Kennerly, Montgomery & Finley, P.C.

KM Newsletter

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Articles in this edition:

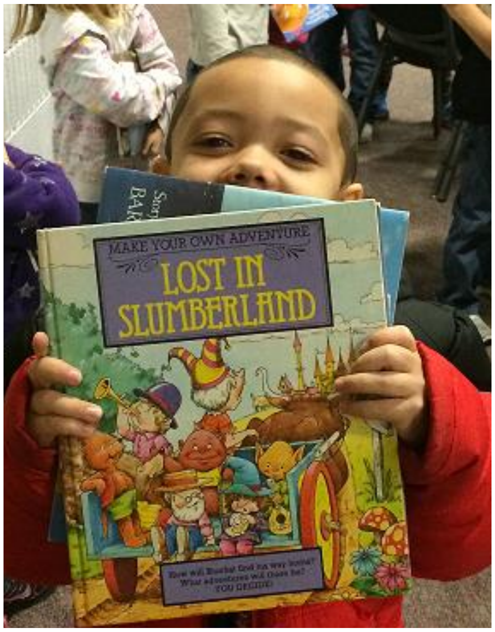
Christenberry Kids Reading Program

Llama Llama Red Pajama, Cat in the Hat, and Curious George are not titles you would ordinarily find in a law firm's library, but at Kennerly Montgomery these books, along with many others, can be found right alongside Black's Law Dictionary and the Tennessee Code Annotated. Although our attorneys have been known to enjoy tales of princesses, pirates and dinosaurs, these books are actually for the benefit of the kindergarten class at Christenberry elementary school.

As a firm, we decided the idea of children in our community without books was simply unacceptable and decided to "adopt" Christenberry's kindergarten class. Our goal is to inspire a community of readers by giving children the opportunity to succeed through literacy.

Our attorneys and staff work hard year-round to collect new and used "level one readers" and other age-appropriate children's books for our kindergartener's. Since 2013 we have been distributing our collection of books to the school every nine weeks. To date, we've distributed about 5,000 books to 500 kids!

If you would like to learn more about our book project, please contact Ashley Trotto at 865-546-7311 or atrotto@kmfpc.com.



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Is Your Company Part of a Controlled Group or Affiliated Service Group?

By Kathy D. Aslinger, Esq.

Knowing This Answer Is Vital To Proper Administration Of Your Employee Benefit Plans.

Each year you receive a questionnaire from your company's health insurance provider or the third party administrator for your retirement plan, and one of the questions is whether your company is part of a controlled group or an affiliated service group. You think the owner of your company has some ownership interests in other companies, but you know your company operates independently, so you answer the question "no" each year. If, however, you answer incorrectly, you may create significant issues for your health and retirement plans.

The Internal Revenue Code ("Code") requires qualified retirement plans, such as 401(k) plans, to pass certain coverage and discrimination tests that include all the employees of all members of the controlled group or affiliated service group. The results of those tests may impact the contributions an employer is required to contribute to the plan, the classifications of employees covered by the plan, and the amount employees are eligible to defer to the plan.

Additionally, the Affordable Care Act ("ACA") requires employers with at least 50 full-time or full-time equivalent employees to offer health coverage to each of its full-time employees and their dependents. The failure to offer health coverage can result in significant penalties to the employer.

When determining whether an employer has at least 50 full-time employees under the ACA or whether an employer must be aggregated with other employers for retirement plan purposes, an employer must look at the rules under Code §§ 414(b), (c), (m), or (o), which describe controlled groups of corporations, entities under common control, and affiliated service groups. This article will focus only on controlled groups and entities under common control.

Two or more corporations or entities are treated as a controlled group or under common control pursuant to Code §§ 414(b) or (c) if (1) at least 80% of each entity is owned by a common parent (a "parent-subsidiary" controlled group) or (2) the same five or fewer individuals, estates, or trusts have both a controlling interest and effective control of the entities (a "brother-sister" controlled group). The same owners have a controlling interest when they own at least 80% of the entity and effective control when they own more than 50% of the entity, considering each person's ownership only to the extent that it is identical with respect to each entity. Code § 1563(a)(2), (f)(5); Treas. Reg. § 1.1563-1(a)(3)(ii).

For example, assume Bob and Sally each own 40% of Corporations A and B, and Susan owns 20%. Bob runs Corporation A, Sally runs Corporation B, and Susan just collects dividends. These seemingly independent corporations are in a brother-sister controlled group because the same group of five or fewer individuals has both a controlling interest and effective control. If each corporation has 30 full-time employees, then each corporation must offer health insurance or face penalties under the ACA because the combined corporations have over 50 full-time employees. Additionally, the combined employees must be included in the annual testing of any retirement plan sponsored by either corporation.

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.

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Rollovers as Business Startups (ROBS)
Viable Funding Option or Terrible Retirement Plan?

By Zack R. Gardner, Esq.

You have scrimped and saved your money over the years and now your 401(k) or IRA is looking pretty good. You have always wanted to own your own business but lacked the startup money necessary to do so. You have now read about this "ROBS" thing online and think that maybe that is the solution to your startup funding problem. But, you need a little more information before you act.

Generally speaking, here is how Rollovers as Business Startups (ROBS) work: you incorporate a new C corporation, the corporation sets up a qualified retirement plan (usually a profit-sharing plan), and the plan contains terms allowing investment in employer stock. Next, you enroll in the plan and rollover your 401(k) or other retirement account into the corporation's new qualified retirement plan. That plan, under your direction, buys shares of stock in the corporation whereby the plan becomes the owner of the new business.

The transaction described above avoids immediate taxation of the funds rolled over into the new qualified retirement plan and provides the necessary funding for the new company.

You might be thinking "That sounds great, sign me up!" Wait one second though, you do not have all the facts. Unfortunately, ROBS are not the panacea ROBS promoters would have you believe they are. In fact, ROBS could lead to a host of problems including putting your retirement funds at risk of complete loss.

First, ROBS puts all of your retirement eggs in one basket—instead of having a diversity of investments able to weather the ups and downs inherent to the stock market, you have a single investment in a startup company. Startup companies, regardless of how they are funded, are risky ventures carrying a substantial risk of failure. This is not something to be taken flippantly.

Second, your ROBS business will face increased IRS and/or Department of Labor scrutiny. The IRS has stated, very clearly, that it does not have a favorable view of the entire ROBS concept. If the IRS comes knocking, it will attempt to "unwind" the ROBS transaction and treat the entire value of the rollover as taxable and levy additional excise taxes if applicable. This risks not only your business but your financial future.

Last, related to the increased scrutiny, you will have increased costs associated with the ROBS business. These include increased fees related to forming your business, fees related to audits, and fees related to simply running your business. ROBS promoters will charge fees to help form your business. Attorneys and accountants will charge fees for professional services both for recurring issues and single-event issues. Single-event fees may go towards defending your business against the IRS or DOL while recurring fees will include services related to annual filing requirements for the plan and the corporation, appraisals, and general corporate governance. Ultimately, these fees will make the ROBS business more costly than a similar non-ROBS business.

This is by no means a comprehensive article about ROBS, but it should serve as a brief introduction to what ROBS are and why you might want to think twice before forming a ROBS business.

Zack R. Gardner assists nonprofit and tax-exempt entities with forming their organizations, and obtaining and maintaining their nonprofit and tax-exempt statuses. If you have questions about nonprofit issues or for more information, please call Zack Gardner at (865)-546-7311 or email zgardner@kmfpc.com.

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President Trump's Tax Reform Proposal: An Overview

By Ashley N. Trotto, Esq.

On April 26, 2017, White House officials outlined President Trump's latest tax plan. The plan is, for now, only about 200 words long. But, if implemented, would dramatically change the way individuals and businesses pay taxes.

The stated goals of the plan include: growing the economy and creating jobs, simplifying the tax code, providing relief to American families with an emphasis on the middle class, and lowering the business tax rate from one of the highest in the world to one of the lowest.
For individuals, the plan would:

- Reduce the number of income tax brackets from seven to three: 10%, 25%, and 35%.
- Double the standard deduction, while eliminating most others except for the home ownership (mortgage interest deduction) and charitable deductions.
- Repeal the Alternative Minimum Tax, the estate tax (aka "death tax"), and the Affordable Care Act's additional 3.8% tax on investment income.
- Provide tax relief for families with child and dependent care expenses.

For businesses, the plan would:

- Reduce the corporate tax rate to 15%.
- Assess a one-time tax on the trillions of dollars held by overseas corporations.
- Move to a "territorial" tax system, in which businesses would only pay tax on income earned in the United States.

The outline provided that throughout the month of May, the Trump Administration would hold "listening sessions" with stakeholders to receive input on the proposed plan and would continue to work with the House and Senate to develop the details of a plan that "provides massive tax relief, creates jobs, and makes America more competitive – and can pass both chambers."

It is not yet clear when Congress will introduce legislation born from the plan described above, or from an entirely new outline, but Treasury Secretary Steven Mnuchin has publicly stated that he wants to see a tax reform bill passed by the end of the year.

Ashley N. Trotto practices in the areas of ERISA law, pension plans, and employment law. Ms. Trotto assists both private and governmental clients in the design, implementation, and maintenance of their employee benefit plans and specifically health and welfare benefit plans. Ms. Trotto focuses much of her time on assisting clients with issues related to health plan compliance. If you have questions or for more information, please call Ashley Trotto at (865)-546-7311 or email atrotto@kmfpc.com.

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Recent Changes to Estate Planning & Probate Laws

By Michael R. Crowder, Esq.

On May 4, Governor Haslam signed into law a new "omnibus" probate bill, which makes several changes to Tennessee law in the areas of wills, estates, and trusts. These changes may have an impact on your estate plan. Some key changes include:

A new law is added which authorizes the use of a memorandum, separate from a Will, to dispose of a person's tangible personal property at their death. We have commonly included a provision in our Wills asking the executor to respect any memorandum that the testator leaves behind regarding the disposition of his/her tangible personal property, but there has always been a question as to whether such memorandum was legally binding under Tennessee law. This new law addresses that issue, and provides that a Will may refer to a written statement or list to dispose of items of tangible personal property not otherwise specifically disposed of by the Will (other than money, evidences of indebtedness, documents of title, securities, and property used in a trade or business).

To be admissible as evidence of the intended disposition, the memorandum must be either in the handwriting of the testator or signed by the testator; be dated; and describe the items and the recipients of those items with reasonable certainty. It may be prepared before or after the execution of the Will and may be altered by the testator after its preparation, provided that the testator signs and dates the alteration.

Note that the executor of an estate is not liable for any distributions of tangible personal property that are contrary to such memorandum if the executor did not have actual knowledge of the memorandum. It would be wise, therefore, to keep such memorandum with, or physically attach it to, your Will.

Another new law is added pertaining to the funding of revocable trusts. This new law clarifies that actual steps must be taken to transfer property to a trust. For example, a deed must be recorded or an asset registered in the name of the Trustee. If an asset is capable of registration, a simple recital or declaration in the trust instrument that the asset is a trust asset will not be sufficient to transfer the asset to the trust.

Other changes include, but are not limited to: (1) suits for establishing a paternal relationship for purposes of inheritance have been extended to inheritances under a will or trust (where formerly it applied only to inheritances by intestate succession), and now such suits must be brought within the earlier of the probate creditor period (generally four months from publication of notice to creditors) or one year after the father's death; (2) a clarification that a disclaimed gift or power passes back to the donor or creator, whereas before the law was silent in this regard; and (3) a new rule which provides that when a personal representative files a claim against the estate it is administering, it must provide the probate clerk with the names and addresses of each residuary beneficiary, and the clerk is then required to send a copy of the claim to each residuary beneficiary within five days.

Michael Crowder works primarily in the firm's estate planning, and business & corporate law practices. If you have any questions or concerns about how these changes may impact your estate plan or probate administration, or about estate planning generally, please contact Michael R. Crowder at (865)-546-7311 or email mcrowder@kmfpc.com.

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