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THE COMPASS

SERVING ALL POINTS OF NEBRASKA AND THE MIDWEST

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New Rules Muddy the Water

The Nebraska Supreme Court recently clarified the regulatory roles of the Department of Natural Resources ("Department") and the Natural Resource Districts in the case of *In re Complaint of Central Nebraska Public Power and Irrigation District,* 270 Neb. 108 (2005) ("*Central Nebraska*"). The Court concluded that "the Department has no independent authority to regulate groundwater users or administer water rights for the benefit of surface water appropriators." This ruling should have clarified the roles of Natural Resource Districts and the Department in the governance of water rights and water users in the State. Natural Resource Districts are the preferred regulators of ground water rights and users and the Department is the regulator of surface water rights and users. However, the Department will attempt to use its rulemaking authority under LB 962 to reassert authority over water rights in the state.

In *Central Nebraska*, the Court had been faced with the question of whether the Department could force ground water well owners whose pumping may have affected surface water appropriations of Central Nebraska Public Power and Irrigation District to cease or restrict pumping. The Department had previously concluded that they did not have independent legal authority to regulate or administer groundwater users for the benefit of surface water appropriators. The Court's holding affirmed the previous conclusion of the Department. Any action of the Department to restrict ground water rights and users must be done in conjunction with Natural Resource Districts, because Natural Resource Districts have the specific legislative authority to regulate ground water rights and users.

The Court specifically did not address what relief, if any, Central may obtain under Nebraska Revised Statutes § 46-701 *et seq*.; specifically, the revisions to the Ground Water Management and Protection Act as established in LB 962 in 2004. The Ground Water Management and Protection Act creates a system of cooperative governance between the Department and Natural Resource Districts for hydrologically-connected water supplies. The Act requires that the Department and Natural Resource Districts work together to regulate those river basins, sub-basins, or reaches that may be designated as fully appropriated.

The Department is currently evaluating the expected long-term availability of hydrologically-connected water supplies in each of Nebraska's river basins. By January 2006, the Department is expected to have completed these evaluations regarding, 1) the nature and extent of useable surface water and groundwater in each river basin, sub-basin, or reach; 2) the geographic area within which the Department preliminarily considers surface water and groundwater to be hydrologically-connected; and, 3) the extent to which current uses of surface water and ground water affect available near-term and long-term water supplies.

Once the Department has evaluated each river basin, the Department may act to designate a river basin as fully-appropriated. The Department shall determine the basin fully appropriated when a river basin, sub-basin, or reach reaches the level where the then-current uses of hydrologically-connected surface water and groundwater causes either, a) the surface water supply to be insufficient to sustain over the long term the beneficial or useful purposes for which existing natural flow, storage, or in-stream flow appropriations

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were granted; b) the stream flow to be insufficient to sustain over the long term the beneficial uses from wells constructed in the ground water which is dependent on recharge from the river or stream involved; or, c) reduction in the flow of a river or stream sufficient to cause non-compliance by Nebraska with an interstate compact or decree, other formal state contract or agreement, or applicable state or federal laws. Basically, when there is not enough water to supply existing or future uses which rely on stream-flow, the Department will designate a stream as fully appropriated.

The Department is currently developing the rules that it will use for designating fully-appropriated basins. As a member of the Department's rulemaking committee, representing small communities, it seems very clear that what rules the Department adopts will significantly affect groundwater rights within fully-appropriated basins. The rules as currently drafted propose to designate a fully-appropriated basin when a surface water irrigator's irrigation right will be partially affected by lack of water. The rules propose to consider a twenty-five year lag effect for groundwater pumping, and to include all areas within which pumping of a ground water well for fifty years will cause a ten percent depletion in surface water flows. Applying a twenty five year lag effect and including all ground water wells within the 10/50 line will allow the Department to designate most of the state as fully appropriated.

As basins are designated fully appropriated, Natural Resource Districts will be forced by the designation to create integrated management plans. These integrated management plans require Natural Resource Districts to work with the Department to protect existing surface water appropriators to the detriment of existing and future ground water users.

The Department's determination of a fully-appropriated basin is important, because when the Department determines a basin to be fully appropriated, the Department shall enter an immediate stay on the issuance of any new surface water appropriations and Natural Resource Districts are required to issue an immediate stay on the construction of any additional ground water wells or ground water uses within the fully appropriated area. These stays may be in effect up to five years as the Department and Natural Resource Districts negotiate integrated management plans for the basin. In addition, these stays may become permanent if the integrated management plan of the Department and the Natural Resource District does not allow additional uses.

The new regulations in the Groundwater Management and Protection Act will restrict and possibly eliminate new ground water wells in fully appropriated areas. In addition, the Act may force Natural Resource Districts to place significant restrictions on existing ground water wells in those fully appropriated areas. It is important for landowners, communities and ground water well users in Nebraska to be aware of the changes that are coming to their river basin in January 2006.

The Nebraska Supreme Court has made it clear that Natural Resource Districts are the preferred regulators for ground water; however, the new Ground Water Management and Protection Act allows the Department to substantially affect current and future ground water uses by designation of fully-appropriated basins. The Supreme Court's declaration in *Central Nebraska* that "the Department has no independent authority to regulate groundwater users or administering groundwater rights for the benefit of surface and water appropriators" may be partially ignored by the Department's proposed rules. Landowners, communities, and ground water well owners have until August 11, 2005 to comment on the Department's proposed rules for designating fully-appropriated basins. Our office has the experience and ability to prepare comments on your behalf. If you have any questions regarding the status of your current well uses or ability to use water in the future, please contact our office.

– Scott D. Peterson, Esq.

Do Your Severance Agreements Pass the Test?

Whether it is a single-employee termination or a large scale reduction-in-force, many employers find that written severance agreements are a useful tool to eliminate uncertainty and reduce potential liability arising out of the termination. However, as one recent case shows, even Fortune 500 companies can't escape liability if their severance agreements do not strictly comply with the federal law that governs employment severance agreements.

In *Thomforde v. IBM*, (Case No. 04-1538, 8th Cir., May 3, 2005), plaintiff Dale Thomforde worked for IBM in Minnesota for 28 years as an engineer when he was selected for an involuntary reduction-in-force. IBM agreed to pay Thomforde severance benefits if he signed a written "General Release and Covenant Not to Sue" ("Agreement"). The Agreement provided, among other things, that by signing it Thomforde released IBM "from all claims . . . [he] may have against IBM of whatever kind . . . [including] claims arising under the [federal Age Discrimination in Employment Act ("ADEA")] . . . and any other federal, state or local law dealing with discrimination in employment . . . ." Three paragraphs later the Agreement provided that "[y]ou agree that you will never institute a claim of any kind against IBM . . . including, but not limited to, claims related to your employment with IBM." However, in an attempt to comply with a federal regulation governing severance agreements, the Agreement later stated that "[t]his covenant not to sue does not apply to actions based solely under the [ADEA]."

Thomforde signed the Agreement, collected the severance benefits, and then sued IBM for age discrimination under the federal ADEA. IBM moved to dismiss the case based on Thomforde's voluntary execution of the Agreement. The trial court agreed with IBM, and dismissed the case. Thomforde appealed that decision to the U.S. Court of Appeals for the Eighth Circuit (which covers Nebraska).

The federal appeals court sided with Thomforde and reinstated his lawsuit against IBM. According to the Eighth Circuit, because the Agreement did not satisfy the "strict and unqualified" requirements of the federal Older Workers' Benefits Protection Act ("OWBPA"), it was not effective and did not bar Thomforde from suing IBM for age discrimination. Among other things, the appeals court concluded that the Agreement was ambiguous. While "[t]he intended effect of the Agreement was to release the employee's substantive claims under the ADEA, while preserving the employee's right to challenge the validity of the release through a lawsuit, as provided by the regulations (29 C.F.R. 1625.23(b)) . . . the Agreement does not explain how the [release and covenant not to sue] relate to each other or the limited nature of the exception to the covenant not to sue in light of the release of claims." Because the Agreement did not meet the OWBPA's strict requirement that it be written in a manner calculated to be understood by the employee, the Agreement was ineffective and Thomforde was permitted to sue IBM for age discrimination.

LESSON:

Adopted in 1990, the OWBPA amended the federal ADEA to provide for minimum requirements for a knowing and voluntarily release of claims under the ADEA. Regulations implementing the OWBPA provide that a waiver is not "knowing and voluntary" unless it meets all of the following requirements:

- The waiver must be part of a written agreement that is written in a manner calculated to be understood by such individual, or by the average individual eligible to participate;
- The waiver agreement must refer to the ADEA by name in connection with the waiver;
- The written agreement must advise the employee to "consult with an attorney prior to executing the agreement";
- Under the waiver agreement the individual cannot waive rights or claims that may arise after the date the waiver is executed;
- In exchange for the waiver, the individual must receive "consideration in addition to anything of value to which the individual already is entitled";
- In instances of single-employee terminations, the individual must be given a period of at least 21 days within which to consider the agreement;
- In instances where a waiver is requested in connection with an exit incentive or other employment termination program ("program" is defined to include voluntary and involuntary terminations affecting two or more employees) offered to a group or class of employees, the individual must be given a period of at least 45 days within which to consider the agreement;
- The 21- or 45-day period runs from the date of the employer's final offer. Material changes to the final offer restart the running of the 21- or 45-day period, although the parties may agree that changes do not restart the running of the 21- or 45-day period. Moreover, an employee may sign a release prior to the end of the 21- or 45-day time period, provided that the employee's decision to accept such shortening of time is knowing and voluntary and is not induced by the employer through fraud, misrepresentation, a threat to withdraw or alter the offer prior to the expiration of the 21- or 45-day period, or by providing different terms to employees who sign the release prior to the expiration of such time period;
- The waiver agreement must provide that for a period of at least 7 days following the execution of such agreement, the individual may revoke the agreement, and the agreement shall not become effective or enforceable until the revocation period has expired. The 7-day revocation period cannot be shortened or waived;
- If the waiver is requested in connection with an exit incentive or other employment termination program offered to a group or class of employees, the employer (at the commencement of the 45-day period) must inform the individual in writing in a manner calculated to be understood by the average individual eligible to participate, as to:
    - Any class, unit, or group of individuals covered by such program, any eligibility factors for such program, and any time limits applicable to such program; and
    - The job titles and ages of all individuals eligible or selected for the program, and the ages of all individuals in the same job classification or organizational unit who are not eligible or selected for the program. Information regarding ages must be broken down according to the age of each person eligible or selected for the program and each person not eligible or selected for the program. The use of age bands broader than one year (such as "age 20-30") is not permitted.

See 29 C.F.R. § 1625.22.

Properly drafted severance agreements are a legitimate tool for employers to reduce the risk involved in any termination. However, as the *Thomforde* decision makes clear, such agreements are not effective unless they comply with the very strict requirements of the OWBPA. Employers using severance agreements are encouraged to consult with experienced employment law counsel to determine whether their severance agreements comply with the OWBPA and this new court decision.

–Mark A. Fahleson, Esq.

TAX UPDATE: DEFERRED COMPENSATION AGREEMENTS

Late last year, Congress enacted the American Jobs Creation Act of 2004, which includes a number of changes to the Internal Revenue Code. One major change involves the tax treatment of deferred compensation agreements. If you have an existing nonqualified deferred compensation arrangement, you need to review the plan soon to make sure it complies (or can be amended to comply) with the new Act. *Failure to take action could result in serious tax consequences*. Some of the most frequently asked questions about the new law are discussed below.

1. **What is a Nonqualified Deferred Compensation Agreement?**
   A nonqualfied deferred compensation agreement ("NDCA") is an agreement between an employer and an employee in which the employer promises to pay the employee wages or other benefits at some time in the future. It is called "nonqualified" because it is not structured to be a qualified retirement plan (like an IRA or a 401(k)). Qualified plans, most stock option plans, and vacation leave and similar plans are not NDCAs and are not covered by the new law.

2. **Why do employers set up NDCAs?**
   NDCAs are a useful tool to provide incentives and tax benefits to key employees. The idea is to help the employee plan for retirement or provide an incentive for the employee to stay (or both) without having to comply with all the anti-discrimination rules that apply to qualified plans.

3. **Prior to 2005, how were NDCAs taxed?**
   Prior to the new Act, there was no immediate federal income tax on a properly structured NDCA. Typically, when "contributions" were made under this type of arrangement, the employer would just make a book entry of the amount due to the employee. In some cases, the employer would actually deposit funds into a bank account or investment account (or sometimes a trust) held in the name of the employer. When the money was set aside, there was no taxable income to the employee and no tax deduction to the employer. Since the funds were still held in the name of the employer, the tax consequences were deferred. As the funds were ultimately paid to the employee (upon retirement or termination or similar events), then the amount paid would be income to the employee and create a tax deduction for the employer. This was true regardless of whether the amounts set aside for the employee were immediately vested or whether the amounts would be paid only if the employee stayed with the employer for a period of time.

4. **How are NDCAs taxed under the new law?**
   The new Act makes it much more difficult for the employee to avoid recognizing income. It imposes two new significant restrictions:

   (A) **<u>Substantial Risk Standard</u>**: Under the new Act, once the employer sets aside the funds, the amount set aside is taxable income to the employee regardless of whether the funds are actually paid to the employee. There is one main exception to this rule. The amount set aside is not immediately taxable to the employee if there is a "substantial risk" that the employee will not receive these funds. Though the IRS has not yet specifically defined a "substantial risk," early guidance from the IRS indicates that there must be some real risk that the amount will not be paid. A provision that the employee will not receive the funds if he or she does not work with the employer until retirement would be one example of a substantial risk. Another example could be tying the additional compensation to achieving certain long-term performance goals. If there is a substantial risk of nonpayment, then the tax consequences are put off until the risk is no longer there. When the risk is removed, the amounts set aside are taxable income to the employee and deductible to the employer.

   (B) **<u>No Acceleration of Benefits</u>**: Under the new Act, an employee is immediately taxed on amounts set aside for him or her if the time table for payment can be accelerated at the option of the employee or the employer. The payments must be made on a fixed schedule except in cases of separation from service, death, disability or a change in employer ownership.

5. **How does the new law apply to "old" deferred compensation agreements?**
   The new law applies to any amounts set aside by an employer after January 1, 2005. If new amounts are set aside for an employee in 2005 under the terms of an existing agreement, the new law will apply to all the amounts set aside for the employee under that agreement. Thus, if the old plan does not comply with the new law and new contributions are made in 2005, the employee could be immediately taxed on the *entire* amount set aside for him or her over the years.

6. **What can be done to save an "old" deferred compensation plan?**
   Generally, the solution is to "freeze" the old plan by amending it to stop contributions after January 1, 2005. If an amendment is done properly, there will be no income tax to the employee on the amounts set aside in 2004 and prior years until the amounts are actually paid. The deadline to complete amendments is December 31, 2005, but it would be wise to complete the amendments as soon as possible to avoid new contributions in 2005 which could jeopardize the old plan.

7. **Is there any benefit to NDCAs under the new Act?**
   Though their usefulness is now somewhat limited, a NDCA can still serve a useful purpose. If an employer desires to provide a real incentive for an employee to stay until retirement, the NDCA can be a tool to provide that incentive and provide some retirement income assistance to the employee. Just how flexible the IRS will be in administering the new law has yet to be determined.

8. **I think I have a deferred compensation agreement from 2004 or earlier. What do I do now?**
   Have the agreement reviewed and do not make or accept any additional contributions under the plan until you have done so.

If you have questions or would like our assistance in reviewing an existing agreement or creating a new one, please contact us. We would be happy to assist you.

–Timothy L. Moll, Esq.

The Uniformed Services Employment and Reemployment Rights Act – If You Have Employees, it Likely Applies to You.

United States history is replete with inspiring accounts of our dedicated citizen soldiers – from colonial minutemen to present-day members of the Guard and Reserve. In our current political climate, and in light of September 11th, the War on Terror, and the ongoing conflict in Iraq, increasing numbers of men and women are being called to duty for unprecedented periods of service.

USERRA's Three Fronts

Enacted on the heels of the Gulf War, the Uniformed Services Employment and Reemployment Rights Act ("USERRA") is the federal law that governs the rights of citizen soldiers and dictates the obligations of those that employ them. USERRA's stated purpose is to strengthen and broaden the rights of persons who voluntarily and involuntarily leave employment positions to undertake military service. To strengthen and broaden these rights, USERRA provides for protection on three fronts. First, USERRA prohibits discrimination and retaliation against employees who perform military service. Second, USERRA delineates the rights and benefits to which employees serving the military are entitled. And, third, USERRA provides for reemployment rights.

USERRA operates to minimize the disadvantages and disruption to soldiers' civilian careers. Accordingly, USERRA both provides for broad protections to covered employees and allows for serious penalties against noncomplying employers. Take note – if you have employees, USERRA likely applies to you.

USERRA covers both active and reserve service with the Army, Navy, Marine Corp, Air Force, Coast Guard, the Army or Air National Guard, the commissioned corps of Public Health Service, and any other category of persons designated by the President in time of war or national emergency. The employee's absence from work may be based on voluntary or involuntary service, and absences due to training and weekend maneuvers are also covered. Thus, it is incumbent upon employers to have policies and procedures in place to facilitate their employees' military leave (and return) process. It also behooves citizen soldiers to become educated about their rights and the procedures to follow to ensure the vesting of those rights.

Covered Employers

USERRA applies to all private employers, regardless of whether an employer has one employee or thousands. USERRA's definition of employer also includes the federal government, states, and successors in interest. In fact, any person, institution, organization or other entity that pays salary or wages for work performed or that has control over employment opportunities is covered by USERRA. Thus, both an employment agency and a union hall fall within USERRA's definition of employer. Furthermore, USERRA applies extraterritorially.

Covered Employees

To qualify for USERRA protection, the employee must be a member of, perform, have performed, applied to perform, or have an obligation to perform service in a uniformed service. Even part-time, temporary or probationary employees are eligible, and no minimum period of employment is required of an employee seeking USERRA's protection. Professionals and employees who occupy managerial or executive positions are also USERRA employees. USERRA, however, does not apply to soldiers that have separated from the uniformed service under a dishonorable or bad conduct discharge, or other than honorable conditions.

Prohibited Discrimination

The first tier of USERRA's three-tiered approach prohibits an employer from denying initial employment, reemployment, retention in employment, promotion, or any "benefit of employment" on the basis of an employee's service in the uniformed services if such service is a motivating factor in the adverse employment action. A "benefit of employment" is a benefit that flows to the employee as a result of the employee's employment by the employer in question. Courts have unanimously held that USERRA is to be construed broadly in favor of its military beneficiaries. For example, a regular schedule can be considered a benefit of employment, and an employer who transfers a covered employee to a different job with a less desirable schedule denies that employee a benefit of employment.

USERRA also provides protection from discrimination to persons who take action to enforce USERRA protections, testify or make a statement in conjunction with a USERRA proceeding, or assist or participate in a USERRA investigation. A court has recently held that USERRA also provides a cause of action for harassment and hostile work environment, as freedom from these conditions is a benefit of employment.

Protected Benefits

The second of USERRA's protections ensures certain rights and benefits of employees while they are absent due to military service. Generally, an employee who is absent for military service is treated as if he or she were on an unpaid leave of absence. Thus, while on leave the employee is entitled to the same rights and benefits, other than salary, as any other similarly situated employee.

Health care coverage during periods of leave is governed by USERRA provisions as well as the Consolidated Omnibus Budget Reconciliation Act ("COBRA"). Even for employers that are not subject to COBRA, USERRA provides for health benefit continuation coverage for employees on leave. As to vacation days, the employer must allow the employee to use any accrued vacation or paid leave during any absence due to service in the uniformed services; however, the employer may not require the employee to use vacation or leave during the service period. In regard to retirement ben-

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efits, regardless of whether the employer's plan is a defined contribution or defined benefit plan, USERRA guarantees any employee who qualifies for USERRA's protections those benefits that would have accrued if the employee had not been on a military leave of absence. In other words, military service is treated as employment for purposes of vesting and benefit accrual.

USERRA also contains a statutory limit on the at-will employment doctrine. For a returning employee who serves for more than 30 days, but less than 181 days, such employee cannot be discharged except for cause within 180 days after the date of such employee's reemployment. If the employee serves for more than 180 days, the period of protection extends to one year. By implication, an employee who serves 30 days or less is not protected from at-will status and can be terminated for reasons other than cause.

Reemployment Rights

The most complicated and perhaps the most important of USERRA's protections are its reemployment rights provisions. Stated simply, USERRA provides for prompt reemployment in the position that the employee would have attained had the military service not interrupted the employment relationship. It is as if the employee is on an escalator during military service – when the employee returns to work, he or she returns to the position that he or she would have held had military service not interrupted.

To qualify for reemployment rights, an employee must satisfy certain requirements, which differ depending on the length of the employee's service. All employees must give prior notice of military service, unless military necessity renders prior notice impossible. For any service less than 31 days (*e.g.*, weekend drills, intermittent training, or fitness for duty examinations), the employee is to return to work on the next scheduled shift. For service in excess of 30 days, USERRA provides for a period of rest and a method by which to report back to work or reapply for employment. An employer is excused from reemploying a returning soldier only if reemployment would cause undue hardship, if changed circumstances make reemployment impossible or unreasonable, or if the employee performed brief, non-recurring services.

USERRA requires employers to notify employees of their USERRA rights. The Department of Labor has created a poster that satisfies this requirement. The poster is available at www.dol.gov/vets/.

Be Prepared

Congress clearly recognizes the importance of prohibiting discrimination and retaliation against members of the service, ensuring their employment benefits, and preserving their ability to return to civilian employment. Therefore, USERRA is essential in both keeping skilled members in the uniformed services and protecting the jobs of those who serve. Employers must be aware of USERRA protections and requirements, and although such protections and requirements are extensive and complex, the employer's USERRA awareness and training of requisite personnel to implement policies and procedures will substantially minimize the viability of USERRA enforcement actions. Furthermore, it is imperative to note that according to recent surveys, a growing number of employers are voluntarily providing greater benefits. In sum, an employer cannot afford to disregard or ignore USERRA. Both the law and public policy require that employers comply. *– Kristin S. Simpson, Esq.*

Attention Employers: Are You Using the New I-9 Form?

On June 21, 2005, the U.S. Citizenship and Immigration Services (USCIS) issued an "updated" and "rebranded" Employment Eligibility Verification Form (Form I-9) for employers to use during the hiring process.

Employers are encouraged to begin using this new form and to continue doing so until a completely revised Form I-9 is released in the future, most likely in 2006.

The new Form I-9 can be found on our website at www.remboltludtke.com in the "Articles" section of "Legal News".

The American College of Trust and Estate Counsel ("ACTEC") has elected one of our partners, Timothy F. Clare, as a Fellow.

ACTEC brings together the nation's top trust and estate lawyers and professors. The substantive areas of expertise include estate planning, probate, estate and trust administration, transfer tax laws, income tax laws that affect individuals and trusts, elder law and charitable planning. Less than one percent of all licensed lawyers in the United States and Canada are ACTEC members.

In order to be elected a Fellow, a lawyer must:

1. Be rated by his peers as possessing very high and pre-eminent legal ability with the highest professional and ethical standards;

2. Have at least ten (10) years experience in active private trust and estate practice, and have demonstrated exceptional skill in the area;

3. Have made a substantial contribution to the trust and estate field through lecturing, writing, bar activities and/or legislative drafting.

Mr. Clare joins his partner, James E. Rembolt, as an ACTEC Fellow. Rembolt Ludtke LLP is now one of only two law firms in Lincoln and one of five law firms in Nebraska having more than one ACTEC Fellow.

NOT ALL TRADEMARK RIGHTS ARE CREATED EQUAL

The strength and scope of trademark rights vary greatly - and they should. Joe, the owner and sole employee of JOE'S LAWN CARE, does not need the protection that GOOGLE and WALMART need. Two relevant factors determining the strength and scope are the type of registration and the novelty of the mark. This article will briefly describe the different options for registration of a trademark and how this decision affects the rights involved. In the next edition of ***The Compass***, the difference the choice of the actual mark itself can make will be explained.

There are essentially three levels of registration of trademarks. (The fourth level, international registration, will not be addressed here. International trademarks require extra steps to be fully secured.)

1) The first level is not to register at all. You actually do have rights to a trademark, even an unregistered one, if you have used it in commerce. These rights permit you to keep others from using that mark in your geographic area for the same types of products. The law gives you that protection for at least two reasons. First, it helps ensure that you can protect – and benefit from – the reputation that you have established in the mark. Second, it also gives the public confidence that a product bearing that mark will be from the same source every time. As a result, these rights are limited to the scope of your reputation. The people who are unaware of your mark or reputation cannot be confused by a competitor who uses the same mark for the same products. In such a case, without registration, there is no trademark right infringed.

2) The second level is to register your mark with the Nebraska Secretary of State. Your mark can be registered in a few weeks time for the cost of a search and the filing fee.

Registering the mark gives notice to others interested in using that mark or a similar mark. A simple, 60-second, free search of the Nebraska Secretary of State's website, or a quick call to that office, would reveal to anyone that your mark is already taken. Also, with the registration, it is much easier to tell others to stop using your mark; the registration is strong evidence of your right. A cease and desist letter is more persuasive if accompanied by a copy of the registration rather than a mere statement that you used the mark first. It is also easier to win in court if a dispute goes that far. Your date of first use is in the registration and gives you virtually automatic priority over all subsequent users of that mark in your area. Without registration, you would have to prove to the court your date of first use after the dispute arises.

It costs about $500 (fees and attorney charges) for a straightforward filing of a trademark and the required publication. If objections are raised by the Secretary or another entity, it would, of course, cost more. But even in that case, the extra money is worth it; the objection raises doubts as to your rights to the mark. Without registering, you could be building up good will in a mark that you are not entitled to use and may later be forced to abandon.

3) The next level is federal registration of the trademark. This gives you considerably stronger rights. However, it is only available to those marks used (or soon to be used) in interstate trade. While the "interstate commerce" requirement is not cumbersome, there are some uses that would be precluded. For instance, a lawn mowing service limited to the Grand Island area might have a hard time establishing it is engaged in interstate commerce. However, if your services or goods are purchased by out-of-state visitors, or if your advertisements reach people out of state who could plausibly order your goods or services, the interstate commerce requirement is probably met.

Federal trademark rights are harder to obtain. Unlike the Nebraska Secretary of State who just looks at the local records of marks and entities registered in the state, the US Patent and Trademark Office (USPTO) employs many attorneys whose only job is to research all the trademark registrations nationwide to determine if your mark is already taken, or is too similar to a mark already taken. But once you clear that hurdle and get a registration, you can prevent anyone anywhere in the nation from starting to use any mark that is likely to confuse the public.

Suppose that long ago you began to use the service mark SAM'S CLUB for your dime store in Wahoo. Years later, Sam Walton federally registered the mark for his ubiquitous stores. Mr. Walton could not prevent you from running your dime store in Wahoo under the name, but he could prevent you from expanding into Ashland, and prevent you from expanding into the pizzeria business, even though you used the name first! For the mom-and-pop store, that might be OK. For any business that may ever want to expand the use of its mark, geographically or in its product line, federal registration is a relatively cheap guaranty of the unhindered ability to do that.

So, my daughters (ages 5 and 6) need not register their YUMMY LEMONADE mark which occasionally appears on a table in our front yard during the summer. On the other hand, although JOE'S LAWN CARE is local and limited, I would still recommend a state registration to protect his mark and reputation within his area and to ward off anyone considering the same mark. But for the company involved in interstate trade or the company wanting to reserve its rights to expand its use of the mark in the future, I would recommend the federal registration.

One final note about the difference between marks (trademarks and service marks) and names (entity names and trade names): The marks identify products or services; the names identify entities. These often overlap. For example, there is a company with the *name* COCA-COLA and a drink with the *trademark* COCA-COLA. Names and marks are both registrable in Nebraska. However, while the Nebraska Secretary of State's office routinely searches both types to ascertain the availability of a proposed name or mark, the statutes do not appear to require it to do so. To maximize your protection

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under the state system, therefore, the mark and the name should both be registered, even if identical. It is a different story with the federal registry. Only marks are registrable. The USPTO will not register trade names or entity names, so your protection comes only from the use of your mark as a trademark and/or service mark. *– Glen Th. Parks, Esq.*

TYPE OF REGISTRATION	EST. COST	SCOPE OF TRADEMARK (TM) RIGHTS	PRESUMPTION	CONS
No registration; just use	$0	Rights limited to your area; you lose against a federal TM holder who used it first; you lose against a federal TM holder who used it *second*, except in your geographic trade area.	None	No assurance of name availability; no notice to others not to use your TM; no presumption of TM rights or date of first use.
State registration	$400-$500	Same as above; and notice to everyone that you claim rights to this TM, keeping most others away.	Your rights to the TM; your date of first use	Cost (minimal); little or no protection against even a later federal TM owner.
Federal registration	$1000 - $1500	Rights to prevent others across the nation from starting to use your mark in your field.	Same as above	Cost; may require follow-up with USPTO; harder to attain federal TM registration; can take several months or more.

Is There Something Wrong With Your Tax Advice?

If you have been dealing with any tax issues lately, you may have noticed some additional disclosures included in letters or correspondence from tax professionals. Recently, the IRS issued new regulations (effective June 20, 2005) which govern how attorneys and other professionals give tax advice. The regulations are commonly referred to as Circular 230 and are the result of a continuing effort by the IRS to crack down on abusive tax shelters. Though their target is tax shelters, the new regulations are written broadly and apply to almost all written advice (including letters, memos, and e-mail) on federal tax issues. Generally, any tax advice *must* either: (a) comply with detailed requirements for issuing formal tax opinions; or (b) include a prominent disclosure indicating that the advice cannot be relied upon for purposes of avoiding tax penalties. For routine tax advice, it is generally not cost-effective to perform the due diligence and analysis required for a formal tax opinion which meets IRS standards. As a result, written communications from our office which involve any federal tax issues will now include a legend similar to the following:

> DISCLOSURE: In accordance with IRS Circular 230, please note the following with regard to any portion of the above message which involves federal tax issues: Unless expressly stated otherwise above, (1) nothing contained in this message is intended or written to be used or relied upon by any taxpayer for the purpose of avoiding penalties that may be imposed under the Internal Revenue Code; and (2) nothing contained in this message may be used to recommend, promote or market any federal tax transaction or matter.

The presence of the disclosure does not mean that you are receiving inappropriate or substandard legal advice. We remain committed to providing the highest quality legal services in a cost-effective manner. When you see the disclosure, remember that it is simply a required acknowledgment that we have not been asked to provide a formal tax opinion. Without a formal opinion, if the IRS subsequently contests the tax issue, you will not be able to avoid a penalty by claiming you relied on the advice of your attorney. Questions? Please do not hesitate to contact us.

– Timothy L. Moll, Esq.

YOU COULD HAVE MAIL

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