BURKE, WARREN, MACKAY & SERRITELLA, P.C.

YEAR END ISSUE 2015 | BWM&S BULLETIN | VOLUME 13 • ISSUE 3

LABOR & EMPLOYMENT

USING AN OVERBROAD CONFIDENTIALITY, NON-COMPETE AND NON-SOLICIT AGREEMENT TO SCARE EMPLOYEES CAN SERIOUSLY BACKFIRE

Aaron Stanton

Most employers know that Illinois law requires them to narrowly tailor restrictive covenants in employment agreements to the specific interest(s) that the employer seeks to protect (*i.e.*, proprietary customer information and the actual customers that the employee worked with). Employers, however, often tell counsel that they do not want to pay an attorney to "narrowly tailor"

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WEALTH & SUCCESSION PLANNING

2015 YEAR-END TAX PLANNING SUMMARY

Greg Winters

Despite a great deal of commentary about the inequities and inefficiencies of the current income tax code, 2015 did not see the enactment of significant tax legislation. In fact, Congress has yet to act on a series of tax extenders (the 50-plus provisions that expired at the end of 2014 that are temporarily extended year after year). Even though there have been few changes, all taxpayers are still

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FIRM HOSTS DISCUSSION ON THE GLOBAL REFUGEE CRISIS

The firm was honored to host Herbert Quelle, German Consul General *(pictured on left)*, and Monsignor Michael Boland, President and CEO of Catholic Charities of the Archdiocese of Chicago *(pictured on right)*, for a discussion on the global refugee crisis. The discussion was held on November 23, 2015 at River Roast in Chicago, as part of the regular luncheon series on contemporary issues sponsored by the firm's Religious practice.

The world is today witness to the most dramatic mass migration since the Second World War, as millions are driven from their homelands in Syria and beyond by war and violence, creating a

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CRAIG SKORBURG

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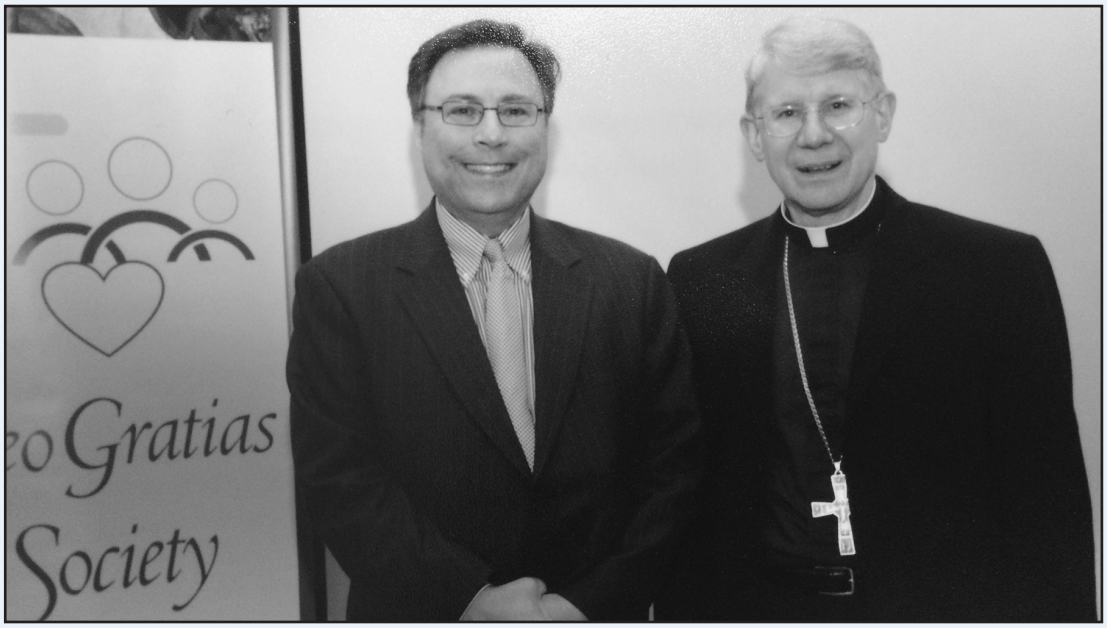
NEXT ISSUE: Client successes, the firm grows again and more.

Firm Sends Team to Chase Summit

Ed Lesniak

Susan Overbey

The Firm's Ed Lesniak and Susan Overbey were asked to present at the Chase Mortgage Banking Litigation Summit that took place in Brooklyn, New York, October 26-28, 2015. The summit was a meeting of JPMorgan Chase Bank, N.A. in-house counsel and its outside litigation counsel to review and discuss current developments in the area of mortgage banking litigation. Ed spoke on current developments in the bankruptcy law aspects of mortgage banking litigation, while Susan spoke on current legal trends and issues in the area of mortgage banking law in Illinois.



Diocese of Joliet "Deo Gratias Society" Mass and Reception

The Firm's Jim Geoly (left) with Most Rev. Daniel Conlon, Bishop of the Diocese of Joliet at the recent "Deo Gratias Society" mass and reception. The Society supports the work of Joliet Catholic Charities and other ministries.

Firm Sponsors DLC Forecast

The Firm was a sponsor of the Development Leadership Consortium's 2015 Philanthropy Forecast on November 9th at Steppenwolf Theater in Chicago.

The event, "The Evolving Landscape: Funding Public and Private Partnerships," featured (from left) Ken Modzelewski, Senior Campaign Strategist at The Trust for Public Land; Wendi Taylor Nations, Chief Marketing Officer of World Business Chicago; Donald A. Cooke, Senior Vice President for Philanthropy at McCormick Foundation; and Donna LaPietra, Civic Leader & Chairman of the Millennium Park Foundation Board.

The Firm supports the DLC through event sponsorships and other efforts. The Firm was represented at the event by a group led by Litigation partner Susan Horner who is also active in the Firm's Not-for-Profit and Planned Giving practice. For more information, please contact Susan Horner at 312/840-7082 or shorner@burkelaw.com.

New IRS Audit Rules May Complicate the Purchase of a Partnership Interest

Rich Lieberman

The Bipartisan Budget Act of 2015 (H.R. 1315) (the "Act") made important changes to the manner in which the Internal Revenue Service ("IRS") will audit and collect tax from partnerships, which includes limited liability companies classified as partnerships for income tax purposes (hereafter collectively referred to as "Partnerships"). Starting with the 2018 tax year, the IRS will assess tax due on Partnership audit adjustments at the entity level for all Partnerships, unless the Partnership elects on a timely basis not to apply the new rules. Although the new rules are intended to make it simpler and more cost effective for the IRS to audit *large* Partnerships, the bill may be a trap for unsuspecting *small* Partnerships.

Under the new Partnership audit rules enacted the week of November 2, the IRS will soon audit Partnerships in the same manner that it currently audits "C corporations." Under the Act, income tax will be assessed at the assumed highest rate and collected at the entity level. Therefore, investors interested in purchasing a partner's interest in a partnership or a member's interest in a limited liability company will be required to give consideration to the potential exposure he or she may face from an IRS audit of the Partnership for tax years prior to the investor's purchase of the interest. Specifically, following an audit, the IRS will determine the Partnership's underpayment and multiply the underpayment by the highest statutory corporate or individual rate in effect during the year the assessment is made (currently 39.6%). Of small consolation, a Partnership will be allowed to submit evidence that its partners have varying effective rates and request that a lower tax be imputed.

One positive aspect of the Act is that the partners will not be jointly and severally liable for any tax due at the Partnership level. Also, if the Partnership has tax-exempt partners, the Partnership will be allowed to demonstrate to the IRS that a portion of the adjustment is allocable to such partners, thereby allowing the IRS to redetermine the imputed underpayment accordingly.

Under the existing audit procedures, an IRS audit that increases Partnership income causes the resulting tax liability to be spread among those persons who were partners of the Partnership during the tax year under audit. The new rules stand that principle on its head and cause those persons who are partners in the year the tax payment is made to bear the economic burden of the Partnership's payment of tax, interest and penalty (and the interest on the assessment will not be deductible, in contrast to the usual rules applicable to interest payments).

One result of the new audit rules is the potential increase in out-of-pocket cost to those investors who acquire an interest in an existing Partnership either from an existing partner or even directly from the Partnership. As in the case of the purchase of a stock interest in a "C corporation" (or a membership interest in a limited liability company classified as a "C corporation" for income tax purposes), investors will be required to perform greater due diligence, including a thorough review of the Partnership's past tax filings and the quantification of potential tax exposures.

Under the Act, certain Partnerships have the option to elect out of the new Partnership audit rules. Partnerships eligible to opt out, and which do so on a timely basis, may pass through Partnership audit adjustments to the persons who were partners in the Partnership during the tax year under audit. However, only those partnerships with 100 or fewer partners (including LLCs classified as partnerships for income tax purposes that have 100 or fewer members) ("Small Partnerships") may elect out of the new rules. Unfortunately, for some Small Partnerships, opting out may be easier said than done.

This article was prepared by Firm tax partner Rich Lieberman. To continue reading, please visit the pressroom at www.burkelaw.com/PRESSROOM or visit Mr. Lieberman's bio page. Mr. Lieberman can be reached at rlieberman@burkelaw.com or 312/840-7011.

Firm's John Stephens and Jeff Warren at LAW meeting in China

The Firm's John Stephens (left) and Jeff Warren (right) join Jamie Chou from San Francisco-based Cooper White & Cooper LLP at the recent Lawyers Associated Worldwide (LAW) annual meeting in Shanghai, China. Burke, Warren was recently selected as the sole Chicago member of LAW, a global association of nearly 100 top quality independent law firms located in more than 50 countries.

Client Recognized for Student Housing Developments in Arizona and Wisconsin

Joe von Meier

The Firm would like to congratulate Core Campus on its recent completion of two significant student housing developments located adjacent to two major US universities. The company's "Hub" projects at the University of Arizona in Tucson and the University of Wisconsin in Madison were recently featured in BisNow as being among the top luxury student housing properties in the country. Both Hubs feature an array of indoor and outdoor amenities as well as exquisite architecture and interior design. Following the Core Campus development goals, both Hubs are modern buildings with modern amenities that are in tune with the needs of today's college students.

The Hub at the University of Arizona and The Hub at the University of Wisconsin both include impressive amenities that anyone, not just college students, would approve of. Each unit in both Hubs includes a private bed and bath, washer and dryer, a fully equipped kitchen and more. That's just the beginning though. Arizona's Hub includes gaming rooms, a fitness center, meeting rooms, a spa, and a rooftop with a sundeck, infinity pool, LED TV, grilling gazebo, and sand volleyball court with stadium seating. Wisconsin's Hub is just as notable with a spa, fitness center, indoor golf simulator, multipurpose rooms, climate and access controlled garage and a rooftop sundeck with a pool, LED TV, sand volleyball court, hot tubs, cabanas, and a seasonal ice rink. Beyond just the standard amenities, Wisconsin's Hub also includes upgraded individual units with dry bars, private hot tubs, and wireless sound systems.

A rooftop view of The Hub at the University of Wisconsin in Madison.

Core Campus, the student housing arm of Chicago-based Core Spaces, entered the student housing market in July 2013 with the first Hub at Arizona State University in Tempe, Arizona. The company's goal for Hub is to rethink student housing by developing living spaces designed for every aspect of college life: academics, wellness and community on multiple campuses across the nation. The company believes that students deserve all of the comforts of home — and then some, which is why they offer acquisition, development and in-house management services to deliver student housing tailored to the needs of students, parents, universities, and the local communities where they invest. The company is well on its way to changing the way people view the standard college apartment.

A rooftop view of The Hub at the University of Arizona in Tucson.

The Firm's Joe von Meier was honored to play a role in delivering Core Campus's vision for the Hub at the University of Arizona and the Hub on campus at the University of Wisconsin. Joe handled the architect's agreements and construction contracts as well as the joint venture, development and property management agreements. According to Joe, "although relatively new to the market, Core Campus has carved out a niche as the country's leading student housing developer and its rapid growth and successful delivery of multiple projects proves that its business model is poised for success in the years to come."

For more information on related matters, please contact Joe von Meier at jvonmeier@burkelaw.com or 312/840-7063.

International Sales Contracts

Fred Mendelsohn

Josh Cauhorn

Businesses large and small now routinely buy and sell goods across oceans and international boundaries. Often, the business people involved may not speak the same primary language and the contracts they enter can be as simple as an e-mail exchange. They may also fail to take into account many of the intricacies of international law.

The United Nations recognized the importance of these issues in the 1980s, when it prepared the Convention on Contracts for the International Sale of Goods ("the CISG"). The CISG has now been ratified by 83 countries including the world's largest economies. Because it governs a significant proportion of world trade, the CISG is proving to be one of the most successful economic treaties to date. It is therefore important for companies conducting business internationally to understand how the CISG affects international goods transactions.

Generally, the CISG governs contracts for the sale of goods between businesses located in separate signatory countries. Article 6 of the treaty provides flexibility where parties may exclude the CISG entirely or "derogate from or vary the effect of any of its provisions." As such, parties are free to write their own contracts to govern their own international transactions.

The CISG does not uproot the laws of signatory countries, but instead serves two key purposes: to fill in gaps in goods contracts to help resolve disputes and to facilitate dialogue between potential parties to such contracts, before they engage in a covered transaction. For example, if a German company contracts to sell a significant piece of equipment to an English business, but the contract is silent on what happens if the equipment is a "lemon" and simply does not work as represented, the CISG provides a mechanism to "avoid" the sale.

If, however, parties to an international goods transaction do not have a contract, the CISG provides a default set of terms and remedies for these commercial transactions, much like the Uniform Commercial Code in the United States. By way of example, the CISG covers:

- The key elements of offers and the manner of their acceptance;
- What happens when parties seek to add or change terms or other modifications to international sales contracts;
- The role of local and international practice, customs and usage;
- Obligations as to the quality of the goods, issues as to examination of goods, delivery, payment and notice of any claimed lack of conformity;
- Remedies for breach of contract — for both the seller and buyer — ranging from delivery and price issues, repair, replacement or price adjustment for non-conforming goods to contract avoidance, warranty issues, or damages incurred by performing sellers; and
- The passing of risk of loss in the goods sold to defenses due to acts of God (i.e., force majeure).

To the extent necessary, courts in signatory countries will, by default, apply the law of the CISG to contracts for goods transactions, instead of the sales law of their own country, when a dispute relative to an international goods transaction applies.

What general impact does the CISG have on businesses? If a transaction is covered, businesses must not only know how the CISG works, but also understand that unless they alter the terms of their international goods contract, the rules may not have any effect to which they are accustomed. As such, businesses should ensure that they address all of the issues above in their sales contracts and avoid disputes before they occur. No international goods sales contract should go without review by counsel, particularly with respect to choice of law and dispute resolution provisions. One aspect of international goods disputes that is not addressed by the CISG (but can be by the parties themselves) is what court or forum (e.g., arbitration) will hear any dispute governing a covered transaction.

Language barriers and cultural differences have the potential to exacerbate disputes involving the international sale of goods. As such, it is important for businesses to ensure that their contractual protections as buyer or seller are not lost in translation. The CISG is not necessarily a substitute for a well drafted sales contract, but it does establish a baseline, uniform international law that creates level negotiating positions both in pre-contract negotiations and post-contract disputes, which courts in signatory countries seek to evenly apply to avoid misunderstandings of the scope and applicability of the CISG among parties in different legal and economic cultures.

Burke Warren attorneys are available to answer any questions or advise solutions to any concerns regarding international purchase or sales agreements. Please contact Fred Mendelsohn, fmendelsohn@burkelaw.com or 312/840-7004, or Josh Cauhorn, jcauhorn@burkelaw.com or 312/840-7055 with any questions regarding the subject matter.

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but want generic agreements with "broad" restrictions to "scare employees."

While such broad language has always been dangerous, particularly with "key" employees that the employer entrusts with important, confidential client information, taking this course of action just became a lot more perilous after the Illinois Appellate Court, in *AssuredPartners, Inc. v. Schmitt*, rendered on October 27, 2015. In this case, the court refused to enforce non-competition, non-solicitation, and confidentiality provisions in an employment agreement between an insurance broker and one of its sales managers, even though the employee allegedly **stole the employer's "customer expiration list," which included allegedly confidential expiration dates of the customers' insurance policies.**

Affirming summary judgment in favor of the employee, the court held that the non-competition, non-solicitation, and confidentiality provisions were unenforceable as overbroad and refused to modify the restrictions even though the agreement contained a "judicial modification" provision.

Affirming summary judgment in favor of the employee, the court held that the non-competition, non-solicitation, and confidentiality provisions were unenforceable as overbroad and refused to modify the restrictions even though the agreement contained a "judicial modification" provision.

The court's ruling was based in large part on the unique facts of this case. The employee had been in the professional insurance business since 1999 and since 2003 had "specialized" in the niche field of "lawyers professional liability insurance" ("LPLI"). In 2011, the employee signed a "senior management agreement" that restricted the employee from: (1) working for a competitor of the employer in the United States; (2) soliciting any customer or potential customer of the employer; or (3) disclosing any information concerning the employer or its subsidiaries and affiliates.

Non-Competition Provision

The employer contended that the non-competition provision was valid because it protected a legitimate business interest — the employer's "customer expiration list," which the employee allegedly stole and used to solicit customers after he resigned. Rejecting this contention, the appellate court held this provision overbroad because it was not narrowly tailored to the "specific kind of professional liability insurance practice [the employee] developed during his employment." Instead, this clause broadly prohibited the employee from working with all types of professional liability insurance, not just his specialty of LPLI. As a result, this provision "clearly exceeded that which is necessary to protect…the customer expiration list." The court also noted that the geographic and temporal scope — the entire United States for 28 months — was overbroad given that the employee only worked for 20 months under the agreement in question.

Non-Solicitation Clause

The court also held the customer non-solicitation provision overbroad because it precluded the employee from soliciting any customers or potential customers of the employer regardless of whether they worked with the employee in the LPLI business. In so holding, the court noted that this was broader than necessary to protect "those customers and vendor/supplier relationships that [the employee] developed while working for [the employer]." As a result, this provision would preclude the employee from working with customers that the employee did not work with during his employment. This was significant because the employer engaged in 47 insurance related businesses covering over 30,000 customers. The employee, however, only worked in one line of business (the LPLI) with far fewer than the 30,000 customers and "only had access to confidential information related to clients he *serviced* while with [the employer]." [Emphasis in original.]

Confidentiality Provision

Even though the employer alleged that the employee stole confidential information (the customer expiration list), the court refused to rein in this conduct using the confidentiality provision because the court found this clause to be overbroad. This provision precluded the employee from "the use or disclosure of any information, observations and data (including trade secrets) obtained by [the employee] during the course of [] employment . . . concerning the business or affairs of [the employer] and [its] respective Subsidiaries and Affiliates." The court found this provision "patently overbroad" because it covered "almost all information" the employee became aware of during his employment, regardless of whether the information was confidential or proprietary in nature, or even whether he obtained the information from a source other than his employment, *i.e.*, customer and other information that the employee developed in the years before his employment with the employer. The court found that this overbroad confidentiality provision limited the employee's "ability to work in the insurance industry by preventing [the employee] from using any knowledge that he gained while in plaintiff's employ, regardless of whether he gained such knowledge, directly or indirectly, *as a result of* his employment." [Emphasis in original.]

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OVERBOARD

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No Judicial Modification

Also, despite an explicit clause in the agreement that "consented to judicial modification" in the event any provision was deemed overbroad, the court refused to narrow the above provisions even though the employer sought to enforce restrictions less onerous than provided for in the agreement. In so holding, the court noted that to do so would discourage employers from "narrow and precise draftsmanship." Thus, the burden is on employers to narrowly tailor restrictive covenants.

What Employers Can Do To Protect Themselves

- **More is not necessarily better.** Do not draft restrictions broader than necessary to scare and/or deter employees because you could be left with no remedy if an employee, as in *AssuredPartners, Inc. v. Schmitt*, takes confidential customer information and then steals your customers.
- **One size does not fit all**. The restrictions must be narrowly and specifically tailored to the particular employee and the interests that the employer wants to protect. Thus, the exact same language might not work for all employees. **As a general rule of thumb, the more important the employee to your business, the more the agreement should be written to this employee's specific circumstances**.
- **Non-Public Does Not Make Information Confidential.** Simply because the employee has access to non-public information does not make it confidential to warrant protection under Illinois law. Like non-solicit and non-compete provisions, the confidentiality provision should be limited to information that the employee learned while working with the employer and which the employer developed and/or paid to develop.
- **Consider Garden Leave.** A garden leave provision allows an employer to pay an employee their regular salary and benefits not to compete for a certain period of time (generally no longer than 30-60 days). During this time, the employer remains an employee but agrees not to contact any customers unless agreed to by the employer and to assist in transitioning the customers to a new contact person for the employer.

If you have questions or would like to discuss your company's restrictive covenants, please contact Aaron Stanton at 312/840-7078 or astanton@burkelaw.com.

REFUGEES

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crisis in European nations deluged with survivors. While some countries have opened their borders, others have been unwelcoming. Political and cultural tolerance for these newcomers, and political leaders' abilities to ameliorate tensions are being sorely tested; social welfare organizations are simply overwhelmed.

Consul General Quelle outlined Germany's accelerated political and humanitarian response to the estimated 1 million refugees for whom Germany had become the "beacon of hope." With 60 million globally on the move, Germany committed to accepting the equivalent of 1% of its existing population, even as they were "forced to improvise" orderly structures and procedures at its borders. German policies arose from humanitarian and pragmatic grounds.

Mr. Quelle contrasted US geographical insulation from the human consequences of recent Middle East destabilization with the position of Europeans — obliged to save migrants from drowning on their Mediterranean shores. With immigration at the core of its national identity, the US does have systems in place for screening and processing refugees and asylum seekers; Germany has raced to update its principles for identifying, accepting and resettling legitimate refugees. The Consul General quoted Pope Francis who, this past September, recited the Golden Rule to the US Congress, challenging us to live up to that standard and counseling us to view these suffering masses as individual persons whose faces and stories we see and hear: "The yardstick we use for others will be the yardstick which time will use for us."

Msgr. Michael Boland presented a clear picture of the resources and work that are involved in settling and integrating refugees in the Chicago area. Refugees are admitted only after an extensive screening process that takes at least a year and often much longer. He stressed the importance of guiding newcomers toward jobs and education, of parish and community support structures, and of keeping families together as they assimilate and progress toward self-sufficiency here. From direct financial support to housing to schools to providing guidance on how appliances work, Catholic Charities provides relief and support throughout the immigration process for refugees. Msgr. Boland estimated that about $25,000 is typically spent in the process of settling a family in Chicago.

Consul General Quelle and Msgr. Boland provided practical perspectives on the European refugee crisis and how the United States can participate in relief efforts. Many thanks to both presenters as well as to the attendees. Those interested in contributing to relief and support efforts can do so on the consulate website or through Catholic Charities.

TAX PLANNING SUMMARY

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encouraged to consider their current tax situation and decide whether it makes sense to take steps to minimize their 2015 tax liability prior to year-end.

For 2015, individual taxes are assessed at the following rates:

Taxable Income Joint/(Single)	Tax Rate	Long-Term Capital Gains Rate	Qualified Dividend Rate
$0 - $18,450 ($0 - $9,225)	10%	0%	0%
$18,451 - $74,900 ($9,226 - $37,450)	15%	0%	0%
$74,901 - $151,200 ($37,451 - $90,750)	25%	15%	15%
$151,201 - $230,450 ($90,751 - $189,300)	28%	15%	15%
$230,451 - $411,500 ($189,301 - $411,500)	33%	15%	15%
$411,501 - $464,850 ($411,501 - $413,200)	35%	15%	15%
Over $464,850 (over $413,200)	39.6%	20%	20%

In addition to the taxes summarized in the above schedule, the Affordable Care Act created additional taxes that became effective in 2013 and are scheduled to continue indefinitely. The most prominent of these taxes are:

- **Increased Medicare Tax** – An individual is liable for an additional Medicare Tax equal to 0.9% if the individual's wages, other compensation, or self-employment income (together with those of his or her spouse if filing a joint return) exceed the threshold amount for the individual's filing status. Thus, the wage withholding rate for Medicare taxes is 1.45% up to the income threshold and 2.35% (1.45% + 0.9%) on amounts in excess of the threshold amounts. The threshold amount for purposes of the increased Medicare tax is $250,000 for married couples filing a joint return, $125,000 for married individuals filing a separate return and $200,000 for single taxpayers.
- **Net Investment Income Tax** – A surtax of 3.8% is imposed on the unearned income of individuals, estates, and trusts above a threshold amount of $250,000 for married couples filing a joint return, $125,000 for married individuals filing a separate return and $200,000 for single taxpayers. For individuals, the surtax is 3.8% of the lesser of:
  1. The taxpayer's net investment income; or
  2. The excess of modified adjusted gross income over the threshold amount.

Investment income includes income from interest, dividends, annuities, royalties, rents (not derived from a trade or business), capital gains (not derived from a trade or business), trade or business income that is a passive activity with respect to the taxpayer, and trade or business income with respect to the trading of financial instruments or commodities. The surtax on unearned income results in long-term capital gains and qualified dividends being taxed at rates as high as 23.8% (20% + 3.8% surtax).

The increased tax rate on long-term capital gains for high income taxpayers along with the additional 3.8% surtax on net investment income makes it all the more important that individuals monitor their capital gains and losses. If you have recognized gains during the year, you may wish to consider selling investments that have losses to offset those gains.

Congress has failed to act on various tax extenders

As has been true each of the past several years, Washington has failed to address various tax extenders that expired at the end of last year. Extenders are tax items (credits or deductions) that have an expiration date. Without an extension, these tax provisions essentially disappear. There are approximately 50 such items that expired over the past year that need to be addressed. These items range from the tax deduction for sales taxes paid to research tax credits. The delay in addressing these extenders may cause a delay in the Internal Revenue Service issuing 2015 tax forms and a similar delay in processing returns.

We often receive questions about the tax-free distribution of funds from an individual retirement account for charitable purposes. Unfortunately, this provision has not yet been extended for 2015. Under the provision that was in effect the past several years, individuals age 70½ or older had been permitted to make direct transfers of up to $100,000 annually from an individual retirement account to a charitable organization. By distributing funds directly from your IRA to charity, the distribution is not included in the account owner's taxable income (and the account owner is not allowed to claim a tax deduction for the charitable contribution). Without this provision, if an individual wished to contribute IRA assets to charity, the individual would be required to take a distribution from his IRA and then contribute the funds to charity. The individual would include the distribution in income, but would be allowed a charitable deduction for his contribution. Unfortunately, the deduction in many cases would not fully offset the additional income because of (among other things) the phase-out of itemized deductions for high-income taxpayers. Likewise, most states, including Illinois, do not allow a charitable deduction. As a result, including the IRA distribution into income before claiming the charitable deduction may also increase state taxes.

Maximize contributions to tax-deferred retirement accounts

Maximizing contributions to tax-deferred retirement accounts, such as an Individual Retirement Account or a company 401(k) plan, will reduce your taxable income and your tax liability. The 401(k) contribution limit for 2015 is $18,000. In addition, individuals who will be at least 50 years of age by the end of 2015 may make an additional "catch-up" contribution of $6,000. The contribution limit will remain unchanged for 2016 and will be $18,000. The catch-up contribution limit for 2016 will also remain at $6,000.

Contributions to Individual Retirement Accounts may also be tax deductible (depending upon your income and whether you participate in an employer sponsored retirement plan). For 2015, the contribution limit is $5,500. In addition, individuals who will be at least 50 years of age by the end of 2015 may make an additional "catch-up" contribution of $1,000 in 2015. The contribution limits for 2016 will not change.

Self-employed individuals may consider establishing a simplified employee pension (SEP) plan. By utilizing a SEP, self-employed individuals may be able to contribute up to $53,000 to a tax-deferred retirement account. Further, contributions for 2015 need not be funded until the extended due date for filing the individual's 2015 tax return.

Estate & Gift Taxes

For 2015, the estate and gift exemption amount is $5.43 million ($10.86 million for married couples). The exemption amount is indexed for inflation and will increase in 2016 to $5.45 million ($10.9 million for married couples). The top tax rate for estate and gift tax purposes has also been set at 40%.

The generation-skipping transfer ("GST") tax is still in place. Generally, the tax applies to lifetime and death-time transfers to or for the benefit of grandchildren or more remote descendants. For 2015, the rate is a flat 40%. The tax is in addition to any gift or estate tax otherwise payable. As with the gift and estate tax, each taxpayer is allowed a $5.43 million GST tax exemption for 2015.

Consider Lifetime Gifts that take Advantage of both the Gift Tax Exemption and GST Exemption

Many clients utilize a portion or all of their $5.43 million gift tax exemption ($10.86 million for a married couple) by structuring long-term GST exempt trusts benefiting multiple generations. Such trusts will remain exempt from all gift and estate tax as long as the trust remains in existence. Under Illinois law, such trusts can last in perpetuity, thereby allowing you to create a family "endowment fund" for your children, grandchildren and future descendants.

If you already have taken advantage of the current $5.43 million exemption amount or you are not in a position where it makes sense to gift a large amount, you should still continue to plan a gifting strategy going forward.

Annual Exclusion Gifts

In 2015, you may make a gift of $14,000 to any individual and certain trusts without any gift tax consequences. Married individuals may make gifts of up to $28,000. Gifts may be made outright or in trust and may be in the form of cash, securities, real estate, artwork, jewelry or other property. Giving property that you expect to appreciate in the future is an excellent way of utilizing your annual exclusion gifts because any post-gift appreciation is no longer subject to gift or estate tax. To take advantage of your annual exclusions for 2015, gifts must be made by December 31. Gifts over $14,000 or gifts that will be "split" between spouses must be reported on a gift tax return, which must be filed in April 2016. The annual exclusion amount is scheduled to remain $14,000 in 2016, $28,000 for married couples.

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TAX PLANNING SUMMARY

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Payment of Tuition and Medical Expenses

In addition to annual exclusion gifts, you may pay tuition and medical expenses for the benefit of another person without incurring any gift or generation-skipping transfer ("GST") tax or using any of your estate or GST tax exemption. These payments must be made directly to the educational institution or medical facility. There is no dollar limit for these types of payments and you are not required to file a gift tax return to report the payments.

Take Advantage of Today's Low Interest Rates

Interest rates remain at historically low levels. Low interest rates enhance the benefits of several gift and estate planning strategies. One such strategy is the "grantor retained annuity trust" or GRAT. A GRAT is an irrevocable trust to which a donor transfers property and retains the right to receive a fixed annuity for a specified term. At the expiration of the term, the property usually passes outright or in trust for the benefit of descendants or other named beneficiaries. The amount of the gift resulting from the transfer of the property to the GRAT is the present value of the remainder interest that passes to the beneficiaries at the end of the term. Under the valuation methods adopted by the IRS, the lower the interest rate at the time of the gift, the lower the present value of the remainder interest and the smaller the amount of the gift that must be reported to the IRS. Interests in closely held family businesses or marketable securities with high growth prospects are often ideal properties to transfer to a GRAT. While there has been considerable discussion about disallowing "zeroed-out" GRAT's and requiring a minimum GRAT term of 10 years, Congress has not taken any action in this respect. As a result, GRAT's remain a very attractive planning opportunity.

Example – Individual funds a GRAT with $1 million. The GRAT's term is 5 years and its assets appreciate at a rate of 8%. Assuming the applicable IRS interest rate is 2.0% (the rate in effect for December 2015) and the GRAT is "zeroed-out," the remainder value of the GRAT assets at its termination would be approximately $250,000.

In other words, the GRAT structure would have allowed the individual to transfer assets valued at approximately $250,000 to his children or designated beneficiaries without incurring any gift tax obligation or utilizing any of his or her lifetime exemption amount.

Low interest rates also make sales to "defective" grantor trusts more attractive. Under this strategy, a taxpayer creates a trust, typically for his or her spouse and descendants. The taxpayer then sells assets to the trust taking back a note requiring the trust to repay the taxpayer in installments. The trust is structured so that it is ignored for income tax purposes, resulting in no income tax consequences upon the sale. The interest paid on the note is typically at the applicable federal rate, which changes month to month based on current market rates. The lower the interest rate on the note, the greater the amount of assets that will accumulate in the trust free of estate, gift and GST taxes.

For more information, please contact Greg Winters at 312/840-7059 or gwinters@burkelaw.com.

BWM&S

Firm Welcomes New Associate

The Firm welcomes Joshua (Josh) Cauhorn, a new associate in the Firm's Litigation practice. Prior to joining the firm, Mr. Cauhorn held a consulting role at an independent school on Chicago's West Side where he led an effort to develop a multifaceted financial and organizational strategic plan. He is currently an active member of the Mercy Home Associate Board as well as the Regional Strategy Team for Illinois Leaders for Educational Equality.

Mr. Cauhorn earned his B.S. in English Education, *magna cum laude,* from Huntington University and his J.D., *magna cum laude,* from the Loyola University Chicago School of Law. During law school, Mr. Cauhorn was a National Champion in the 2013 William W. Daniel National Mock Trial Competition as well as a National Champion and National Best Advocate in the 2015 ABA National Criminal Justice Competition. He was also an intern at the U.S. Attorney's Office for the Northern District of Illinois as well as a judicial extern at the U.S. District Court for the Northern District of Illinois.

Josh Cauhorn

Mr. Cauhorn can be contacted at 312/840-7055 or jcauhorn@burkelaw.com.

Considerations when Entering into Cloud Computing (SaaS) Contracts

Software as a Service, or "SaaS," is part of what is known as "cloud computing." It is quickly becoming a desirable option for many companies because of the lower up-front costs and ease of access. SaaS delivers technology applications via the Internet where data is inputted, stored and accessed remotely. This avoids the capital-heavy expenses of installation and maintenance of an on-premises IT infrastructure. It also allows for a quicker and more efficient way to update the software and troubleshoot any potential problems that arise. Although the benefits may appear to make SaaS an easy choice, there are potential pitfalls that can cause major harm to a company that need to be taken into consideration.

Kara Bufalino

SaaS vs. the End User License Software Model

A company traditionally acquires software through a subscription-based model where the software provider grants a license to the end user. This approach is typically done through a software license agreement and usually comes with a hefty licensing fee to be paid up-front. In contrast, SaaS payment terms are on a subscription basis where the cost is spread out over a longer period of time. Additionally, due to the "remote" nature of SaaS, the data is no longer stored on the premises of the business, allowing the data to remain protected if some sort of disaster were to occur at the business. Further, in contrast to the manual updates that can cut down on the efficiency of a business, SaaS provides only the most current version. Ultimately, SaaS can be a desirable option for companies that may be short on capital and do not want to be stuck with out-of-date software. However, there are certain risks that must be weighed before a company decides to replace its usual end user-licensed software with SaaS.

Issues with SaaS

The following provides a brief overview of the issues that should be considered in conjunction with SaaS:

- **Security:** If sensitive company data and business processes are to be entrusted to a third-party service provider, then issues such as identity and access management will need to be addressed. Additionally, companies must be aware that data can be accessed while in transit over the Internet, or on the remote server where it is stored, thus making it vulnerable.

- **Limited Software Choice:** Instead of being able to continue using a tried-and-true version of software, with SaaS, businesses only have access to the must current versions.

- **Payment of Subscription as Necessary for Continued Service:** In contrast to the end user license agreement which allows the end user unfettered access once the license fee has been paid, a company that utilizes subscription-based SaaS services must continue to pay — even when the service is poor or the software has bugs — in order to maintain access.

- **Potential for Hidden Costs:** When reviewing the contract from a SaaS provider, it is crucial to take note of what exactly is covered by the subscription fee. In many instances, there are additional costs for configuring and setting up the software, as well as for installing the software on certain devices such as smart phones and tablets.

- **Questionable Data Rights:** There exists much ambiguity on whether the right to access the data remains with the customer and, more importantly, what rights the SaaS provider has to the data that is being stored on its system.

SaaS Contract-Specific Points

Once a business chooses SaaS, special attention must be paid to the agreement provided by the vendor. Although larger SaaS vendors will have form agreements that offer little room for negotiation, it is still important to keep the following provisions in mind while reviewing:

- **Subscription Price:** It is important to review what exactly is included in the subscription. In many instances, integration, client training and support are the responsibility of the client, and receiving such services from the vendor will require additional costs.

- **Performance:** Service Level Agreements are becoming more common in SaaS contracts — these agreements

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CLOUD COMPUTING

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usually provide guarantees on when service will be available (known as "uptime"). Additionally, it is important that there be language requiring the obligation of the vendor to perform regular back-ups. Further, if possible, it is smart to include a provision that provides the client with the right to receive a credit, or in the best case scenario — a right to terminate, upon the occurrence of any service lapses.

- **Privacy and Security:** The contract should set forth specific procedures to follow in the event of a data breach, disaster recovery, or termination of service. The contract should also state that the vendor is regularly audited for security purposes.

- **Termination:** A contract must set forth what will become of the client's data when the relationship is terminated. If possible, a provision should be included stating that the client's data will be returned or destroyed within a predetermined amount of time.

As noted above, SaaS is a popular alternative to typical end user licenses that most businesses have grown accustomed to. With its cheaper up-front costs and focus on providing the most up-to-date versions, SaaS may be the perfect solution to a small company's software needs. However, although the benefits of SaaS may be tempting, businesses must be cognizant of the potential problems associated with this model for obtaining software, and the dire consequences that may be faced in the event of a data breach or loss.

Kara Bufalino is an associate in the Firm's corporate practice. For more information on SaaS agreements and related issues, you may contact Ms. Bufalino at 312/840-7050 or kbufalino@burkelaw.com.