AUGUST 2013 NEWSLETTER

POZZUOLO RODDEN, P.C.
COUNSELORS AT LAW
THE BYE-BENSON HOUSE
2033 WALNUT STREET, PHILADELPHIA, PA 19103
215-977-8200
www.pozzuolo.com

OBAMACARE- THE MANDATES AND PENALTIES FACING PRIVATELY HELD BUSINESSES

NEWS ALERT:

Free Online CLE/CPE Credits:

Pozzuolo Rodden, P.C. is pleased to announce the opportunity to obtain free CPE/CLE credits by viewing the Lawline webcast courses previously taught by Joseph R. Pozzuolo and/or Jeffrey S. Pozzuolo titled "The Negotiation and Documentation of Commercial Financing Documents Including The Use of Convertible Loans With Put

and Call Options", "How Middle Income Families Should Plan for Retirement Including Ethics" and "The Fundamentals of Starting a Business".

* **How Middle Income Families Should Plan For Retirement** - http://bit.ly/ZvqNbr

* **The Fundamentals of Starting a Business** - http://bit.ly/13Q8dei

* **The Negotiation and Documentation of Commercial Real Estate Loan Documents-** http://bit.ly/17jfXSN

Any problems, feel free to contact Chrissy at: chrissy@pozzuolo.com

QUESTION OF THE MONTH:

How Does the Supreme Court's Recent Decision in United States v. Windsor Affect Federal Benefits for Same Sex Couples?

Answer-See Page 4 of this Newsletter

OBAMACARE- THE MANDATES AND PENALTIES FACING PRIVATELY HELD BUSINESSES

On March 23, 2010, President Obama signed into law the Patient Protection and Affordable Care Act, a.k.a. Obamacare or the Affordable Care Act. The goals set by enactment of the Affordable Care Act are to improve the quality, affordability, and rate of health insurance coverage in the U.S. and to lower the costs of healthcare for individuals and the government. These goals are to be achieved through subsidies and mandates, and through the creation of health insurance Exchanges. The law has many provisions that have either taken effect or will take effect over several years beginning in 2010. Many businesses and employers are or will be subject to these provisions as they become effective. In fact, the law will require some affirmative action to be taken by businesses.

Health Insurance Exchange Notices

One new requirement applicable to businesses under the Affordable Care Act is the employer provided Exchange notice requirement. Beginning in October 2013, employers will be required to provide notice to their employees of coverage options available through the new health insurance marketplace, or "Exchange". The Exchange will be available to individuals to enable them to purchase qualifying, affordable healthcare coverage. Open enrollment for health insurance coverage through the health insurance Exchange begins October 1, 2013 for enrollment in health coverage starting January 1, 2014.

Specifically, the Affordable Care Act requires an employer to provide written notice to all of its employees notifying them of the following:

(i) The existence of the Exchange and certain basic information about the Exchange;

(ii) That the employee may be eligible for a premium tax credit by purchasing a qualified health plan through the Exchange when that employee's employer-sponsored health insurance plan does not provide "minimum value" which will lower the cost of coverage; and,

(iii) That if the employee purchases a plan through the Exchange, the employee may lose the employer contribution to a healthcare plan sponsored by the employer and must pay premiums with after tax dollars.

Employers who are subject to the Fair Labor Standards Act (FLSA) are subject to the notice requirement. Generally, the FLSA applies to employers that employ at least one employee and who are engaged in, or produce goods for, interstate commerce. Employers with less than $500,000 in annual revenue may be exempt from the notice requirement.

Subject employers must provide the notice to all employees. They are not required to notify their employees' dependents.

Employers are required to provide the notice to each new employee at the time of hiring beginning October 1, 2013. For 2014, the U.S. Department of Labor will consider a notice to be provided at the time of hiring if the notice is provided within 14 days of an employee's start date. The notice must be provided in writing and it may be provided by first-class mail. It may also be provided electronically if certain electronic disclosure safe harbor requirements under the Department of Labor's regulations are met. There is no requirement to obtain an employee's signature for receipt of the notice.

The U.S. Department of Labor has not specified a direct penalty for failure to comply with the notice obligation. Instead, the participant has rights under ERISA to recover damages sustained as a result of the failure to receive information as directed under law.

The U.S. Department of Labor has issued two separate model notices for employers to use. One model notice is for employers with employer sponsored health plans; the other is for employers who do not sponsor a plan.

Pay or Play Mandate

The Employer Shared Responsibility provisions, a.k.a. the so called "Play or Pay" mandate, are another set of Affordable Care Act provisions which employers must be aware of. Under the Pay or Play mandate, employers with at least "50 full time employees" will face penalties if they do not offer their employees health plan coverage that meets "minimum value" and "affordability" standards. The Pay or Play mandate was initially scheduled to go into effect January 1, 2014. However, the deadline to comply has been extended until 2015.

There are a number of general rules and exceptions in determining whether an employer has "50 full time employees" for purposes of applying the Pay or Play mandate. For example, generally, a "full time employee" is an employee who is employed on average for at least 30 hours of service per week or 130 hours of service for a calendar month. Sole proprietors, partners in partnerships and 2% S-corporation shareholders generally are not considered employees for purposes of the Pay or Play mandate.

"Full time equivalent employees" are also included in the determination of whether an

employer has 50 full time employees for purposes of the Pay or Play mandate. To calculate the number of full time equivalent employees, the employer must: (i) add up the total number of hours of service for all employees who were not employed on average of at least 30 hours of service per week (up to a maximum of 120 hours of service per employee per month may be included); and (ii) divide that total number by 120. The result is the number of full time equivalent employees for the month.

To calculate whether the 50 full time employee threshold is met, the total number of full time employees must be determined for each calendar month in the previous year. In addition, the total number of full time equivalent employees for each calendar month in the previous year must be determined. The totals are added together and divided by 12. If the result is 50 or greater, then the Pay or Play mandate will apply.

Meanwhile, a plan is considered to meet the "minimum value" standard if, on average, it pays at least 60% of the benefits covered by a typical employer plan. A plan is "affordable" if the employee's share of the cost for self-only coverage under the employer's lowest cost plan is no more than 9.5% of the employee's pay.

Essentially, there are two penalties under the Pay or Play mandate. One penalty is assessed against the employer if it does not offer a health insurance plan. A different penalty is assessed where the employer fails to provide qualifying health insurance plan. The amount of the penalty will depend on why it was assessed and the number of employees the employer has. Payment of the penalty is not tax deductible either.

More specifically, an employer will be liable for the former penalty if, for any month, the employer fails to offer to all its full time employees (and certain dependents) the opportunity to enroll in a qualifying healthcare coverage plan sponsored by the employer and any of those employees is certified to receive a premium tax credit or cost sharing reduction for buying health coverage on an Exchange. This penalty is calculated according to the following formula:

$2,000 X (the number of full time employees – 30)

An employer will be liable for latter penalty if the plan it sponsors and offers to its full time employees is not "affordable" or does not provide "minimum value", such that a full time employee will receive premium assistant and credit to shop for insurance on the Exchange. This penalty is calculated according to the following formula:

The lesser of:

(A) $3,000 X (the number of full-time employees receiving premium tax credits);

or

(B) $2,000 X (the number of full time employees – 30)

A penalty calculator has been made available by the U.S. Chamber of Commerce at http://www.uschamber.com/health-reform/calculator.

Where there is a controlled group or affiliated service group of employers, all employees of the group members are counted for determining whether the group is considered an employer with at least 50 full time employees. The calculation of the penalty, if necessary, however is determined on a member employer basis as opposed to a group basis.

There is an exception to the Pay or Play mandate for "new employers". Employers who were not in existence during the entire preceding calendar year may not be subject to the Pay or Play mandate. The IRS is considering drafting a safe-harbor rule for new employers to assist them in determining whether the Pay or Play mandate will apply to them.

Although some plans may receive "grandfather" status and be exempt from requirements under the Affordable Care Act, it is likely that most businesses and plans will be subject to the Act's provisions.

In fact, it is important for employers to understand that there are many rules and exceptions to the Exchange Notice requirements, the Pay or Play mandate and many other Affordable Care Act provisions. Furthermore, many provisions are already effective and more will become effective on an ongoing basis. Compliance is important and it is important to discuss with your attorney the ramifications of these mandates and Affordable Care Act's provisions generally on your business and to develop a strategy to meet the law's requirements.

QUESTION OF THE MONTH:

How Does the Supreme Court's Recent Decision in United States v. Windsor Affect Federal Benefits for Same Sex Couples?

States, such as New Jersey, have had laws affording rights to same-sex couples, through either civil unions or marriage. However, federal law previously refused to recognize such relationships. In 1996, the United States Congress enacted the Defense of Marriage Act ("DOMA"), which in part defined "marriage" and "spouse" to exclude same-sex couples under federal law. There are over 1,000 federal laws, regulations and directives which address marital status. These federal laws and regulations provide for benefits and responsibilities for married couples relating to taxes, social security, housing, health care benefits, veterans rights and many other matters.

Recently, in United States v. Windsor, the Supreme Court of the United States examined the constitutionality of DOMA's purposeful exclusion of same-sex couples from the definitions of "marriage" and "spouse." The Court found that this exclusion caused residents in states allowing marriage of same-sex couples to have second-tier marriages and to receive lesser rights and benefits than opposite-sex married counterparts. The Court held that the purpose of DOMA was to discourage states from enacting same-sex marriage laws and to "restrict the freedom and choice of couples married under those laws if they are enacted." The Court also recognized that the children of same-sex couples were harmed financially by DOMA's limited definitions. Based on this reasoning, the Court found that DOMA was invalid and in violation of the Fifth Amendment to the United States Constitution because it does not serve a legitimate government purpose and the effect of the exclusionary definitions is to "disparage and injure" same-sex couples who have been granted marital rights by the State where they reside.

Based on the Windsor decision, married same-sex couples are now entitled to the

following federal benefits from which they were previously excluded: social security benefits, spousal retirement benefits, lump sum death benefits, tax benefits, joint income tax returns, estate tax and estate planning benefits, estate tax portability, federal employment benefits, immigration benefits and veteran and military benefits.

- If there are any legal questions you would like this office to answer in the future, please email the question to us at info@pozzuolo.com. Each month, the question with the most relevance to our privately held business clients, advisors, and friends will be answered in our monthly newsletter. The questions can relate to any of the areas practiced by this office including business planning and transactions, corporate law, commercial litigation, employment law and litigation, commercial real estate and development, construction law and litigation, estate planning, estate administration, tax and pension law, family law litigation.

PUBLICATIONS

All of the following professional publications and past newsletters written by attorneys of this office are available by clicking here: http://pozzuolo.com/Pubs Articles.shtml

- **Corporate/Tax Articles**

- Bankruptcy - How To Prevent It And How To Cope With It Should It Happen To Your Business
- Deferred Compensation Rewards And Retains Key Employees
- Design Buy-Sell Agreements For Maximum Utility
- How An S Corporation Avoids The Double Taxation Incurred When Excessive Compensation Is Treated As A Dividend
- How Mortgage Lenders Should Draft Broker Agreements To Avoid RESPA Violations
- How To Look, Act And Sound Like A Professional Corporation
- How to Structure a Suitable Buy-Sell Agreement
- How To Use Non-Qualified Deferred Compensation Arrangements As A Business, Retirement And Tax Planning Tool
- Money Purchase Pension Plan Falls Out Of Favor
- Protecting A Client's Business From Unfair Competition Using Restrictive Covenants
- Structuring Loans From Qualified Plans - How To Handle The Strict Tax Rules
- What Type of Qualified Corporate Retirement Plan Best Serves Your Business, Tax And Retirement Needs
- Why An Employment Contract Is Mandatory

- **Estate Planning Articles**

- Adapt Estate Planning Strategies to Fit the Needs of Same-Sex Couples
- College Funding Tool Offers Estate Planning Advantage

- Diversify Strategies For An Effective Estate Plan
- Divorce and Estate Planning
- Divorce Raises The Need For Performing An Estate Planning Review
- Drafting The Durable Power Of Attorney For Wealth Protection Purposes
- Estate Planning For Pet Owners
- Remarriage Situations Can Raise Special Estate Planning Considerations
- Six Proven Estate Planning Techniques
- Special Needs Trust - An Estate Planning Tool For The Disabled
- The Limited Liability Company -A Sophisticated Tool For Estate Planning
- Using Trusts To Maximize Family Protection And Minimize Estate Tax
- Why Living Wills- Advance Directives Are An Essential Part Of Estate Planning

Actual resolution of legal issues depends upon many factors, including variations of facts and state laws. This newsletter is not intended to provide legal advice on specific subjects. It is to provide insight into legal developments and issues. You should always consult with legal counsel before taking any action on matters covered in our updates.

This newsletter is courtesy of Pozzuolo Rodden, P.C.

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