INSIDE THE LAW

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CONDOMINIUMS 101

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Condominiums are peculiar "creatures." They are often thought of as a lifestyle choice, but they are actually a special legal form of property ownership under which an individual purchases and owns a unit in a multi-unit complex. What follows is a legal explanation of what a residential condominium is, how it functions, and some of the hot-button issues that can cause turmoil within condominium communities.

When you purchase a condominium unit, you actually purchase your individual unit together with a share in the entity (usually a condominium trust) that governs and maintains the common elements of the community. Common elements vary but typically encompass everything outside the unit's interior walls, such as the land, recreational facilities, walkways, outside grounds, lobbies, hallways, elevators, and parking. The ownership of the common elements is shared among the individual unit owners (often termed as their "beneficial interest"), as is the cost of their operation, maintenance, and ongoing replacement. The management of the common facilities is typically delegated to a small group of unit owners elected to the board of trustees.

The condominium lifestyle can be attractive. It often relieves the unit owner of certain dreaded obligations like shoveling snow and mowing the lawn, it can be less expensive than other types of home ownership, and it can provide a sense of community. There is, however, a price to pay for the benefits of association. In order to promote the welfare of the condominium community, owners must give up a certain degree of freedom. Many condominiums have rules limiting everything from exterior decorations, pets, and the frequency of visitors to policies regarding rentals, etc., and sometimes disagreements about the rules of the community can lead to dysfunction.

When most people purchase a condominium unit, they do not typically give much thought to how their community works. It functions like a microcosm of society. The unit owners pay monthly dues to the homeowner's association ("HOA"), much like municipal taxes. The HOA, which is generally governed by a board of trustees, functions as the local government. The trustees function as elected officials. They establish an annual budget, collect and expend the revenue

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of the HOA, plan for maintenance and repairs, and oversee the community's reserve fund. The board of trustees also functions as the "police," seeing to the enforcement of any restrictions or rules and levying fines for violations where appropriate.

The HOA is a powerful collection of elected trustees. The vast majority of the time, the trustees volunteer their time toward the goal of ensuring a smooth-running community for all. Other times, however, a few overzealous trustees may exceed the limits of their authority. The kind of divisiveness that results from an autocratic board can bring smaller condominiums to financial ruin and chaos. For that reason, it is important for every condominium owner to have a basic understanding of how condominiums are supposed to function.

The rules of the road for each condominium community are set forth in the condominium documents. In Massachusetts, the condominium documents typically consist of a master deed, a declaration of trust, and rules and regulations. The master deed defines the physical boundaries of the units and distinguishes the units from the shared common areas. It provides the blueprint for how the land and facilities are allocated among the unit owners and the HOA. The declaration of trust creates the HOA, establishes a board of elected trustees, and sets forth the by-laws under which the trustees govern the community. The declaration of trust should also contain all the unique rules and regulations of the condominium.

In Massachusetts, the recorded master deed and/or declaration of trust must set forth any restrictions concerning the use and maintenance of the units and the common areas. This is important because use restrictions (such as a ban on smoking, the prohibiting of rentals, or a ban on pets) should be disclosed to buyers before they purchase their units. Use restrictions that are not set forth in the master deed or declaration of trust are not legally enforceable. Many trustees (and even professional management companies) do not realize this and mistakenly believe that they can make sweeping changes by a rule or regulation passed solely by the trustees.

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In our practice, we have encountered condominium communities that improperly sought to impose restrictions on the use of units. In one case, a group of trustees imposed a rule banning pets when the condominium documents expressly permitted them. In another case, the trustees promulgated a policy that prohibited unit rentals. While the rules of the community can change, trustees need to understand that they cannot effectuate such sweeping changes in isolation.

What many owners do not realize, however, is that with the requisite vote of the unit owners (usually a supermajority), condominium associations *can* change their rules. They can ban smoking, prohibit pets, and restrict rentals in the community, irrespective of the impact on owners who purchased with different rules in place. These types of changes can have a real effect on unit owners who purchased their unit under one set of rules, only to find the rules have changed. For that reason, a higher threshold of approval is required.

Most recently, we were asked whether a condominium community could implement a ban on smoking. The answer is yes, but the trustees could not pass such a rule without unit owner approval. Because a smoking ban regulates the use of the units and common areas, such a restriction would need to come in the form of an amendment to the by-laws. In order to pass such an amendment, typically 67 percent or more of the unit owners, as well as approval by a majority of trustees, is required. If the trustees purported to implement a smoking ban on their own, the ban would be legally invalid.

Condominium arrangements are wonderful when they work, but most unit owners do not know enough about how they should function. Lawsuits and infighting between trustees and unit owners only serve to drain the resources of the HOA. Let Fletcher Tilton explain condominium ownership and management to you. We regularly advise HOAs about how to manage their communities and adapt to the changing legal landscape, and we would be pleased to add your community to the more than 40 condominium communities we currently serve. **FT**

WHICH EMPLOYEES IN MASSACHUSETTS ARE ELIGIBLE TO BE PAID AS TIPPED SERVICE EMPLOYEES?

by Joseph T. Bartulis, Jr., Esq.
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While most Massachusetts employers often know when they can and cannot classify an employee as paid hourly or paid a salary as an exempt employee under the federal Fair Labor Standards Act, occasionally an employer will ask whether it must pay its hourly paid employees the minimum wage (which is $8 per hour at the time of this writing) or whether it meets the criteria to pay them the lower, current "Tipped Service Employee" rate of $2.63 per hour.

MASSACHUSETTS SERVICE EMPLOYEE STATUTE AND REGULATION

Under Massachusetts law, a Service Employee is defined in MGL 149, § 152A as:

"… a person who works in an occupation in which employees customarily receive tips or gratuities, and who provides service directly to customers or consumers, but who works in an occupation other than in food or beverage service, and who has no managerial responsibility…" – MGL 149, § 152A

Under Massachusetts law, any employer that is employing tipped Service Employees additionally must comply with the following provisions within the Code of Massachusetts regulations in order to pay them that rate. 455 CMR 2.02. Looking at both the Regulation and the statute, they collectively provide that an employer may pay the Service Employee rate only if:

(a) It is actually paying the employee not less than $2.63 per hour for every hour actually worked — not just the time he or she is servicing a customer;

(b) The employer has first informed the employee of the provisions of paragraph 3 of MGL 151, § 7;

(c) The employee actually received tips in an amount that, when added to the service rate of $2.63 per hour, equals or exceeds the basic minimum wage (which is $8 per hour at the time of this writing); and

(d) All tips received by the employee were either retained by him or her or were distributed to him or her through a tip-pooling arrangement.

ILLUSTRATIONS

1. If a Service Employee waitress works for 20 hours in a given pay period when one includes all time spent doing preparation work and post-customer side work, under the current Massachusetts minimum wage, that Service Employee must earn at least $8 per hour worked, or $160, between tips and his or her hourly service rate over that pay period. If the Service Employee earned $150 in tips during that pay period, the employer may deduct that $150 of tips from the $160 minimum that the Service Employee must earn over that pay period. The employer is responsible for the remaining $10 due, or $2.63 per hour for each hour worked, *whichever is higher*. Since $2.63 per hour for the 20 hours worked is $52.60 and that figure is higher than $10, the employer must pay the $52.60 in wages for the pay period. From this example, the reader sees that the employer may not adjust downward the $2.63 paid per hour even though the employee will be earning beyond minimum wage. This is because $2.63 per hour is the lowest hourly rate that may be paid to a Service Employee. See, 455 CMR 2.02.

2. If the same Service Employee worked the above 20 hours during the pay period but only received $90 in tips (rather than $150 as above), the employer would again be responsible for paying the employee either the remaining $70 due or $2.63 per hour, *whichever is higher*. Since paying the employee the $2.63 per-hour rate would result in a $17.40 shortfall to the employee below the minimum wage threshold, the hourly rate paid to that employee for that particular pay period would actually need to be $3.50 per hour, not $2.63. See, 455 CMR 2.02.

PAYMENT FOR ALL HOURS WORKED

In each example above, please recall that the 20 hours represents all time from when the employee arrives at the job site and punches in until he or she has punched out and finished his or her shift. In no event should any hourly paid employee (tipped Service Employee or otherwise) be allowed or required to do any work for his or her employer before he or she has started his or her shift or after it has ended. No work should ever be done "off the clock." If you have an employee who insists on doing work before or after he or she punches in (yes, those people do exist), the employer cannot be complicit and simply sit idly by while the employee is doing so. Instead, the employer should have a provision in the employee handbook that expressly prohibits an hourly paid employee from doing any work before or after his or her shift. If an employee is seen violating

Readers are reminded that Massachusetts employers may pay employees a rate less than minimum wage only if its employees meet the requirements for being classified as Service Employees.

this policy, the employer should remind the employee of the policy and that he or she will be subject to discipline if he or she does not stop violating the policy. If it happens again, the employer should mete out punishment against the employee. Doing so will both serve to stop any such practice and help the employer establish that the employee was warned not to work off the clock, if that ever becomes an issue later.

FEDERAL LAW ISSUES

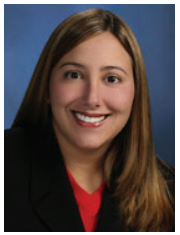
While beyond the scope of this short article, readers should note that certain tipped service occupations have additional federal law requirements that they *may* be governed by as well. For example, in order for limousine drivers who receive tips to be paid the tipped services rate, federal law requires the driver be paid the tipped service rate to earn at least $30 in tips per month. Additionally, the federal law tends to be very strict when it comes to defining tips. If an employer conditions a particular tip amount must be paid to the employee in advance of the service being provided, the federal law may view that as a mandatory tip, which could, in turn, be considered not to actually be a tip – since it is not discretionary and not within the exclusive purview of the person receiving the services. When this occurs, an employer may be precluded from including the mandatory tip amount when calculating whether the tipped Service Employee is actually earning over the minimum wage and it may be required to supplement the employee's wages in the manner described above in Illustration 2.

CONCLUSION

From the above article, readers are reminded that Massachusetts employers may pay employees a rate less than minimum wage only if its employees meet the requirements for being classified as Service Employees. Employers that have questions about whether their employees meet the Service Employee prerequisites or that wish to learn more about any federal regulations that may impact their Service Employees are welcome to contact the author. **FT**

FIRM **NEWS**

Congratulations to Our Attorneys Frederick Misilo, Jr. & Marisa Higgins!



Frederick M. Misilo, Jr. and Marisa W. Higgins recently prevailed in an appeal in the Supreme Judicial Court of Massachusetts in the case of Silva v. Carmel, SJC–11438 (2014).

In an April 18, 2014 decision, the Supreme Judicial Court vacated a 209A Abuse Prevention Order entered against Nancy Carmel, an individual with intellectual disabilities, who resided with the alleged victim in a residential program under the auspices of the Department of Developmental Services ("DDS"). On behalf of Nancy Carmel, Mr. Misilo and Ms. Higgins argued that persons residing together a residential program regulated by DDS are not household members and do not qualify for the protections offered under the Abuse Prevention Statute (G.L. c. 209A). In this case, the parties were not related by blood or marriage and did not have any family-like connection. Indeed, the only connection between these parties, and the reason they resided in the same residential program, was due to the services each requires as a result their respective intellectual disabilities.

The Supreme Judicial Court unanimously agreed, holding that "individuals who share a common diagnosis or status, rather than marriage, blood, or other relationships that are enumerated in G.L. c. 209A, § 1, and who live together in a State-licensed residential facility, do not qualify as 'household members' within the meaning of G.L. c. 209A, § 1,"

Atty. Misilo argued the appeal to a full court panel on February 6, 2014. For the Court's Opinion, visit our website www.fletchertilton.com

2014 BEST LAW FIRMS U.S.News & WORLD REPORT Best Lawyers

Once again, Fletcher Tilton has received a Tier 1 ranking in the 2014 Edition of *U.S. News – Best Lawyers "Best Law Firms."*

This Tier 1 ranking was determined through the firm's overall evaluation, which was derived from a combination of our client's impressive feedback, the high regard that lawyers in other firms in the same practice area have for our firm, and the information that was provided in response to the law firm survey.

Super Lawyers 2014

Congratulations to seven of our attorneys that have earned a spot on this year's list of "Super Lawyers."


Richard C. Barry, Jr.


Phillips S. Davis


Mark L. Donahue


Robert F. Dore, Jr.


Marisa W. Higgins


Douglas Q. Meystre


Sumner B. Tilton, Jr.

Richard C. Barry, Jr.
Estate Planning & Probate, Elder Law

Phillips S. Davis
Business & Corporate, Real Estate, Mergers & Aquisitions

Mark L. Donahue
Real Estate, Business & Corporate

Robert F. Dore, Jr.
Estate Planning & Probate, Business & Corporate

Marisa W. Higgins *(Rising Star)*
Family Law, Estate Planning & Probate

Douglas Q. Meystre
Personal Injury Plaintiff: General, Civil Litigation Defense, Business Litigation

Sumner B. Tilton, Jr.
Estate Planning & Probate, Closely Held Business

Super Lawyers selects attorneys using a patented multiphase selection process. Peer nominations and evaluations are combined with third party research. Each candidate is evaluated on 12 indicators of peer recognition and professional achievement. Selections are made on an annual, state-by-state basis.

Fletcher Tilton Completes its Move Into Expanded Office Space on Cape Cod

May 2014 - Fletcher Tilton announces its new Cape Cod office location at 1597 Falmouth Road (Rt. 28), Suite 3, in Centerville, MA, not far from our previous location in Hyannis.

The firm continues to support clients in the following practice areas:

Business & Corporate

- Selection of Entity
- Mergers & Acquisitions
- Employment Matters
- Business Succession Planning
- Reorganizations
- Nonprofits
- General Business Advice

Commercial Lending

- Asset Based Financing
- Real Estate and Construction Financing
- Participation and Intercreditor Agreements
- Collateral Analysis
- Financing Restructure and Debt Workout
- SBA and Bond Financing

Immigration

- Business Immigration
- Family Immigration

Litigation

- Business and Commercial
- Criminal
- Divorce
- Probate
- Personal Injury
- Product Liability
- Employment
- Environmental/Land Use
- Professional Malpractice
- Bankruptcy
- DUI

Real Estate

- Sale, Acquisition & Financing
- Leasing
- Environmental
- Permitting, Zoning & Development
- Condominiums
- Real Estate Abatement

Taxation

- Taxpayer Resolution Services
- Tax Planning Services

Trust & Estate/Special Needs/ Elder Law

- Estate Planning
- Trust & Estate Administration
- Retirement Planning
- Taxation
- Foundation Administration
- Special Needs
- Special Education
- Elder Law

We look forward to working in our new, larger office space and to continue to provide responsive solutions to our growing list of clients.

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