Kennerly, Montgomery & Finley, P.C.

KM Newsletter

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100 YEARS

Articles in this edition:

Kennerly, Montgomery & Finley, P.C. Celebrates 100 Year Anniversary

2016 marks our 100th year of the practice of law in Knoxville. Our firm origins go back to 1916 to the days of Donelson and Montgomery. The firm and its name evolved since then, and since 1985 has been Kennerly, Montgomery and Finley, P.C. Three of our current shareholders have been practicing with the firm since that time. During these many years we've been fortunate to have many great lawyers practice in the firm and many repeat clients. Our involvement in Knoxville and East Tennessee has been long-standing and varied. Since the early days our firm has been known for handling litigation matters in state and federal courts and also has been involved in representation of clients in virtually all aspects of the practice of law. Warren Kennerly helped create the Knoxville Utilities Board in 1939, and was its long-time general counsel until his retirement. Through the years the firm has continued representation of governmental clients and been involved in significant undertakings in Knoxville, including assisting clients involved in businesses operating at the 1982 World's Fair, development of major downtown office buildings, Knoxville's first waterfront restaurant, the Knoxville Convention Center, and downtown redevelopment. In addition, through the years we have represented lenders and financial institutions, governmental bodies and utility companies, private and publicly held businesses, and numerous individuals in their legal matters be it simple or complex. As we mark our hundred years of practice in Knoxville, we express our gratitude for the clients we serve and those lawyers who have come before us and the proud legacy they have left us.

Business Held Liable for Third Party Criminal Acts

By Jack M. Tallent, Esq.

A Davidson County, Tennessee jury earlier this month awarded Erin Andrews $55 million against an individual and a hotel franchisee after the individual videotaped Ms. Andrews through the peephole in her room door. This case highlights that business owners can be held responsible for crimes committed by third parties against guests on the business's premises. In the Andrews case, the jury found the perpetrator 51% at fault; however, the jury also found the hotel to be 49% at fault under Tennessee's comparative fault system, leaving a whopping judgment against the hotel of $26,950,000.

Until the mid-1990's, the Tennessee Supreme Court had held that businesses did not have a duty to protect their customers from the criminal acts of third parties unless the business knew or should have known that a criminal act was occurring or about to occur that posed an imminent probability of harm to its customers. In 1996, the Supreme Court abandoned that approach and greatly expanded the duty of business owners to protect their customers from criminal acts of third parties. The Court determined that a business has a duty to protect its customers from criminal acts of third persons if the business knows or has reason to know that criminal acts against its customers on its premises are reasonably foreseeable. Thus, the Court has adopted a balancing test as to whether or not a business should have foreseen that its premises might have become the scene of the particular crime and therefore should take steps to protect its potential customers or members of the public.

In the Erin Andrews case, there was evidence introduced that the perpetrator had contact with hotel personnel such that they knew or should have known that a criminal act was about to occur.

This case is a reminder that businesses cannot neglect what is occurring on or about their premises. Businesses should be mindful of criminal acts occurring in the vicinity of the business's premises and, if foreseeable, use reasonable care to protect customers and potential customers from harm.

Jack Tallent has participated in several cases involving criminal assaults on business guests over the years as part of his civil litigation practice. If you have any questions about premises liability issues, call him at (865) 546-7311 or email jtallent@kmfpc.com.

New Law Brings More Clarity and Flexibility to Church Plans

By Kathy D. Aslinger, Esq.

As part of the federal budget deal signed into law on December 18, 2015, Congress passed a number of tax provisions, known as the Protecting Americans from Tax Hikes Act ("PATH ACT"). Included in the PATH ACT are some significant legislative changes for church plans. Those changes (1) allow church plans to have automatic contribution arrangements; (2) permit transfers and mergers between church 401(a) and 403(b) plans; (3) clarify the application of the controlled group rules to church plans; (4) modify the 415 Rule for grandfathered defined benefit 403(b) plans, and (5) clarify that church plans can invest in a group trust. This article focuses on automatic contributions arrangements.

An automatic contribution arrangement is a retirement plan feature in a defined contribution plan under which an employee who is eligible to participate in the plan but fails to make an affirmative salary deferral election is automatically enrolled in the plan and treated as having elected to contribute a predetermined percentage of the employee's compensation. The plan sponsor must provide notice to participants of the right to elect a different deferral percentage or to elect not to contribute, and must provide a reasonable period of time after providing the notice and before the first automatic deferral is made for the participant to make a different election. If no affirmative investment election is made, contributions will be invested in a default investment option.

A "church plan," in broad terms, is a retirement plan established and maintained for its employees by a church or by a convention or association of churches that is exempt from tax under Internal Revenue Code ("Code") § 501. A church plan might be a "qualified" plan under Code Section 401(a), or an annuity plan under Code § 403(b).

A majority of church plans are exempt from the Employee Retirement Income Security Act of 1974 ("ERISA"), which supersedes most state laws relating to employee benefit plans. This means that church plans may be subject to state laws affecting payroll withholding, which, without ERISA preemption, could be interpreted as preventing church plans from withholding deferrals without an affirmative election by the employee.

Section 336(c) of the PATH Act states explicitly that it "shall supersede any law of a State . . . that would directly or indirectly prohibit or restrict the inclusion in any church plan . . . of an automatic contribution arrangement." This preemption opens the door for church plans to take advantage of provisions that have proven extremely beneficial to employees participating in ERISA plans, as automatic contribution arrangements have significantly increased plan participation and retirement savings of affected participants.

Kathy D. Aslinger commonly assists clients in maneuvering through the complex world of audits, fiduciary liability issues, DOL and IRS compliance, HIPAA, COBRA, ERISA and state law obligations, as well as Affordable Care Act compliance. If you have questions or for more information, please call Kathy Aslinger at (865)-546-7311 or email kaslinger@kmfpc.com.

Tennessee For-Profit Benefit Corporation Act

By Brittany Brent Smith, Esq.

Effective January 1, 2016, Tennessee corporations can be formed under the "For-Profit Benefit Corporation Act" (the "Act"). A corporation organized under the Act must be managed in a manner that considers the best interests of those materially affected by the corporation's conduct, including the pecuniary interests of shareholders, and the public benefit or benefits identified in the corporation's charter.

The Act defines a "public benefit" as a positive effect, or a reduction of negative effects, on one or more categories of persons, entities, communities, or interests (other than shareholders in their capacities as shareholders), including, but not limited to, an artistic, charitable, cultural, economic, educational, environmental, literary, medical, religious, scientific, or technological effect.

The corporation's charter must include a statement regarding the purpose or purposes for which the corporation is organized, including one or more public benefits to be pursued by the corporation. An existing corporation organized under the Tennessee Business Corporation Act may amend its charter to include a "public benefit" statement and therefore become subject to the Act upon the approval of two-thirds of the outstanding shares of each class of stock of the corporation. Any stock certificate issued by a for-profit benefit corporation, and any notice sent by a for-profit benefit corporation, must conspicuously state that the corporation is a for-profit benefit corporation subject to the Act.

Directors of for-profit benefit corporations are expressly required by the Act to consider the effects of any transaction on the interests of those materially affected by the corporation's conduct, including the pecuniary interests of shareholders, and the public benefit or benefits identified in its charter. Directors of corporations formed under the Act shall not give priority to the interests of any individual constituency or limited group of constituencies materially affected by the corporation's conduct, including the pecuniary interests of shareholders.

In addition to the requirement to file an annual report with the Tennessee Secretary of State applicable to all Tennessee corporations, a for-profit benefit corporation must also deliver to its shareholders an annual benefit report describing (1) the ways in which the corporation pursued the public benefit or benefits stated in its charter, (2) the extent to which the public benefit purpose or purposes were pursued or achieved, and (3) any material circumstances that hindered efforts to pursue or achieve the public benefit or benefits. The annual benefit report must be posted on the public portion of the corporation's website, if any, or provided, without charge, to any person who requests a copy.

The for-profit benefit corporation's charter or bylaws may require that the corporation obtain a third-party certification addressing the corporation's promotion of the public benefit or benefits identified in its charter, such as the B Corp certification offered by B Lab. Examples of companies that have obtained B Corp certification include Patagonia, Inc., The Honest Company, and Ben and Jerry's.

Brittany Brent Smith assists business and corporate clients with a range of business planning and operations services, including establishing, organizing, and maintaining their entities. If you have questions about the "For-Profit Benefit Corporation Act" or for more information on Corporate Law, please call Brittany Brent Smith at (865)-546-7311 or email bsmith@kmfpc.com.

Estate Planning to Avoid Probate

By Michael R. Crowder, Esq.

"Probate" is the process of transferring a decedent's property to a successor owner at death, under the supervision of a court. If the decedent left a will, the court will admit the will to probate and appoint an executor to administer the assets in accordance with the terms of the will. If the decedent did not leave a will, then the court will appoint an administrator to administer the assets in accordance with Tennessee's laws of intestate succession.

Not all property is subject to probate administration at a decedent's death. Only property that requires the legal process to transfer clear title to a successor owner at death is considered "probate property." Some property, on the other hand, passes automatically (by contract or by operation of law) to a successor owner at death, and so is not required to go through probate.

Often times, probate is not desired. It can be more costly and more time consuming than not going through probate. Fortunately, if the decedent's estate consists only of non-probate assets, probate can be completely avoided and the family can still gain access to a decedent's assets.

There are multiple ways for an individual to plan their estate so as to avoid probate. One such way is to own property jointly with someone else. If the ownership includes a right of survivorship, then title to the property automatically passes to the surviving owner when the other owner dies. Probate is not necessary to transfer the property. This can work well with real estate, vehicles, bank accounts, or other valuable property.

Another way to avoid probate (that may provide additional protections and advantages over owning property jointly) is to put property in trust. A trust is an arrangement by which the owner of property transfers legal title to a trustee who manages the trust property for the benefit of one or more beneficiaries. The property in trust passes in accordance with the terms of the trust instrument, and therefore the trustee is able to transfer it to the beneficiaries without going through probate.

There are many types of trusts. For example, in recent years Tennessee has approved:

- **Community Property Trusts**: Available for married couples and allows both spouses' ownership in the community property to receive a step up in basis to the fair market value of the property upon the first spouse's death. This enables the surviving spouse to sell the property without incurring any capital gains tax;
- **Marital Asset Protection (MAP) Trusts**: Available for married couples and retains the asset protection qualities of tenancy-by-the-entirety ownership even after the first spouse's death; and
- **Tennessee Investment Services (TIS) Trusts**: A self-settled spendthrift trust that protects an individual's assets from creditors.

If you have any questions about planning your estate, please contact us.

Michael Crowder works primarily in the firm's trust & estate planning and business & corporate law practices. For more information, please contact Michael Crowder at (865)-546-7311 or email mcrowder@kmfpc.com.

Reimbursement of Employee Expenses

By Ben D. Cunningham, Esq.

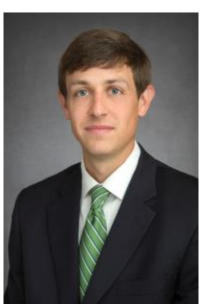
As a general matter, employers are not required to reimburse their employees for any expenses incurred in connection with their work. However, just because employers are not required to reimburse employees does not mean that they shouldn't.

While not required, employers are allowed to reimburse their employees for business expenses, including travel reimbursements and, in fact, are arguably encouraged to do so by the IRS. Thus, the primary reason employers should reimburse their employees' expenses is that the IRS allows a business to deduct legitimate business expenses when calculating its income for tax purposes. According to IRS Publication 535, to be deductible, "a business expense must be both ordinary and necessary. An ordinary expense is one that is common and accepted in your industry. A necessary expense is one that is helpful and appropriate for your trade or business. An expense does not have to be indispensable to be considered necessary."

Travel expenses are one of the most common legitimate business expenses claimed by employers. The easiest way to reimburse for miles driven by your employees is to use the IRS mileage rate that the IRS publishes annually. The IRS rate is adjusted annually for inflation and takes into consideration the insurance, maintenance, licensing and fueling costs of vehicles. Because the IRS rate takes these considerations into account, employers do not have to document separate vehicle use costs. All that is required is that the employer maintain records of the dates, mileage and reasons for the business travel in order to establish the legitimacy of the tax-exempt reimbursement.

For employers who do not reimburse employee expenses, one potential pitfall is the Fair Labor Standards Act's mandate that wages be paid "free and clear." If an employee is required to return some portion of wages – whether directly or indirectly – and that "kickback" puts the employee's hourly rate below the minimum wage, then the employer has violated the FLSA. For employers employing individuals at or near the minimum wage, it only takes a minor expense to create a problem. For instance, an employee working 40 hours a week making $8.00 per hour needs to incur just 6 dollars per day in expenses for the kickback to take his or her wage down to the federal minimum wage.

In conclusion, while the general rule is that an employer does not have to reimburse its employees for business expenses, it likely makes better business sense to do so. Not only will employee morale increase but the employer will receive a tax benefit at little to no additional cost to the employer. In addition, if the employer has any employees at or close to the federal minimum wage, by reimbursing expenses, the employer removes any chance that it may involuntarily reduce the employee's earnings below minimum wage and thus incur potential FLSA liability.



Ben Cunningham focuses his practice on representing businesses and individuals in the areas of business and corporate law, labor and employment law, civil litigation and appeals, and construction law. If you have questions about reimbursement requirements or for more information on employment law, please call Ben Cunningham at (865) - 546-7311 or email bcunningham@kmfpc.com.

Upcoming Programs

Kennerly Montgomery routinely produces programs on topics of current interest. All programs last one hour and are free and open for all clients and friends. If you or someone you know would be interested in attending any or all of these programs, we would be glad to have you. Click here for more information on these programs and to view materials from previous seminars.

Employers

Family Medical Leave Act
Affordable Care Act
Retirement Plan Legislation
QDROs for Government Employers

Workers' Comp

Tennessee Workers' Compensation Reform Act of 2013
Working with employees on workers' comp claims
How workers' comp affects hiring and firing employees

Independent Contractors

New rules on determination of Independent Contractors vs. Common Law Employees

Overtime

Fair Labor Standards Act proposed changes on overtime

Tax-Exempt Entities

Retirement plans for exempt entities
Special rules under §§ 403(b), 457, 409A
Common errors & corrections

Churches

Legal organizational and governance structure
Steps to limit personal liability of church volunteers
Retirement plans of church-related organizations

Kennerly Montgomery is a general practice law firm providing diverse professional services for 100 years both inside and outside the courtroom to a wide variety of individual, corporate and governmental clients. Our attorneys practice in all state and federal trial and appellate courts, as well as before administrative boards and panels and alternative dispute tribunals. We provide assistance in a variety of areas, including business and corporate law, governmental affairs and public utilities, employment law, worker's compensation, construction law and litigation, employee benefits, civil litigation and appeals, insurance defense and coverage litigation, taxation, wills and estate management, real property, healthcare, insurance defense and governance for churches and church-associated entities, technology transfer, and intellectual property.

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