1916

The Best Lawyers in America© Have Been Announced!

Kennerly Montgomery has fifteen attorneys recognized across both categories for 2023.

Best Lawyers® 2023

James N. Gore, Jr.

Litigation - Insurance

Robert H. Green

Construction Law
Litigation - Construction

Michael S. Kelley

Appellate Practice
Litigation - Bankruptcy

Jason E. Legg

Personal Injury Litigation - Plaintiffs
Workers' Compensation Law - Claimants

William E. Mason IV

Employee Benefits (ERISA) Law
Litigation - ERISA

Marshall H. Peterson

Closely Held Companies and Family Businesses Law
Tax Law
Trusts and Estates

Eddy R. Smith

Trusts and Estates

Kevin C. Stevens

Construction Law
Litigation - Construction

Jack M. Tallent II

Commercial Litigation
Construction Law
Litigation - Construction

Douglas J. Toppenberg

Family Law

More Changes Coming Soon to Retirement Savings

Ashley N. Trotto, Esq.
Jordan Bondurant, Summer Associate

It is no surprise that America has a retirement savings problem. The SECURE Act, passed in late 2019, was the legislature's most recent attempt at improving retirement savings opportunities for workers. Building on that momentum, the House recently passed the *Securing a Strong Retirement Act* ("SECURE 2.0"). In response, the Senate's Health, Education, Labor, and Pensions Committee advanced the *Retirement Improvement and Savings Enhancement to Supplement Healthy Investments for the Nest Egg Act* ("RISE & SHINE Act") and the Senate's Finance

Committee advanced the *Enhancing American Retirement Now Act* ("EARN Act").

Although there are differences between the House and Senate bills, there are significant areas of overlap. It is expected that a compromise bill will be passed later this year. The following summarizes a few key provisions included in both the House and Senate bills:

- **RMD Commencement:** the SECURE Act increased the Required Minimum Distribution ("RMD") start date from age 70 ½ to age 72. The House would further increase to age 73 in 2023, 74 in 2030, and 75 in 2033 while the Senate would increase from age 72 to 75 in 2032.

- "**Catch-up" Increase**: currently, the "catch-up contribution" limit is $6,500 for individuals over age 50 participating in 401(k), 457(b), and 403(b) plans. The House would increase the limit to $10,000 for those aged 62-64 and the Senate would increase to $10,000 for those aged 60-63.

- **Domestic Abuse Distribution**: Both the House and Senate would permit penalty free distributions up to $10,000 for victims of domestic abuse.

- **Long-Term Part Time Employees:** The SECURE Act provides that part-time employees who work 500 hours for *three consecutive years* are eligible to participate in their employer's 401(k) plan. Both the House and Senate would reduce that requirement to *two consecutive years*.

- **De Minimis Incentives:** Both the House and Senate would permit employers to provide a "de minimis" financial incentive to employees who elect to participate in a retirement plan. Unfortunately, neither the House nor the Senate has defined the term "de minimis."

- **Elimination of "First Day of the Month" Rule:** Currently, governmental 457(b) plan participants must make deferral elections *prior to the first day of the month* for which the election relates. Both the House and Senate would revise the rule to require that deferral elections be made prior to the date the compensation which is the subject of the election is currently available.

- **Employee Certification of Hardship:** Both the House and Senate would permit an employer to rely on an employee's certification that conditions for a hardship distribution have been satisfied.

- **Expansion of EPCRS:** Both the House and Senate propose significant expansion of the Employee Plans Compliance Resolution System ("EPCRS"), the IRS's retirement plan correction program, including extension of correction periods, new safe harbor correction methods, and additional flexibility with respect to self-correction.

Kennerly Montgomery

Not Just National Recognition

Nineteen of our attorneys received 53 accolades across 21 categories in Cityview Magazine's Top Attorneys in Knoxville for 2022.

Cityview's ratings are based on votes by our peers in the Knoxville bar, with the top vote in each category denoted with a Golden Gavel. Kathy D. Aslinger received the Golden Gavel in Employee Benefits/ERISA - Defense.

You can see the entire list **here**!

Round and Round We Go: NCAA Issues Directives Aimed at Collectives and PSAs

Reece Brassler, Esq.

Monday, May 9, 2022 was another landmark date in the ever-changing NIL landscape as the NCAA issued "Interim Name, Image and Likeness Policy Guidance Regarding Third Party Involvement." Such guidance specifically targeted two groups: NIL Collectives and Prospective Student Athletes. Further, the mission of such guidance is clear: keep NIL money out of recruiting, be it of high school prospects or current NCAA athletes in or considering the transfer portal.

Specifically, the NCAA's NIL Guidance broadly defines "Boosters" as individuals, independent agencies, corporate entities, or other organizations known (or that should be known) by an institutional executive or administrator to have participated in or otherwise be affiliated with an agency, organization, or entity promoting the institution's athletics program or to assist or have assisted in providing benefits to student athletes and their family members. Pursuant to this broad definition, NIL Collectives appear to be "Boosters" pursuant to NCAA's definitions, and as such, are prohibited from engaging in recruiting activities, "including recruiting conversations," on behalf of schools.

As a refresher, NIL Collectives are third-party groups organized to collect money to sign athletes, and prospective student athletes, to NIL deals. Collectives – by way of reported six-figure deals to prospective student athletes and guaranteed money for being on a roster or a specific position group – have straddled, and potentially crossed, the lines delineated by the Interim NIL Policy established in July 2021. Given that the NCAA's NIL Guidance specifically states "NIL agreement[s] between a PSA and a booster/NIL entity may not be guaranteed or promised contingent on initial or continuing enrollment," the propriety of the above-described NIL deals is unclear, at best, and an egregious violation of NCAA Policy at worst.

While states continue to legislate around NCAA guidance, including by permitting universities to have direct relationships with NIL collectives, it is unclear whether and how that benefits players. These uncertainties not only create confusion for athletes and institutions, but also have potentially massive ramifications on both institutions and student-athlete if and when the NCAA issues penalties related to NIL activities. As always, such penalties could include loss of eligibility and NCAA sanctions.

Due to the seriousness of the potential ramifications, I encourage prospective and current student-athletes to seek guidance from trustworthy, unbiased sources before engaging with NIL Collectives and other boosters – even those affiliated with institutions. I encourage NIL Collectives to do the same and to constantly monitor NCAA Guidance and Federal Legislation that may affect their ability to engage with institutions and prospective student athletes.

For additional information about your NIL rights and the laws and rules governing them, do not hesitate to contact Kennerly, Montgomery & Finley, P.C.

Best Lawyers® : Ones To Watch

The Best Lawyers in America© also announced this year's Best Lawyers: One to Watch. We are excited to announce that all five of our associate attorneys have been included, three for the third consecutive year!

Michael R. Crowder

Elder Law
Nonprofit / Charities Law
Tax Law
Trusts and Estates

Ashley N. Trotto

Employee Benefits (ERISA) Law
Health Care Law
Labor and Employment Law - Management

Zack R. Gardner

Corporate Law
Intellectual Property Law
Technology Law

Reece Brassler

Intellectual Property Law
Litigation - Construction

Rebecca C. Hanniford

Banking and Finance Law
Project Finance Law
Real Estate Law

New Law Impacts Trust Grantors' and Beneficiaries' Rights

Michael Crowder, Esq.

On April 14, 2022, Tennessee SB 2166/HB 2353 was signed into law, making some changes concerning administration of trusts in Tennessee. Notably, T.C.A. § 35-15-817 was completely revamped to give trustees another option under Tennessee law to be discharged of fiduciary liability.

Previously, if a trustee sought to be discharged of fiduciary liability under Tennessee law, the trustee could (i) obtain a formal release from the court, or (ii) obtain written consent from every beneficiary.

Under the revised T.C.A. § 35-15-817, Tennessee law now allows trustees a “streamlined” method for obtaining a release from liability by allowing the trustee, upon such trustee's removal or resignation, or upon the full or partial termination of the trust, to simply send a notice.

If the notice includes the information required under T.C.A. § 35-15-817(c) (including a statement of the fair market value of the trust's assets and liabilities; fees and expenses paid, taxes paid, and distributions made over a certain time period; and the trustee’s contact information), and if the notice is sent to the persons listed in T.C.A. § 35-15-817(d) (including the grantor, if living, and each qualified beneficiary), then the person receiving the notice has 45 days to notify the trustee of an objection to the notice. If a person does not object within 45 days, the trustee is relieved from any liability for the time period covered by the notice, and that person is generally barred from contesting the validity of the trust, bringing a claim of breach of trust against the trustee, or bringing a claim of breach of fiduciary duty against a co-trustee, trust advisor, or trust protector for failure to object to the trustee's notice. If a person does object within 45 days, the trustee must default to one of the other two options for obtaining a release.

Importantly, the notice is *presumed* to have been received 10 business days after the date of mailing. T.C.A. § 35-15-817(k). Conceivably, this means a beneficiary or grantor could be time barred from contesting the validity of a trust or bringing a claim of breach of trust against a fiduciary 55 days after the trustee sends the notice to that person, regardless of whether that person *actually* received the notice.

In light of this new law, if you are a beneficiary or grantor of a trust, it is important to ensure the trustee has your current contact information on file. Additionally, if you receive a notice like the one described here, you should immediately seek counsel on whether a response is warranted, lest your rights be time barred.

As Tennessee continues its pursuit of being a leading trust jurisdiction in the country, beneficiaries and grantors of trusts need to remain cognizant that their rights are subject to change. Please contact us if you wish to discuss further.

Presentations and Seminars

Our attorneys at Kennerly Montgomery regularly provide seminars on current legislative issues and hot topics for our clients, both in our office and at client sites.

We also regularly present at conferences and learning courses for fellow professionals.

If you have any interest in setting up a seminar for your business or want to attend one of our next in-house seminars, please email glemons@kmfpc.com

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