INSIDE THE LAW

Winter 2018

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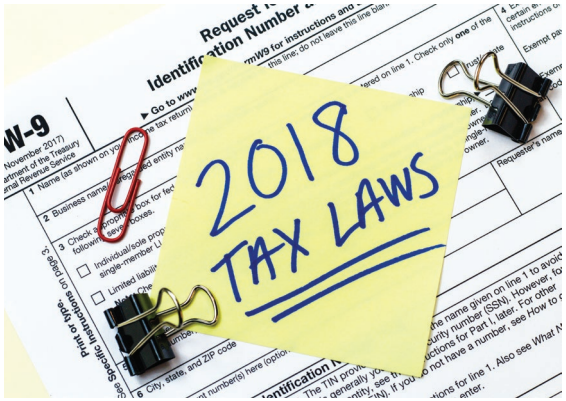
SWEEPING TAX LAW REVISION AFFECTS NEARLY EVERYONE

Provided by the Trust and Estate Department of Fletcher Tilton PC Attorneys at law.



President Donald Trump signed the Tax Cuts and Jobs Act in December, 2017. This law represents a sweeping reshuffling of tax policy reminiscent of tax laws signed by President Ronald Reagan in 1981 and 1986 and President George W. Bush in 2001.

The Tax Cuts and Jobs Act will have an impact on both the federal and state levels. For instance, when it comes to federal estate and gift taxes, the combined gift and estate tax exemption will rise from $5.49 million to $11.2 million. The increased exemption will allow individuals to make larger lifetime gifts (typically to children, in trust or outright) to reduce potential federal and Massachusetts estate taxes without triggering a federal gift tax (there is no Massachusetts gift tax). Additionally, the increased exemption should motivate individuals to review their estate plans and make sure any provisions tied to the federal estate tax exemption amount still reflect their intentions.

The new law contains a number of changes to the federal income tax. First, there will be reduced income tax rates with seven tax brackets.

For singles, the new brackets are:	For married couples who file jointly, the brackets are:
• 10% on the first $9,525 of taxable income	• 10% for up to $19,050 taxable income
• 12% on taxable income between $9,526 and $38,700	• 12% for $19,051 to $77,400
• 22% between $38,701 and $82,500	• 22% for $77,401 to $165,000
• 24% between $82,501 and $157,500	• 24% for $165,001 to $315,000
• 32% between $157,501 and $200,000	• 32% for $315,001 to $400,000
• 35% between $200,001 and $500,000	• 35% for $400,001 to $600,000
• 37% on amounts over $500,000.	• 37% for $600,001 and up

Each tax bracket relates only to the taxable income that falls between the two amounts. For example, if a single taxpayer's taxable income is $100,000, the first $9,525 will be taxed at 10%, the amount between $9,526 and $38,700 will get taxed at 12%, and so on. So, for example, a single filer with $100,000 of taxable income would have been subject to $20,982 of federal income tax in 2017 (21.0%), but only $18,290 in 2018 (18.3%).

Additionally, there are different rates for those who are head of household and for married, filing separately.

Under the new law, the maximum income tax rate is down to 37% from 39.6%. The standard deduction is increased, while the personal exemption is eliminated. Long-term capital gains rates remain the same. Further, one can no longer deduct interest on mortgage indebtedness above $750,000 (on new loans) whereas the previous limit was $1 million. The home equity loan interest deduction is eliminated, and there is a new $10,000 deduction limit on the combined total of local property tax and state income tax.

Other changes include a child tax credit doubled to $2,000 and increased phaseout, an increased alternative minimum tax (AMT) exemption, and a $10,000 annual allowance for tax-free distributions from 529 college savings accounts for K-12th grade private school tuition payments. There is so much complexity in the changes at the individual level on income taxes that an individualized analysis is needed. Individuals should schedule an appointment with their tax accountant or tax attorney to apply the changes in the law to their individual situation so they can adjust tax planning in 2018.

There are changes for businesses as well. There is a reduced maximum tax rate, from 35% to 21%. The corporate alternate minimum tax is repealed, and there is a new cap on interest deductions. It is anticipated that the reduced corporate tax rate will influence corporate investments in capital, personnel, research and development, and expansion.

Finally, the new law impacts "pass-through" entities, including LLCs and partnerships, as well as trusts and estates. There is a new 20% deduction for pass-through income, subject to a phaseout of the deduction for personal services professionals such as lawyers, consultants and accountants. If an individual is one of the estimated 40 million Americans who claimed pass-through income, he or she may have opportunities to realize increased net income in light of this new deduction and also from new rules regarding depreciation of capital investments. Individuals should consult with their tax and/or corporate advisor to both understand and take advantage of these new options.

The Tax Cuts and Jobs Act contains over 1,000 pages of new law. It is impossible to cover all the complexities in an article. In the coming weeks, individuals should look for our suggestions about how to take advantage of the changes that are relevant to them personally, as well as their family, business, and investments. **FT**

NON-COMPETITION AND OTHER RESTRICTIVE COVENANT AGREEMENTS IN COMMUNITY ASSOCIATION MANAGEMENT:

WHAT ARE THEY AND ARE THEY ENFORCEABLE?

By Donna T. Salvidio, Esq.
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Restrictive covenant agreements are frequently relied upon by employers to restrict the future activities of former employees following their separation from employment. These agreements are sometimes generically referred to as a "non-compete," but there are three types of restrictive covenants that employers commonly use:

- non-competition (or "non-compete") agreements
- non-solicitation agreements
- non-disclosure agreements

Each of these types of agreements prohibits an employee from engaging in certain activities after his or her employment has ended. Restrictive covenant agreements were originally relied on in the business world to ensure that key employees with knowledge of the inner workings of their employers could not accept employment with a competitor, solicit fellow employees to leave the employer and/or disclose the employer's trade secrets to their new employer's advantage. Once limited to senior executives, restrictive covenant agreements are now being utilized by employers to bind employees at all levels.

In the condominium context, restrictive covenant agreements are becoming more commonplace between property management companies and property managers. Management companies want to cultivate experienced managers without risking the loss of those employees and their know-how, relationships and proprietary information to their competition. At the same time, management companies and community associations want the ability to hire experienced managers without the limitations commonly imposed by restrictive covenant agreements. Likewise, managers also resist any limitations placed on their options for future employment.

Is there a way to balance the competing interests of condominium associations, their managers and management companies? With the right restrictive covenant agreements in their legal toolbox, management companies can safeguard their proprietary information while imposing appropriate restrictions on their former employees. Before deciding what type (or combination) of restrictive covenant agreement is right for your situation, it is important to understand the basic differences among these types of agreements and how they are used in the context of condominium association management.

NON-COMPETE AGREEMENTS

The broadest form of restriction is the non-compete agreement. In simple terms, a non-compete limits what an employee can do, where he or she can do it and for whom an employee can work next. When drafted appropriately, a non-compete agreement prohibits a former employee from competing with his or her former employer in the same industry for a specific period of time, within a particular geographical area. When drafted too broadly, a non-compete can thwart an employee from leaving to take a better job opportunity, or it can prevent an employee from earning a living in his or her chosen trade altogether.

NON-SOLICITATION AGREEMENTS

Non-solicitation agreements are less restrictive than non-compete agreements. A non-solicitation agreement forbids a former employee from soliciting his or her former employer's clients and employees for a specific period of time. This prevents a former employee from poaching clients and talent from a former employer while not necessarily limiting the employee from working for another employer within the same industry. Since management companies rely heavily upon the talents of their individual managers to keep their association clients satisfied, a non-solicitation agreement can be a less onerous means of ensuring that former employees do not solicit their former clients for business or poach other talented managers away from their former employers. Enforceable non-solicitation agreements are typically limited to a specific period of time not exceeding two years in the management company context.

With the right restrictive covenant agreements in their legal toolbox, management companies can safeguard their proprietary information while imposing appropriate restrictions on their former employees.

NON-DISCLOSURE AGREEMENTS

A non-disclosure, or confidentiality, agreement is the final type of agreement available in an employer's arsenal to protect its business investment. A non-disclosure agreement prohibits an employee from disclosing trade secrets, insider operations knowledge, and proprietary information to third parties, such as a competing new employer. Non-disclosure agreements can be used by management companies to prevent their former employees from disclosing customer lists or technological operations to their competitors. There are practical difficulties in applying non-disclosure agreements to the property management profession, however. The problem-solving and people skills possessed by the top managers are typically accumulated talents rather than trade secrets. Accordingly, management companies may have difficulty identifying the proprietary information they are trying to protect.

WHAT IS THE IMPACT OF NON-COMPETES AND ARE THEY ENFORCEABLE?

In the sphere of community association management, an appropriate non-compete agreement is not one-size-fits-all. A regional management company might provide that upon the termination of employment, a property manager is prohibited from providing property management services to another condominium or management company within a 20-mile radius for the next two years. This type of restriction is probably valid in states that recognize non-competes because it would not prevent the former employee from working as a property manager, but it would prevent the manager from working for a competitor in the same general market as his or her former employer. However, if the same restriction were applied to the employee of a national management company and that employee were prohibited from working for competitors located within a 20-mile radius of any of its existing management offices, that manager might have few options for continuing in the profession, or might be forced to relocate a great distance. A court might find the same restriction valid in the former case and too restrictive in the latter example.

Courts determine the validity of each non-compete on a case-by-case basis. Most courts will not enforce a non-compete unless it meets the following criteria:

- The terms are tailored to protect only the employer's legitimate business interests.
- The agreement is supported by valid consideration.
- It was not signed under duress.
- It is reasonable as to scope, duration and geographical area.
- It is aligned with the public interest.

State laws vary on the enforceability of non-compete, non-solicitation and non-disclosure agreements. Most states, including Massachusetts, Connecticut, Rhode Island, Vermont, Maine and New Hampshire, recognize the validity of appropriately tailored agreements. Massachusetts courts are more inclined than some other states to void, selectively enforce or rewrite overly restrictive agreements.

While many non-compete, non-solicitation and non-disclosure agreements may not be legally enforceable, the cost of challenging an employer's enforcement action can be prohibitive. Some employers use the threat of a lawsuit to gain compliance by the former employee.

Non-competes are also used by employers to prevent competitors from hiring away employees in violation of a non-compete. This is particularly true where the new employer is made aware of the non-compete by the prior employer and continues to solicit the employee anyway. Employers often have better success pursuing the companies who are trying to hire their former employees than suing an individual employee for breach of his or her non-compete.

The evolving body of law is trending away from the wholesale enforcement of non-competes. Management companies would be wise to consider utilizing narrower non-solicitation and non-disclosure agreements to protect their client bases rather than encumbering managers with overly broad and potentially unenforceable non-compete agreements. **FT**

Generally, courts consider the following factors when evaluating the enforceability of non-compete agreements:

- Is the duration of the restriction reasonable in time?
- Is the geographical scope of the restriction reasonable in location?
- Can the employer identify specific confidential information that warrants protection?
- Would enforcement of the agreement create an undue hardship for the employee?
- What were the circumstances surrounding the execution of the agreement?
- Was there a material change in the employment relationship that warranted the execution of a new agreement (and, if so, was there fresh consideration provided by the employer in exchange for the new agreement)?
- Is some form of severance provided during the period covered by the agreement?
- Is the agreement enforceable even if the employer terminates employment?
- Is the public interest detrimentally affected by the enforcement of the agreement?

IMPACT OF THE MASSACHUSETTS LEAD LAW ON COMMERCIAL PROPERTY OWNERS

By Christopher P. Yates, Esq.
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Do you own multiple-family dwelling units? Are you considering entering the market as an owner? If so, you must be familiar with the Massachusetts Lead Paint Law (Lead Law). The Lead Law is a robust policy designed to protect children. Owners should not attempt to avoid or find shortcuts around its requirements. To the contrary, owners and their agents must be proactive in their efforts to comply with the law.

Compliance by owners and their agents will avoid the cost of significant fines, penalties and costly lawsuits. Owners and agents encountering the Lead Law for the first time should seek counsel to help develop best practices for inspection, abatement, compliance and rental practices.

Quite simply, the Lead Law requires the removal of lead paint hazards in homes built before 1978 where any children under the age of six are living. Considering the fact that a significant portion of real property inventory in Massachusetts was built before 1978, the impact of the law reaches many owners.

The law places a burden on owners which could carry significant costs over time:

- Lead hazards must be removed or covered by a licensed de-leader.
- Rental property owners can be held liable for lead poisoning.
- Rental property owners cannot evict or refuse to rent due to lead paint hazards.
- Property must be lead-free or have been de-leaded prior to rental.
- Penalties for noncompliance are severe and costly for both owners and agents.

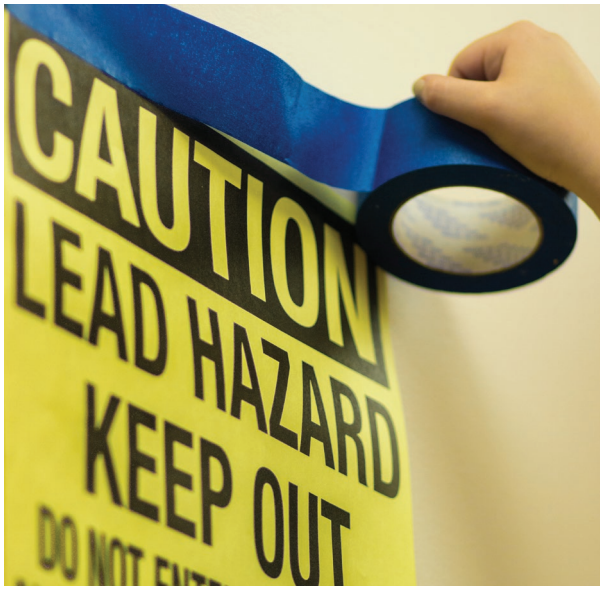
The first step for any owner who must comply with the law is to engage the services of a licensed lead inspector to test for lead and record all hazards. To comply with the law, the owner must have lead paint hazards removed or covered by a licensed de-leader. Although there are interim controls available for urgent hazards, such efforts do not relieve the owner of realizing full compliance with the law.

An owner's responsibilities are not limited to lead abatement. Under the Lead Law, an owner cannot evict a tenant or refuse to rent to a person with a child under the age of six or refuse to renew the lease of a pregnant woman because of lead paint. Discrimination is against the law and carries significant penalties. In addition, the property owner can be held liable for the lead poisoning of a child resulting from conditions at the property. An owner who has failed to comply with the law risks substantial exposure to monetary damages.

Agents for owners must also be aware of the Lead Law and fluent in the disclosure requirements for properties built before 1978. An agent is also prohibited from engaging in any conduct that discriminates against a prospective tenant in an effort to sidestep the Lead Law. Most important, the agent must provide a lessee with the full Property Transfer Notification Certification, which is fully completed and signed by the lessor before being submitted to the prospective tenant.

The failure to obey the law, or any effort to evade its requirements, can be costly to both owners and their agents. Not only is there civil liability for lead poisoning of a child, there are also stiff penalties for failing to comply with disclosure requirements. Civil penalties under state law can be up to $1,000. Violations of the federal laws can reach $10,000 and include criminal liability. An agent may also be subject to penalty under the Massachusetts Consumer Protection Act, which provides for triple damages.

The Lead Law need not be an impediment to owners seeking to enter the multi-family rental business. As with any law, compliance is the best practice. **FT**



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Firm News

FLETCHER TILTON WELCOMES ATTORNEY ERIN GIBBONS TO THE FIRM

Erin N. Gibbons is an Associate Attorney, focusing on real estate and corporate transactions. She represents buyers, sellers and lending institutions in both commercial and residential real estate transactions. She also represents landlords and tenants in commercial and residential leases, and counsels businesses on various corporate matters including corporate formation. Erin prides herself on being a strong advocate for her clients to ensure their individual needs are met and their transaction goes smoothly.

Erin works from our Framingham office and can be reached at 508-532-3530 or egibbons@fletchertilton.com.

FLETCHER TILTON WELCOMES ATTORNEY BRIAN COUGHLIN TO THE FIRM

Brian Coughlin practices in the Business Law area, focusing on U.S. immigration and global workforce mobility. Brian counsels established and emerging corporate clients on immigration issues related to employment authorization, company policy drafting, employee training, and general enforcement and regulatory compliance issues. He also advises on immigration due diligence and risk management in connection with corporate mergers, acquisitions, restructuring, and startups.

Brian works from our Framingham office and can be reached at 508-532-3527 or bcoughlin@fletchertilton.com.

ATTORNEY NISHA KOSHY RETURNS TO FLETCHER TILTON AFTER A FIVE-YEAR HIATUS.

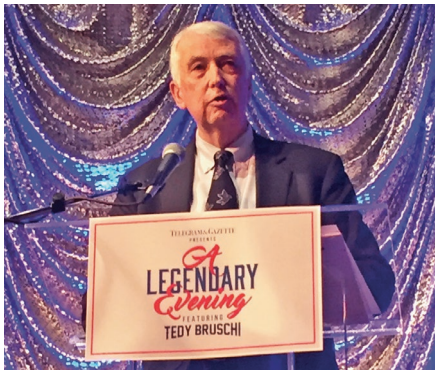
Previously having served for ten years in the firm's Litigation practice group, Ms. Koshy now brings this background to the firm's Real Estate & Commercial Lending practice groups where she uses her experience and insight as a litigator to assist clients with their complex real estate leasing, transfer, development and financing projects.

Nisha works from our Framingham office and can be reached at 508-532-3529 or nkoshy@fletchertilton.com.

WARNER FLETCHER RECEIVES T&G'S ISAIAH THOMAS AWARD

Warner Fletcher was honored Saturday, December 16, 2017 with the Isaiah Thomas award for distinguished community service. This award has been bestowed to one outstanding citizen each year since 1950. Previous recipients include our own Sumner "Tony" Tilton in 2007.

We congratulate both Warner and Tony who have given so much of their time and energy to better the community that surrounds us. While they can each win the award only once, their community work continues year after year.



Warner Fletcher accepting the T&G's Isaiah Thomas Award.

UPCOMING SEMINARS

ESTATE PLANNING SEMINARS
With Attorney Michael Lahti

Tue. Feb. 13 - 10 a.m. & 1 p.m.
Location: Colonel Blackinton Inn, Attleboro, MA

Tue. Feb.27 - 10 a.m. & 1 p.m.
Location: Primavera Restaurant, Millis, MA

Wed. Mar. 7 - 10 a.m. & 1 p.m.
Location: Lobster Pot Restaurant Bristol, RI

Tue. Mar. 27 - 10 a.m. & 1 p.m.
Location: Crowne Plaza, Warwick, RI

Tue. April 17 - 10 a.m. & 1 p.m.
Location: Conrad's Restaurant, Walpole, MA

SAVE THE DATE:

ESTATE PLANNING FOR MA-FLA SNOWBIRDS
Tue. May 22 - 8:30-11:30 a.m.
Resort & Conference Center, Hyannis, MA

For details and to register, visit our website FletcherTilton.com/seminars-events

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