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PARK WATCH

™ LEGAL DEVELOPMENTS NEWSLETTER

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1031 Exchange Fail: Beware the Exchange of Leased Property With Under 30 Year Term Remaining

The Second Lawsuit Should be Against the Purveyor of the Ill-Fated Legal Advice.

By Terry R. Dowdall, Esq.

■ UPSHOT

Qualifying for a 1031 exchange of ground lease property mandates it have a significant remaining: 30 years as commonly applied and understood. While a remaining term exceeding 30 years is not an absolute minimum, perhaps, the Court in the VIP case did not decide just what term, less than 30 years, will be deemed "like-kind" with a fee. Certainly not 21 years. Another better advised seller will need to find that out.

■THE TRANSACTION EXCHANGES A 21 YR GROUND LEASE TERM

Sometimes a 1031 exchange can be a little tricky. In the case of VIP's Industries, the seller (and taxpayer) attempted to complete a tax-deferred like-kind exchange under IRC Section 1031 by exchanging a leasehold interest in real property on which the taxpayer had constructed and operated a motel. The lease of the real property had another *21 years and 4 months* remaining on its term.

Taxpayer exchanged this leasehold interest for fee interests in two parcels of real property, both of which were held in fee.

The question before the court was whether a leasehold in real property with a 21-year-and-four-month term was like-kind to a fee interest in real property. The Tax Court held that the leasehold was not like-kind with the fee interest and denied the taxpayer Section 1031 exchange treatment. The regulations under IRC Section 1031 provide that a leasehold interest in real property with 30 years or more remaining on its term is like-kind with a fee interest in real property.

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Creative Solutions, Efficient, Practical Representation, Profitable Parks

Dowdall Law Offices A.P.C.

In this Issue:

Coming Events:

WMA Convention
Reno: Oct. 14-15.

Owner Legal Seminar
(Benefitting WMA & MHET)
Yorba Linda, Oct. 30

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We recommend:
FEDERAL ARBITRATION CLAUSES;
MANDATORY MEDIATION;
BROAD 'FACILITIES RELEASES'

October 1st Deadline Looms:

"Optional" Affordable Care Act Exchange Notice Required

■ Upshot

Like it or not, under the Affordable Care Act (ACA), the first big compliance deadline is fast approaching. By October 1, 2013, most employers are required to provide all current employees with written notice of the new Health Insurance Marketplace ("Marketplace"). The Marketplace offers individuals and small business owners an online portal to find and compare private health insurance options (in California, it is called "Covered California"). *There is no penalty for failure to comply.*

Each new employee hired after October 1, 2013 must receive the notice within 14 days of the employee's start date. Providing the notice within that time satisfies the U.S. Department of Labor's (DOL) compliance requirement in 2014.

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The question was whether this is an absolute minimum or merely a safe harbor.

■ COMMENT: FORGETTING THE LESSONS OF HISTORY DOOMS ONE TO REPEAT THEM?

Or did seller just simply get bad legal advice, or any legal advice? In the 1950's, the Tax Court had previously decided that a lease with a 20 year remaining term *was not like-kind* with a fee ownership interest. It remains a leading case. There is not a shred of reason to believe the rule no longer applied or was open to further challenge or change. The lease here was twenty-one years and four months. Could anyone believe a few months make a difference?

Exchanges with ground leases require a lease with 30 years remaining, at least. A safe harbor and well, the minimum the Tax Court will uphold. Any less than a 30 year remaining term is open to challenge.

■ OBSERVATION. Why didn't the seller seek an extension of the term to avoid this problem? I suppose it never occurred to the taxpayer that the term might have been extended to provide a clear and safe thirty year remaining term, before entering into the transaction. Sometimes, consulting a lawyer *before* taking action is the *wisest* investment.

Rent Control: Slow Confiscatory Creep Continues

Government Controls over Rent Collection to Supervise and Coerce Claimed Need for Better Management

By Terry R. Dowdall, Esq.

■ Upshot

The latest of intrusive government control–as *your new partner in park maintenance*—has arrived in Los Angeles. Under the Los Angeles Municipal Code, the City of Los Angeles may put your property in a "REAP" program, which provides that tenants pay into an escrow account. The escrow account is used for building repairs and maintenance (once a landlord has failed to repair habitability violations). City says what to do and how to do it. All supervised by the City. Can such an invasive interference with management operation be constitutionally tolerated? In the 9th Circuit, yes.

Government may now control and eliminate your full and unfettered use of rents, by forcing the rent into an account to be used for maintenance, until they approve of the manner in which the property is being maintained. Los Angeles's Rent Escrow Account Program has been sustained.

■ Facts

The Los Angeles Rent Escrow Account Program (REAP) is an administrative program which authorizes the Los Angeles Housing Department to place property into REAP when a landlord fails to repair habitability violations. Four landlords alleged that REAP violated their substantive due process rights. Up to half the rents can be sequestered.

The Court held that:

(1) REAP was rationally related to the legitimate governmental interests of repairing and preventing substandard housing;

(2) REAP did not violate plaintiffs' substantive due process rights; and

(3) plaintiffs' procedural challenges failed to support an as-applied substantive due process claim because none of the allegations plausibly suggested that REAP was arbitrarily and unreasonably applied to any of the plaintiffs, or that the placement of plaintiffs' properties into REAP rose to a level that shocked the conscience.

The "Housing Department" may place property into REAP when a landlord is claimed to have failed to repair habitability violations. When a property is placed into REAP, tenants pay a reduced rent. The Housing Department determines the amount of the reduced rent based on the severity of the habitability violations. Tenants may also choose to pay their reduced rent to either their landlord or an escrow

("October 1st Deadline Looms")

Which Employers Must Provide this Notification?

The requirement applies to all employers covered by the Fair Labor Standards Act; i.e., any business with at least one employee and $500,000 in annual revenue, whether or not the employer provides health coverage to its employees.

What Information Must be Included in the Notification?

In accordance with the temporary guidance issued by the DOL, the notice to employees must:

• Inform the employee of the existence of the Marketplace, a description of the services provided, and the manner in which the employee may contact the Marketplace to request assistance;

• Explain that the employee may be eligible for a premium tax credit if he or she purchases coverage through the Marketplace; and

• Inform the employee that if coverage is purchased through the Marketplace, then he or she may lose the employer contribution (if any) to any health benefit plan offered by the employer, and that all or a portion of such contribution may be excludable for federal income tax purposes.

There are two model notices available on the DOL's website under the heading "Notice to Employees of Coverage Options." One notice is for an employer who offers a health plan to some or all employees, and one notice is for an employer who does not. An employer may use either one of the model notices or a modified version of a notice, as long as the modified notice meets the prescribed requirements under the ACA. *Copies of model notices shortened to one page each are attached for your use*.

No Penalty for Failure to Comply. The ACA initially imposed a fine of up to $100 per day for employers who failed to notify all employees by letter about the Marketplace. However, while the October 1, 2013 notice deadline still stands, the fine was eliminated. *There is no fine or penalty under the law for failing to provide the notice.*

account maintained by the Housing Department. If tenants pay into the escrow account, the tenant, landlord, or Housing Department may apply to the escrow account's manager for funds to repair the habitability violations in the tenant housing.

The Ruling

The Court held that judicial scrutiny is at its lowest level, as landlords are not members of any protected class. There is no "fundamental right to rent uninhabitable housing." Substandard housing is a serious concern in Los Angeles ("one in every eight dwelling units in the state is substandard and that unless health and safety problems are corrected, habitability conditions generally deteriorate until the units become life threatening and uninhabitable and must be removed from the housing stock through closure or demolition." Cal. Health & Safety Code § 17998(a)).

The Court held that the repair and deduct remedies were insufficient to deal with the increasing blight. California state law provides limited remedies to tenants who live in uninhabitable housing. But these remedies were deemed insufficient to ensure that the habitability requirements are met.

Why REAP? REAP was introduced as part of the City's "more vigorous stand against landlords of rental housing who allow their buildings to deteriorate to the point where tenants are living in substandard conditions." Between 1989 and 1993, REAP proved "extremely effective." In 1993, in response to the prevalence of "life-threatening fire safety violations," the City Council amended REAP to strengthen the program's enforcement powers. In 2004, City inspectors cited one of the plaintiff-landlords in this case for "inoperable or missing smoke detectors." REAP addresses the health and safety problems created by substandard housing and encourages landlords to prevent those problems. "These are legitimate goals," the Court said.

Will outright rent strikes be justified because it rationally relates to keeping up property?

Landlords may challenge a decision to be put into REAP status. The placement of their property into REAP through a hearing and appeals process. Property is released from REAP once it is repaired and passes inspection.

Plaintiffs allege that the City improperly placed property into REAP because of damage that their tenants caused. Plaintiffs, however, do not dispute that their property was in violation of housing codes. Moreover, the landlord may appeal a decision placing a unit into REAP. At the hearing, "[t]he landlord may present proof that a rent reduction is not appropriate because the violations were caused by the tenants." LAMC § 162.06(c)(3). Thus, REAP protects against landlords being arbitrarily held responsible for tenant caused damage.

But the City uses REAP to enrich itself and its nonprofit partners! The lawsuit complained that, "the reason for REAP is ultimately to transfer private property from individuals to other private entities . . . not to benefit the public . . . but to financially enrich the government-corporate 'partnership' that supports REAP, while depriving individuals of due process under color of law."

But, said the court, there were no facts to plausibly establish this claim and a bare allegation of wrongdoing is insufficient to withstand a motion to dismiss. Further, the City's use of third-party contractors "rationally advances" REAP's goals. To better administer REAP, the City partners with nonprofit organizations, that "disseminate program information intended to increase voluntary participation of tenants residing in REAP . . . properties." Further, these nonprofit organizations interview tenants to ensure that property has been repaired before it is released from REAP.

Conclusion

This decision is another step toward the government take-over of control and operation of property. It validates the taking of a constitutional right as a permissible and coercive retribution to achieve healthful housing. It provides the foundation for any city to adopt regulations to deal with complaints about facilities and services offered by a landlord by depriving the landlord of rent-controlled revenues already suppressed to the minimum. Any city may now adopt regulations, like those of Los Angeles, which allow for the deposit of tenant rent into an escrow account, controlled by government and its select partners, until such time as violations of code (habitability and tenantability issues) are resolved to the satisfaction of the code inspector. There is no thought or concern for the potentially confiscatory impact on the diminished rate of return. Instead, since the coercion by economic strangulation is related to better health and safety, the courts claim it to be a laudable response to collar difficult landlords. Like taking away the right to vote until you stopped smoking.

Most serious is the implicit acceptance of deprivation of constitutional rights; to promote a desired "end" justifies the "means" thinking. This is also nothing short of validation of an insidious underlying philosophy which embraces a ham-fisted degradation of property rights in the scheme of other liberties. The 9th circuit here holds that a protected right may be sacrificed, indefinitely, to promote repair of code violations? The deprivation of a right to earn a rate of return is constitutionally grounded. Earning a just return is a constitutional right. If we assume that a deprivation of a constitutional rights by taking of protected revenues is an invasion of those rights, the City may still impose fines. However, if taking of rights is justifiable, who decides when the act of government causes an unconstitutionally confiscatory effect and how is that measured? *What safeguard is there to modulate and measure the severity of the effect to the gravity of the wrong?* What protective test gauges potential overreaction, too harsh an effect? Will outright rent strikes be justified because it rationally relates to keeping up property?

And since when has code compliance enforcement justified constitutionally confiscatory effects on return on property? This juxtaposition is plainly malevolent to the core. The end point of analysis is that it must be constitutionally tolerable to bankrupt a landlord by driving it out

of business, because of a police power violation of some degree of seriousness. Punishment by deprivation of constitutional rights? Imposing fines is one thing, but taking revenue required to sustain operations in the business is quite another.

It is clear the 9th Circuit is not sensitive to the nature of substantive due process–the right to a constitutionally sufficient rate of return--which is eroded by degrees when government may take and sequester the return until such time as government is satisfied that the owner is worthy to be restored to its already vested property rights. The 9th Circuit does not "get it" and is once again on the warpath against business and property ownership. Well, at least we have nice weather–certainly there must be *some reason* why all the governmental bullying of property owners is tolerated in California.

Real Life Evictions Redefine DLO Approach to Resolving Tenant Disputes

By: Robin Eifler, Esq.

Upshot

Unlawful detainer laws are a statutory nod to landlords to expedite ejection of bad tenants. It may not seem like it, but eviction statutes are a world of improvement over a general civil action for ejectment. But times have changed. Court closures, mounting court costs, short staffed courts and marshal offices all mean delays and more expense. The Sargent Shriver Act has revitalized eviction defense services. And the Mobilehome Residency Law (Civil Code §§798, et seq.) pushes back eviction dates 3-4 months after the default. If the tenant files for bankruptcy, another few weeks pass by before relief is attained. Our process *(Cheaper, Faster, Better or "CFB")* is designed to save time and minimize costs, but things in general are bound to get worse before better.

Here is What's Happening

The time and expense required to complete an unlawful detainer action and evict the defaulting tenants have increased dramatically in the last few years, largely due to recent budget cutbacks, staff reductions, and court consolidation measures which have been implemented statewide.

> *50 unlawful detainer trials set per day. . . It takes about an hour and a half just to check in the parties and their attorneys . . .*

Example: The Los Angeles Superior Court recently closed ten courthouses and consolidated unlawful detainer actions in five hub locations (Antelope Valley, Los Angeles Central, Long Beach, Pasadena, and Santa Monica.) It is now common for up to fifty (or more) unlawful detainer cases to be set for trial in a single court session. Obviously, there is no way any court can hear that many cases in any one day, even if many of the cases settle.

The Reality: If the matter is set for a morning trial calendar, it is not surprising to see the case be continued over to the court's afternoon session or reset for trial on a different day. Matters set for an afternoon trial calendar could very well be continued to another day, or even transferred to another courthouse.

Court Staffing Cutbacks. The courts have dropped literally hundreds of employees at the Central Courthouse, says one judge recently. Most courts have also reduced their staff and business hours, and many only answer their telephones for three to four hours during the day.

Orange County: Telephone assistance is no longer available. As a result, getting questions answered and rectifying any problems regarding pending cases often takes a great deal more time and effort.

On occasion, a personal appearance at the clerk's office or court department is required to obtain the information or assistance which was previously available over the telephone.

Several courts also now require unlawful detainer documents to be placed in a drop box, even during normal business hours, which almost always equates to additional delay in getting the dropped items processed by the court.

Post Trial: Due to fewer court personnel, writs of possession *(the court order instructing the marshal to take the defendant out of the premises)* take longer. Stories of one month for issuance of the writs are being told. Local law enforcement is experiencing budget cuts and staff reductions as well. The writ and lockout process is typically three to five weeks. Without legal authority of any kind, some sheriffs' departments recently refused to remove elderly or disabled tenants from the premises at the time of the lockout, until the local social service agency was called in and found some type of temporary housing arrangements for these tenants.

True Story, Recent Case in Long Beach:

In one typical Long Beach case, we were forty-eighth of fifty-two cases on the calendar. Although the cases were set for 8:30 a.m., the judge took the bench at 10:00 a.m. It takes about an hour and a half just to check in the parties and their attorneys.

The judge immediately announced that there were *no courtrooms available in the courthouse that day*, and that if the parties did not settle their cases, they needed to be ready to *travel to any courthouse within Los Angeles County* that had an available courtroom!

Given the time needed to travel to another courthouse, the unresolved cases would likely be continued over into the new court's afternoon calendar, thereby resulting in a significant increase in the attorneys' fees incurred for the trial appearance.

Over the course of time, the ability to find ways and means to settle cases has proven valuable tool to cope with courthouse deficiencies. We settled favorably that morning.

While there is not much, if anything, that can be done to ameliorate the delays endured in coping with judicial process, there are strategies and practices which our clients can adopt to obtain faster and better results, and keep litigation expenses to a minimum. Here they are.

■ Coping Techniques for the Elimination of Bad People from Your Park

1. Notices. Check them. Re-check them.

First and foremost, park owners and management should double check their default notices before they are served, or shortly thereafter, to make sure that they are accurate. If it looks like litigation may ensue, the notices should be sent to legal counsel *as soon as possible*, so any defects can be discovered immediately. If there are mistakes, *let's correct them now and re-serve. Do not wait for the bad news until the 60 days are up!!*

Many owners wait until the end of the sixty-day period to confirm the propriety of eviction notices, only to find a flaw in content or service procedure which renders them legally defective, or delays the process. ***Example:*** notices were posted but not mailed; there is a math error in the rent demanded; a late charge is included, but the tenant never tendered rents and so no administrative expense was actually incurred; an NSF charge was made, but the bank did not charge for NSF fees because you are such a good customer; a charge was demanded for an item not included in the rental agreement. *Remember, one cent too much, and the notice is null and void*.

Assumption of Some Risks is Prudent: Certain risks can be assumed and whenever possible, we move ahead if there are colorable arguments. For example, typographical errors in names, addresses, and amounts when the amount demanded is less than the amount due. In some courts, late charges may be permitted. In some of these instances, new notices must be prepared and served, thereby granting the tenants another opportunity to cure, and restarting the sixty-day vacation and sale period. By the time the second default notices expire, the tenants are four months' behind in rent!

In some cases, the errors could have been caught simply by double-checking the numbers and calculations on the notices before they are served, as the subtotals do not add up to the total figure demanded in the notices, or the total demanded in the notices does not match the total reflected on the tenants' billing statement. Address and name errors commonly occur when managers prepare several notices at the same time, as they often use the last notices they prepared as templates for the next notices, and they fail to delete the prior tenants' information on the latest notices. Taking just a few extra minutes to perform a second review of the figures, names, and addresses on your 3/3/60 day notices can save a lot of future time, aggravation, and expense.

> *You can stipulate to as much past rent as you like, but it will not likely ever be collected. . .*

2. Settlement, Work-Out Prospects.

Another recommended practice is to endeavor to reach a settlement with defaulting tenants when practicable. As most judges will not allow a case to proceed to trial until the parties have first conferred in the corridor about settlement prospects, it is oftentimes in the park's best interest to settle and work out an eviction-by-agreement. This saves significant out-of-pocket expense and additional lost rental charges.

The tenant can arrange to be restored to tenancy after past payments are made, or else terminated and evicted without trial. If the tenant has no possibility of reinstatement, it may be less expensive to pay the tenant to leave. Generally, the longer the life of the lawsuit, the greater the costs that mount, and hence the more difficult to achieve a settlement.

Get to the tenants fast, with courtesy, and make your deals early. Sometimes the tenants are divorced from reality and cannot face the inevitable. You can help them. A "reality check" before it's too late gives them a chance at redemption. And will keep your costs and legal entanglements to a minimum.

3. Forbearance Agreements.

Litigation costs can be avoided altogether if a forbearance agreement is employed. A properly drafted forbearance agreement with defaulting tenants allows them to remain in possession, avoids an eviction and gets you paid. Such agreements will provide that the default notices remain in full force and effect during the term of the agreement. No rights are waived by the Park's acceptance of monies from the tenants. An eviction action can be filed on the original default notice in the event that the tenants breach their obligations under the agreement. The courts have recently upheld such agreements over the course of even a seven year period, because of the positive judicial attitude toward enforcing settlements. These agreements can also include other provisions which are beneficial to the park in the event that litigation later ensues, such as admissions that the default notice was proper in form and properly served and a general release of all claims accruing through the date the agreement is executed. There is no reason why the park owner cannot also retain an option to purchase or first right of refusal.

4. Judgments by Agreement.

The unlawful detainer action is always a wake up call, even if the tenant had lived in a state of denial until then. Even then, the opportunity is omnipresent to arrive at agreeable terms to "pay and stay," "stay and sell," or "sell or move," or "move and waive." The flavors are many. Arrangements to "possession only" judgments (requiring vacation from the premises by a date usually before an eviction is completed), may be appealing to the owner. Keep in mind that usually, the judgments for money are worthless. You can stipulate to as much past rent as you like, but it will not likely ever be collected.

Vacating tenants who own their own mobilehome or reside in a park-owned mobilehome can often be required to surrender their interest in their mobilehome to the park as a condition of settlement, thereby avoiding the additional time and expense of conducting a post-judgment warehouse lien sale or foreclosure. If the tenants breach their obligations under the stipulated judgment, the park can enforce its judgment and proceed with the tenants' eviction, usually without further notice or hearing. Tenants who are represented by legal counsel may refuse

to agree to a stipulated judgment, but will often agree to settle their case by way of a conditional settlement agreement, which provides for the action to be dismissed once the tenants fully comply with the agreed upon terms of settlement. Because these settlement options are pursued after attorneys' fees and costs are incurred in preparing, filing and serving the unlawful detainer action, and after several additional months of past due rental payments have accrued, the offering of a reasonable payment plan is typically required. The park's interests are protected, as it can proceed with its legal eviction remedies if the tenants default at any time before the balance owing is paid in full, without having to go through a costly court or jury trial.

5. Trial. The Lawyers Playground? I would be wary of any lawyer who enjoyed going to trial, or favored trial proceedings, not without first exhausting possibilities for alternative resolution. Trial is expensive, time consuming (did I say expensive?), and without hopes of actual reimbursement of costs (hence, expensive). The real benefit of going to trial for eviction lawyers is to charge a block of time without working real hard. Eviction trials are not the high water mark of jurisprudential evolution. Did he pay? Was she served? Is the notice defective? And so, experience pays off when possibilities for resolution are successful, and we avoid all the cost and expense generators lie in view ahead as ultimate eventualities.

Over the course of the last twenty years of DLO, Inc. (which opened October 1, 1993), the firm has opened more than 8,000 files. If there is a way to settle a case, we will find it and work it to a conclusion without any court appearances or court filings.

6. Aren't We Entitled to Attorney's Fees?

Assuming landlord prevails at trial, an award of attorney's fees is mandatory under the Mobilehome Residency Law (Civil Code §§798, et seq.). But the award specified in the court's fee schedule for unlawful detainer actions is very little, and the court rarely deviates from these fee schedules. And there is great sympathy for defaulting tenants. On the other hand, the tenant lawyers recover all their fees when they prevail, whether actually paid by the tenant (or as more usually the case we suspect, not). It may be possible to obtain additional fees if the case is complex and/or the tenants' antics caused fees to skyrocket. However, as many courts require the filing of a separate motion to seek fees over the scheduled amount, resulting in further expense in drafting the motion and appearing at the hearing, pursuing a larger fee award may not be cost-effective or collectable.

. . . very young lawyers employed by legal aid, non-profits . . . harboring in corridors of the courts . . . very clever new lawyers in very large law firms, all using indigent clientele to . . . drive up costs . . . all for their amusement and experience, and at your expense.

Conclusion

Of course, not all cases can be settled. If you must pursue a judgment, expect the case to take weeks longer to complete. Expect the tenant to be represented and vigorously defended. Infusion of monies for indigent legal services means very young lawyers employed by legal aid, non-profits and solo practitioners are actively looking for tenant-clients, often harboring in corridors of the courts going from person to person scouting out anyone in need of assistance. And then there is the *pro bono* department full of very clever new lawyers in very large law firms, all using indigent clientele to obtain court experience, drive up costs with jury trial demands, and to generally cause havoc in the system, all for their amusement and experience, and at your expense.

The foregoing strategies will help our owners obtain the best possible results in a very difficult system at a very trying time.

Employer Liable for a Yogurt Run by Employee Off Hours.

By: Diane W. Medina, Esq.

Upshot

There is a well understood "going and coming" rule that provides that employers are *not responsible* for accidents during the commute to and from work, because such trips are for the "benefit" of the employee, not the employer. In this case, the employee works in downtown Los Angeles. She drives in from Woodland Hills every day. One day on the commute home, she decides to take a side trip to eat some frozen yogurt. And go to yoga. She hits a motorcycle rider during the side trip. He is injured. He sues her *employer.* The trip was purely personal. The benefit of the trip was entirely the employee's. *But* we are in a *California* court. Right! He wins.

The Court of Appeal holds that the employer could still be held liable. Because sometimes the employee used her personal vehicle to do work related activity. With the knowledge of her employer. So the employer might be liable as well.

Respondeat Superior - the General Rules

You already know you may be (vicariously) liable for personal injury and property damage when your employees crash into people while using their personal vehicles for job purposes, under the legal doctrine of *respondeat superior*. But the "going and coming" rule immunized employers for the commute to and from work and for trips during the work day for personal errands rather than job-related activities.

Moradi v. Marsh USA, Inc., states that requiring employees to use their personal vehicles for business could expose you to potential liability for accidents that occur during the employees' regular commute to and from home – even if the employee is also running personal errands along the way.

Facts:

An employee of an insurance broker was required to drive her own car to and from the office, because she had to use it to attend off-site appointments, meetings and seminars, visit prospective clients, make presentations, and transport company materials and co-employees to work-related destinations. One day, she left the office and began driving home. She decided to stop for frozen yogurt and to take yoga class. As she made a left turn into the yogurt shop, she hit a motorcyclist.

The Trial Court:

Given that the accident occurred while she was driving home as part of her regular commute from the office, and because she was running personal errands at the time, she was not acting within the scope of her employment and the accident was her responsibility. The motorcyclist appealed.

Appellate Court Reverses:

The Court rejected the employer's arguments. Why? Because her job required frequent car travel beyond her regular commute, the employer derived enough of a benefit from the employee's use of her vehicle to bring it within the scope of the "required vehicle" exception of the "going and coming" rule.

1. Her job duties required frequent use of an automobile.
2. Her employer required her to bring her own personal vehicle to the office (rather than taking public transportation, being dropped off, or using carpools) and required her to make work-related trips using her vehicle during the day.

> *. . . there was no "unforeseeable" exception to the "required work vehicle" exception to the "going and coming" exception. . .*

Hence, the *"required vehicle"* exception to the *"going and coming"* rule applied. Under this exception, an employee is deemed to be engaged in the course of employment, even while driving to or from work, if the employer "foreseeably" gains at least an incidental benefit from the employee using his or her car during the course of the workday. As the court noted, *it is "foreseeable" that employees using their own cars for work-related duties would do personal errands for their own comfort and convenience.* So, there was no *"unforeseeable"* exception to the *"required work vehicle"* exception to the "going and coming" exception. Very clear.

The "foreseeability" test for *respondeat superior* merely means that the employee's actions are *not so unusual* or *startling* that it would seem unfair to include the loss from the other costs of the employer's business:

> *"The planned stops for frozen yogurt and a yoga class on the way home did not change the incidental benefit to the employer of having the employee use her personal vehicle to travel to and from the office and other destinations . . . [n]or did they constitute an unforeseeable, substantial departure from the employee's commute. Rather, they were a foreseeable, minor deviation."*

- *"The question is . . . whether . . . the use of the car gives some incidental benefit to the employer*." She used her personal vehicle two to five times a week for work-related trips. The day of the accident, she had driven coworkers to an employer-sponsored event. When the accident happened, she was driving home from work and planned on using her vehicle the next day to meet a prospective client.

- Her "*planned deviation was necessary for her comfort, convenience, health and welfare."* The court opined it would have been unreasonable and inconvenient for her to drive all the way home, stop momentarily, and then drive back to the yogurt shop and yoga studio, and found it predictable that an employee would stop for something to eat or take an exercise class on the way home. *Well, there is something to this. Have you ever commuted downtown from Woodland Hills on the 101?*

- At the time of the accident she was either combining her personal business (stopping for yogurt and yoga) with her employer's business (driving her personal vehicle home) or was *attending to both at substantially the same time*. "And '[i]t is the established rule in this jurisdiction that where *the servant is combining his own business with that of his master, or attending to both at substantially the same time, no nice inquiry will be made as to which business the servant was actually engaged in when a third person was injured*.'"

Conclusion:

This decision dramatically expands employer liability. In this case, the employee used her personal car two to five times a week for work-related business. How many times does your manager drive to Home Depot in a week? Does your manager bring in lunch every day? If you require your employees to use their own vehicle for work-related driving, your business will take on additional and possibly surprising liability. Have you checked the driving records of your employees on the road for your benefit? Perhaps you should only use the park truck? Check with your insurance company as to any new clarifications for your general commercial liability policy. You should ensure that all such employees are properly licensed and insured, and that your business insurance will cover these types of accidents.

Please Feel Free to Contact Us with Any Questions!

New Health Insurance Marketplace Coverage Options and Your Health Coverage

PART A: General Information

Form Approved OMB No. 1210-0149 (expires11-30-2013)

When key parts of the health care law take effect in 2014, there will be a new way to buy health insurance: the Health Insurance Marketplace. To assist you as you evaluate options for you and your family, this notice provides some basic information about the new Marketplace and employment-based health coverage offered by your employer.

What is the Health Insurance Marketplace?

The Marketplace is designed to help you find health insurance that meets your needs and fits your budget. The Marketplace offers "one-stop shopping" to find and compare private health insurance options. You may also be eligible for a new kind of tax credit that lowers your monthly premium right away. Open enrollment for health insurance coverage through the Marketplace begins in October 2013 for coverage starting as early as January 1, 2014.

Can I Save Money on my Health Insurance Premiums in the Marketplace?

You may qualify to save money and lower your monthly premium, but only if your employer does not offer coverage, or offers coverage that doesn't meet certain standards. The savings on your premium that you're eligible for depends on your household income.

Does Employer Health Coverage Affect Eligibility for Premium Savings through the Marketplace?

Yes. If you have an offer of health coverage from your employer that meets certain standards, you will not be eligible for a tax credit through the Marketplace and may wish to enroll in your employer's health plan. However, you may be eligible for a tax credit that lowers your monthly premium, or a reduction in certain cost-sharing if your employer does not offer coverage to you at all or does not offer coverage that meets certain standards. If the cost of a plan from your employer that would cover you (and not any other members of your family) is more than 9.5% of your household income for the year, or if the coverage your employer provides does not meet the "minimum value" standard set by the Affordable Care Act, you may be eligible for a tax credit. An employer-sponsored health plan meets the "minimum value standard" if the plan's share of the total allowed benefit costs covered by the plan is no less than 60 percent of such costs.

Note: If you purchase a health plan through the Marketplace instead of accepting health coverage offered by your employer, then you may lose the employer contribution (if any) to the employer-offered coverage. Also, this employer contribution -as well as your employee contribution to employer-offered coverage- is often excluded from income for Federal and State income tax purposes. Your payments for coverage through the Marketplace are made on an after-tax basis.

How Can I Get More Information?

For more information about your coverage offered by your employer, please check your summary plan description or contact _____

The Marketplace can help you evaluate your coverage options, including your eligibility for coverage through the Marketplace and its cost. Please visit HealthCare.gov for more information, including an online application for health insurance coverage and contact information for a Health Insurance Marketplace in your area.

PART B: Information About Health Coverage Offered by Your Employer

This section contains information about any health coverage offered by your employer. If you decide to complete an application for coverage in the Marketplace, you will be asked to provide this information. This information is numbered to correspond to the Marketplace application.

3. Employer name

4. Employer Identification Number (EIN)

5. Employer address

6. Employer phone number

7. City

8. State

9. ZIP code

10. Who can we contact about employee health coverage at this job?

11. Phone number (if different from above)

12. Email address

Here is some basic information about health coverage offered by this employer:

- As your employer, we offer a health plan to:

☐ All employees. Eligible employees are:

☐ Some employees. Eligible employees are:

- With respect to dependents:

☐ We do offer coverage. Eligible dependents are:

☐ We do not offer coverage.

__If checked, this coverage meets the minimum value standard, and the cost of this coverage is intended to be affordable, based on employee wages.

** Even if your employer intends your coverage to be affordable, you may still be eligible for a premium discount through the Marketplace. The Marketplace will use your household income, along with other factors, to determine whether you may be eligible for a premium discount. If, for example, your wages vary from week to week (perhaps you are an hourly employee or you work on a commission basis), if you are newly employed mid-year, or if you have other income losses, you may still qualify for a premium discount.

If you decide to shop for coverage in the Marketplace, HealthCare.gov will guide you through the process. Here's the employer information you'll enter when you visit HealthCare.gov to find out if you can get a tax credit to lower your monthly premiums.

The information below corresponds to the Marketplace Employer Coverage Tool. Completing this section is optional for employers, but will help ensure employees understand their coverage choices.

13. **Is the employee currently eligible for coverage offered by this employer, or will the employee be eligible in the next 3 months?**

☐ **Yes** (Continue)

13a. If the employee is not eligible today, including as a result of a waiting or probationary period, when is the employee eligible for coverage? (mm/dd/yyyy) (Continue)_____

☐ **No** (STOP and return this form to employee)

14. Does the employer offer a health plan that meets the minimum value standard*?

An employer-sponsored health plan meets the "minimum value standard" if the plan's share of the total allowed benefit costs covered by the plan is no less than 60 percent of such costs (Section 36B(c)(2)(C)(ii) of the Internal Revenue Code of 1986)

☐ Yes (Go to question 15) ☐ No (STOP and return form to employee)

15. For the lowest-cost plan that meets the minimum value standard* offered only to the employee (don't include family plans): If the employer has wellness programs, provide the premium that the employee would pay if he/ she received the maximum discount for any tobacco cessation programs, and didn't receive any other discounts based on wellness programs.

a. How much would the employee have to pay in premiums for this plan? $_____

b. How often? ☐ Weekly ☐ Every 2 weeks ☐ Twice a month ☐ Monthly ☐ Quarterly ☐ Yearly

If the plan year will end soon and you know that the health plans offered will change, go to question 16. If you don't know, STOP and return form to employee.

16. What change will the employer make for the new plan year?_____

☐ Employer won't offer health coverage

☐ Employer will start offering health coverage to employees or change the premium for the lowest-cost plan available only to the employee that meets the minimum value standard.* (Premium should reflect the discount for wellness programs. See question 15.)

a. How much would the employee have to pay in premiums for this plan? $_____

b. How often? ☐ Weekly ☐ Every 2 weeks ☐ Twice a month ☐ Monthly ☐ Quarterly ☐ Yearly

(Employers Offering Health Coverage at Present Time)

New Health Insurance Marketplace Coverage Options and Your Health Coverage

Form Approved
OMB No. 1210-0149
(expires 11-30-2013)

PART A: General Information

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5. Employer address	6. Employer phone number	
7. City	8. State	9. ZIP code
10. Who can we contact at this job?		
11. Phone number (if different from above)	12. Email address	

You are not eligible for health insurance coverage through this employer. You and your family may be able to obtain health coverage through the Marketplace, with a new kind of tax credit that lowers your monthly premiums and with assistance for out-of-pocket costs.

(Employers Not Offering Health Coverage at Present Time)