MOVING? COME OUT ON TOP WHEN NEGOTIATING YOUR OFFICE LEASE

Jane M. Myers, Esq.

Typically, the most expensive transaction you will enter into in your professional life will be the lease for your office space. Depending on the amount of space and its location, it is not unusual for business owners to spend hundreds of thousands, and sometimes millions of dollars over the lease term for rent, build-out expenses, real estate taxes and escalations, utilities and other lease costs. Companies are routinely required to deposit a hefty cash security deposit - commonly four months rent or more, and the company's principals are required to personally guarantee the lease.

With that in mind, what should the savvy business owner be aware of in order to come out on top when negotiating a commercial lease?

1. Industry Jargon. Don't be fooled. No matter what anyone says, there is no such thing as a "standard form lease". There are many pre-printed lease forms that landlord attorneys choose from to which extensive customized lease riders are annexed. Do not be misled by industry jargon. For example, when negotiating the extent to which the tenant will be responsible for expenses do not use terms like "net", "net net" or "triple net" lease - different minds can have different interpretations of what these terms mean. Express the business terms in plain English.

2. Use. The Use Clause in the lease provides the landlord with a means of controlling the activities conducted upon its property. An architectural firm whose lease specifies that the premises may be used "solely for architectural offices and for no other purpose" may find itself in trouble if it needs to sublet the space and cannot find another architectural firm as a substitute tenant. The better practice is to include the words "or general executive/administrative offices", or try for "any lawful use" in the Use Clause.

3. Term. There is a risk if the space you intend to lease is presently occupied by another tenant. Will they vacate before your current lease expires? Give the landlord "incentive" to have your new space ready on time by including a financial penalty for each day of landlord's delay, or require the landlord to provide temporary quarters, or at the very least, to pay for your move to temporary quarters. Be sure to include an outside date of cancellation by the tenant if the landlord is unable to deliver vacant possession by a specific date.

4. Option to Extend the Term. Options are advantageous to the tenant since the tenant controls whether or not it will extend the term. However, pay attention to lease language that will insist on specific advance notice from the tenant if the tenant intends to exercise the option; if the tenant misses the date, it will be out of luck.

5. Pass-through Operating Expenses. Typically, the tenant will pay its "proportionate share" (percentage) of the increase in real estate taxes over a base year. There are many issues the tenant should consider when negotiating the payment of taxes, but the two important issues are determining the tenant's proportionate share and defining the base year. Landlords use "interesting math" when calculating a tenant's proportionate share. Do all the tenants' percentages add up to more than 100%? Be aware of pass-through expenses for utilities, insurance, compliance with building codes, statutes and especially environmental regulations.

Other potential pitfalls include alterations and construction of the space, mitigation of damages (in New York there is no legal requirement for a landlord to re-let commercial premises after a tenant defaults), security deposits and "good guy" guaranties, insurance and indemnity issues, responsibility for maintenance and repair of the premises, and be aware of the availability of economic incentives offered to tenants through city and state programs.

Lastly, never sit down at the negotiating table without the ability to get up and walk away. Give yourself twice as much lead time as you might think you need to relocate. With time on your side, and without being pressed for the necessity to reach an agreement, you will come out on top when negotiating your office lease.

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HOW TO GET THE MOST OUT OF YOUR RETIREMENT

Deborah S. Barcham, J.D., L.L.M.

Planning on retiring in five, ten or even fifteen years? It is never too early to begin planning for your retirement. While many executives, professionals and small business owners are familiar with qualified deferred compensation plans such as qualified pension, profit sharing and stock bonus plans permitted under Sect. 401 of the Internal Revenue Code of 1986, many are not aware of nonqualified deferred compensation plans or arrangements that can provide significant additional benefits on retirement to highly compensated individuals.

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Due to dollar limits imposed by ERISA on pension and profit sharing plans, a highly compensated employee is often limited in the amount he can put away for retirement. However, he can use a nonqualified deferred compensation arrangement to save additional amounts for retirement without any dollar restrictions. A nonqualified deferred compensation plan or arrangement allows an employee to defer a portion of his current compensation with no current tax thereon. The offset is that he will be taxed on it at a later date when actually received. The deferral is valuable in that it permits the deferred amount to grow on a pretax and tax deferred basis.

Nonqualified deferred compensation plans must be unfunded in order to defer the taxation of the income to the employee. This means that the employer's promise to pay the deferred compensation at a later date, such as on retirement, must be unsecured and the obligation must be paid by the employer from its general assets. A benefit to the employer of this arrangement is that the employer has the use of the deferred amounts in the interim.

Employers frequently opt not to use the funds, but to set them aside in a bank account, brokerage account or in an insurance or annuity contact so as to provide them with funds with which to pay the deferred compensation. These assets must, however, be subject to creditor claims. A popular method of funding deferred compensation plans is through the use of "rabbi trusts", which trusts will hold and invest funds contributed by the employer until the time for payment arrives. While the funds are not protected against creditor claims, segregation of the assets through rabbi trusts helps assure employees that their employers will have the assets to pay the promised benefits. In some cases the employees are allowed to exercise control over investments, although rabbi trusts will not protect the trusts in the event of the employer's bankruptcy.

There are, broadly speaking, two types of nonqualified deferred compensation plans. In one, the "account balance plan", the employee is credited with a fixed sum, such as deferred salary or bonus plus the earnings thereon, that will be paid at some time in the future. In the second type, the "non-account balance plan", the benefit is stated in terms of a stream of payments, similar to that of a pension plan. Non-account balance plans are usually designed to supplement benefits under pension plans.

The American Jobs Creation Act of 2004 significantly affected the area of deferred compensation. The new law added Sect. 409A to the Internal Revenue Code, which among other things imposes restrictions on stock bonus plans, stock appreciation rights, acceleration of benefits in deferred compensation plans, the ability to protect assets in offshore trusts or to put assets in a trust that become protected upon a change in the financial condition of the company. If these new changes are not

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ESTATE PLANNING IN THESE UNCERTAIN TIMES

Mark S. Charwat, J.D., CPA

It is widely recognized that the federal estate tax laws must and will be revised. The current law was enacted in early 2001 shortly after President Bush was first elected President. At that time the United States enjoyed a budget surplus in the area of $400 billion, and Alan Greenspan, Chairman of the Federal Reserve, advised Congress that he contemplated that in approximately 15 years the entire federal debt would be paid off and eliminated!

The economic outlook was particularly rosy in early 2001. Therefore, noting the budget surplus and at the urging of President Bush, Congress promptly passed a $1.4 trillion dollar tax cut, which included a substantial reduction in estate taxes. However, to conform to budgetary restrictions the estate tax reduction was limited to the following 10 years.

Briefly, the exemption from the federal estate tax was increased to $1 million for 2002 and 2003, $1.5 million for 2004 and 2005, $2 million for 2006, 2007 and 2008, $3.5 million for 2009, and in 2010 the federal estate tax is to be revoked. However, in 2011 and thereafter the federal estate tax is to be reinstated with an exemption of only $1 million!

As a result of the provisions for revocation and then reinstatement of the federal estate tax, it is generally accepted that in the next several years the estate tax laws will be revised. However, it is essentially a political decision as to what changes will be made. At one time the Democrats were willing to accept an estate tax exemption of $3 to $3.5million and the Republicans were willing to accept far less than total revocation of the estate tax.

With the reelection of President Bush and the increase in Republican control of Congress, it appears that if a new estate tax law is enacted prior to the next election the federal estate tax exemption will be fixed at not less than approximately $3.5 million. This is not to say that the exemption will be increased immediately, but only that whatever exemption is fixed will apply with respect to 2009 or 2010 and thereafter. No change in the exemption for the years prior to 2009 is anticipated.

There are several reasons why full revocation of the federal estate tax does not appear plausible. A primary reason is that economic circumstances have materially deteriorated since early 2001. We suffered through a recession with major stock market losses, we are now engaged in the war on terrorism, we were involved in the war in Afghanistan and we are now deeply enmeshed in the war in Iraq. Moreover, the dollar has substantially declined relative to the Euro and many other foreign currencies and we are sustaining major trade and budget deficits. In short, the rosy economic glow of early 2001 has diminished considerably.

Another reason for doubting full revocation of the estate tax is the recognition that it would change the nature of our society. Success in America is based on work and achievement. We are a meritocracy and not a royalty. To fully revoke the estate tax, especially for persons with $50 to $100 million or more, would create a type of royalty. Moreover, many persons would view revocation of the estate tax as an effort to protect the interests of the ultra wealthy and contrary to the long term interests of our nation.

It might seem difficult to undertake estate planning during such uncertain times. However, this is not really the case. The general rule under these circumstances is to undertake such estate planning strategies as may be appropriate, but to avoid incurring any gift taxes inasmuch as the estate tax exemption may be consider-

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ably greater in the future, and as a result estate taxes may possibly be avoided. Moreover, there are many effective estate planning strategies available that will not result in gift taxes.

It is noted that some estate planning strategies not only result in estate tax savings but also in protecting assets for heirs and beneficiaries from creditors, a spouse or future spouse, the inclinations of immature children and general improvidence. Therefore, in addition to saving estate taxes, estate planning should be considered in the broader sense of serving the needs of the family and all of its various members.

THE LATEST . . .

We have a lot happening here at LBC&C.

- Marian Rice was elected to the Nassau County Bar Association Board of Directors.
- Dee Barcham is now the Chair of the Tax Law Committee at the NCBA.
- Mercedes Colwin has most recently been on the Today Show on NBC, Fox News and MSNBC as legal commentator on sexual harrasment issues.

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complied with it could negatively impact the deferral of income anticipated by such plans. Anyone who has an existing deferred compensation plan or arrangement should contact legal counsel to have their plan or arrangement reviewed to make certain that it complies with the new law that took effect January 1, 2005.

Notwithstanding the new law and the restrictions imposed, the nonqualified deferred compensation arrangement remains a very viable tool by which a highly compensated individual can significantly enhance his retirement, by not only deferring a portion of his current income but the growth on that income as well. *Now is the time to plan for your retirement!*

PLANNING FOR THE BUY-SELL AGREEMENT

Jane M. Myers, Esq.

Along with death and taxes, the only other certainty in life is that every closely held business needs a buy-sell agreement. The corollary to this rule is that regardless of whether a business is organized as a corporation, partnership or limited liability company, a buy-sell agreement should be in place to address specific events that, if they occur, will undoubtedly have a dramatic impact on the business owners as well as the future of the business itself.

Unlike a publicly traded company where the "owners" usually exercise no management or control of the business or develop personal relationships with each other, members of a closely-held company have specifically selected each other as business partners, maintain a close working relationship and are active participants in the operation of the business. Also, unlike a publicly traded company, the closely-held company does not have a public market for the sale of an owner's interest.

The owner of a closely owned business must plan in advance for the sale or disposition of his or her ownership interest. If the business of the company is to provide licensed professional services such as architecture, engineering or medicine, the market for the sale of an owner's interest shrinks even more.

For the business owner who is contemplating retirement or who becomes disabled, the looming issue becomes, "how will I get my equity out of the business?" If the business owner dies, the issue becomes what happens to the deceased owner's interest in the business? A related question is how can the remaining owners control the business ownership and avoid becoming "partners" with the deceased owner's spouse or children? In all those instances, valuation of the company and obtaining the money to purchase an owner's interest becomes a paramount issue for all concerned.

Rather than wait to address these issues when upheaval occurs, a buy-sell agreement is a planning tool that can be utilized to accomplish the following goals:

- ensuring conformity of management and control while creating a market for the shares of a deceased, retiring, disabled or withdrawing owner;
- determining who will take over as owner, so that in the event of death, retirement, disability or withdrawal, the remaining owners do not suddenly find themselves in business with the spouse or children of the departed owner;
- addressing how to handle disputes regarding growth, salaries or other business decisions;
- preventing the continued involvement of retired or inactive owners in the business;
- establishing the value of an owner's interest;
- continuing the legal existence of the business after the death, retirement, withdrawal, bankruptcy or expulsion of an owner.

The buy-sell agreement is the Rule Book for the closely-held business. It becomes activated when an owner wants to sell his or her interest, and it usually provides that the business has the right of first refusal on the same terms as a third-party offer. In many cases, the buy-sell agreement would provide that in the event of the death of an owner, the business or the remaining owners would be required to purchase the deceased owner's interest at a predetermined price and typically with life insurance purchased specifically for that purpose.

The buy-sell agreement also addresses specific retirement and disability situations, and contains a buy-out valuation formula. For professional businesses, the loss of a professional license prevents the practice of the profession by that owner and triggers a mandatory buy-out. The terms and conditions of a buy-out agreement are negotiated in advance of any problem arising. Moreover, the parties may change the terms as they may agree.

Smart business planners address these issues when everyone is in the "honeymoon" stage, not when the business is in crisis. Regardless of whether you may wish to sell your interest or to purchase the interest of a retiring, disabled or deceased partner, waiting until a problem arises may be far too late.