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EMPLOYMENT AND LABOR

It Isn't All "Doom And Gloom" Out There . . . But Just In Case You Have To Implement A Layoff

By: **Richard G. Vernon, Esq.**
Julie A. Reddig, Esq.



Apparently not recognizing the irony dripping from his own words, NBC Evening News anchor, Brian Williams, recently introduced a "feel good" story by saying, "All we hear nowadays is 'doom and gloom' – but tonight we bring you a story . . ." It is unfortunate that the extent to which the news media has helped to deepen the current recession with its creative negativism cannot be fully measured. Nonetheless, it is apparent. In a brilliant piece in the *Washington Post's* Outlook section on December 28, 2008, author Eric Weiner wrote:

"If the FDA regulated the media, it would require all stories about the economy to carry this warning: "Dizziness and pangs of existential angst may result. Do not read if you suffer from gloominess or are prone to bouts of anxiety. If you are near retirement age or work in the auto industry, consult with a physician before reading."

He continued:

"I'm sure some of these [media] stories [stories about the economy] are true, or true enough to satisfy an editor somewhere, but there's something

else going on here: It's what psychologists call "confirmation bias." That's the human tendency to seek out only facts that fit what we already know to be true while downplaying or ignoring contradictory evidence To a media covering a recession, everything looks like collateral damage. It's the flip side of irrational exuberance: irrational dependency [A] sort of vicious cycle can take hold. The media reports bad economic news and gloomy forecasts. Consumers respond by hunkering down and closing their wallets. The media dutifully reports that consumers are hunkering down and closing their wallets, prompting consumers to hunker down ever more, which the media reports. Consumers respond by"

Thoughtful employers in the Washington, D.C. metro area realize that while all may not be "doom and gloom," it still is not time for celebration for most of them. To the contrary, necessary steps must be taken to protect their businesses, so that they can survive and be in a position to spring back, as the recession recedes. It is sometimes necessary to lay off a group of employees, and to do so in a manner that diminishes or eliminates the likelihood that this action will be challenged in a charge of discrimination filed with the Equal Employment Opportunity Commission (EEOC) and any of its state or

local counterparts. In this connection, the EEOC reported on March 11, 2009 that during its fiscal year ending September 30, 2008, discrimination claims had increased 15% to a new, all-time high. In particular, age discrimination claims had risen 29%. In addition, retaliation claims had climbed 23%, to become second in number behind race discrimination claims.

With these considerations in mind, we generally recommend that employers undertake a 4-step process before implementing a layoff/reduction-in-force (RIF), with appropriate documentation prepared at each step. Not every step need be taken by every employer, but consideration should be given to the following:

1. The fundamental reason(s) for undertaking a RIF should be discussed at the highest level of an employer's management. There should be reflection on the economic conditions both outside of and within the company that appear to necessitate such action. Prior, non-layoff steps that may have been implemented, such as curtailing travel costs, reducing overtime expenses, implementing furloughs, etc., should be reviewed, and their unavailability for further implementation or lack of success in preventing the need for additional action should be discussed. Ultimately, a decision must be made as to whether sufficient business justifications exist — which are both legitimate and capable of being clearly articulated — for taking the difficult step of implementing a layoff. This decision and its underlying bases should then be documented.

Additional steps for consideration involve structuring the RIF in a manner that is consistent with the fundamental reasons for implementing it. Everyone involved in the decision should understand what the goals of the RIF are and must be able to explain them to lower echelon management and front-line supervisors, so that implementation is consistent with the justifications and goals on which senior management has made its decision.

2. Senior management is also responsible for the next step in the evolving process, that is, determining which areas or departments in the company can be subjected to a reduction in personnel with the least negative impact on the overall operation. Here, consultation with other levels of management and supervision, for example, department heads, may be useful. Decisions with respect to the areas of the company in which layoffs are to be implemented should then be made in the same type of formal meetings among senior management at which the initial decision was made to take such action. Once again, document, document, document!

3. Now it is time to select the positions in each of the affected departments that will be reduced in number. These decisions may perhaps most practically be made by those closest to the departments, that is, the lower echelon managers and front-line supervisors who lead the departments in question. They need guidance, however, in making their decisions. To that end, senior management again should be involved, this time in establishing the criteria for deciding which positions have the greatest and least value to the organization. Among the factors that may be considered in providing this guidance are: the ability of the department to absorb, or do without the job duties of the positions in which reductions will be made; the technical skills and abilities that are required for the positions under consideration; the level of training required for each of these positions; and the ability to replace the lost positions in the future, as the employer begins to grow again.

The decisions made by management and supervisors with respect to the positions to be downsized should then be reviewed and confirmed or altered by senior management. Again, senior management should record the relevant decisions and their underlying bases.

4. Now comes what may be the hardest part — deciding which employees in the positions that have been selected for reduction or elimination are to be laid off. If an entire group or department is to be eliminated, the choices are obvious. More often, however, a pick-and-choose method among a group of employees has to be used, and senior management again must identify factors for making legitimate decisions. These factors may be objective, for example, seniority (a union-originated concept), disciplinary records, and compensation, or subjective, such as performance evaluations, skills, and cross-training flexibility and potential.

Once the criteria to be used have been decided upon (document, document, document), it is up to individual managers and supervisors to make their decisions. However, their decisions should be subject to review. They should be required to articulate to senior management how they reached each of their individual decisions. This will also help to provide assurance that the established criteria for layoff have been implemented and have been applied consistently. Senior management then has the responsibility of affirming or rejecting the decisions made by those who report to them.

This article only provides a general overview of the principal steps to be taken in implementing a layoff. Such things as the need to undertake statistical analyses to confirm that decisions have been made, for example, without

regard to age, to develop strategies for informing employees about their layoffs, to consider whether it is necessary to issue a WARN notice, to analyze the ERISA implications of the RIF, to decide whether to pay severance, and to develop the structure of any severance agreements are beyond the scope of this article. We hope, however, that this article provides guidance for any employer who is required to consider undertaking a RIF in an effort to survive the current recession.

Ideally, documentation as discussed in this article will be prepared in a manner that will make it difficult for a plaintiff to obtain in discovery, that is, the documentation is protected under the attorney-client privilege. The reason for this is to protect against the inclusion of inartful statements in the documentation that may misstate the bases for the decisions made. To that end, among other things: (i) documentation should be captioned "Privileged and Confidential—Prepared in Anticipation of Litigation," and if the company's attorney has been involved

in the employer's process, it should be addressed to him/her; (ii) there should be limited, or preferably, no distribution of any report or other documentation, except on a strictly "need to know" basis; and (iii) the matters addressed in the documentation should not be discussed in additional, informal meetings at which there is general discussion about various business matters, without the presence of counsel, at least telephonically.

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REAL ESTATE TRANSACTIONS

Ambiguous Lease Clause Could Grant Tenant A Right Of First Refusal

By: Vicki R. Canales, Esq.



The DC Court of Appeals has determined that a landlord's attempt to create a right of first refusal may have failed when the language of the lease arguably allowed the landlord to return to a third party to enhance a

bid which the tenant had already matched.

In *Mamo v. Skvirsky and Teklu*, Mamo leased part of an Adams Morgan row house from the Skvirskys. The lease contained a clause granting Mamo a "right to negotiate purchase" and a "right to match purchase offer" which specifically required the Skvirskys to give thirty (30) days' written notice to Mamo of their intent to sell the premises and an opportunity to match any third party's offer. Teklu desired to purchase the property, and on July 6, 2005 the Skvirskys and Teklu signed a contract of sale containing a purchase price of \$1.15 million and a \$50,000 deposit. Skvirsky notified Mamo of the pending contract, but indicated that the purchase price was \$1.2 million. On August 9, Mamo matched Teklu's terms, including the increased price of \$1.2 million which was communicated to him. The Skvirskys then notified Mamo that they had amended the contract to increase the purchase price and deposit amount and that he would have to match the increased terms in order to purchase the property. Mamo declined, stating that the lease obligated the Skvirskys to

sell to him on the original terms he had met on August 9. Teklu sued the Skvirskys and Mamo intervened with a complaint asking the court to enforce his rights under the lease and require the Skvirskys to sell to him on the terms of his August 9 contract. The trial court ruled that the lease "unambiguously allowed the Skvirskys to entertain Teklu's improved offers so long as they gave Mamo the chance to meet them (which they did)." Since Mamo did not match the amended offers, the trial court ruled that he had "no right to compel the Skvirskys to sell to him." Mamo appealed, claiming the lease contained a "right of first refusal" in which the Skvirskys could be compelled to sell to him under the original terms he had matched.

A typical right of first refusal in a lease provides that if a landlord contracts with a third party to sell its property, it must allow the tenant to match the offer. If the tenant matches the offer, the landlord must cease negotiations with the third party and is obligated to sell the property to the tenant. If this interpretation were adopted in the above case, Mamo's notice of his intent to match the initial offer would constitute a binding contract and the Skvirskys would be precluded from selling the property to Teklu. Although Mamo asserted that the lease contained such a right of first refusal, the trial court disagreed and determined that the lease clause granting Mamo a right to "match" a third party offer meant that once Mamo had agreed to purchase the property at Teklu's offer price, the

■ continued from page 3

Skvirskys could return to Teklu and continue negotiating for a higher bid, going back and forth between Mamo and Teklu until the Skvirskys were satisfied.

On appeal, however, the Court determined that the lease's language was ambiguous, that either interpretation was plausible and that the trial court had erred in adopting the Skvirskys interpretation as the only reasonable one. The Court determined a further hearing was necessary to obtain additional evidence regarding the parties' intent.

This case is a reminder to parties of the importance of careful drafting and the need to clearly and explicitly spell out the terms of a right of first refusal, if that is what is intended.

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BUSINESS AND TAXATION

All About Nonstock Corporations

By: Theodore R. Goldstock, Esq.



Most people are familiar with the traditional structure of a privately held, for-profit corporation whose owners, known as stockholders or shareholders, elect a board of directors into whose hands the management of the corporation's business and affairs is entrusted. Shareholders' ownership interests in the corporation are represented by shares of stock, which entitle them to certain voting and dividend rights and an interest in the accumulated capital of the corporation. This corporate model is well suited to the management of a for-profit business enterprise, particularly one whose ownership is spread among many individuals.

"Nonprofit" activities, however, can also be carried on through a corporation, and Title 5, Subtitle 2, of the Corporations and Associations Article of the Annotated Code of Maryland (the "Act") provides for the creation of nonstock corporations, which can hold assets and carry out their purposes on behalf of their "members." Maryland uses the term "nonstock" corporation to designate a corporation that does not have shareholders, and the nonstock corporation is the appropriate corporate form for carrying on nonprofit activities, or at least activities that are not solely motivated by profit. Members of a nonstock corporation, as opposed to shareholders in a corporation that is authorized to issue shares of stock, do not invest in such an entity with the expectation of receiving distributions of profits or realizing capital gains on their investment. If a corporation is formed with the expectation that it will seek an exemption from income taxes as a nonprofit entity, the nonstock corporate form

provides a structure that is tailored to satisfy the most fundamental requirement of nonprofit status, i.e., the corporation is not formed to create pecuniary benefits for its shareholders, members or directors. This is not to imply that nonstock corporations are barred from making profits from their activities. Indeed, some nonstock/nonprofit corporations may make substantial profits, but the profits are not distributed to their members or directors. Instead, they are reinvested in order to further the purposes for which the nonstock corporation was formed. Nonstock/nonprofit corporations that sell services, such as nonprofit hospitals, research institutions, and schools are examples of entities that may realize profits (tax free) on their primary activities, although they also may receive donations to further their charitable or scientific purposes.

Memberships in certain other nonstock corporations can be sold by the corporations to prospective members (clubs, for example), and there can be provisions for redeeming such memberships under certain circumstances. Nonstock corporations are often formed as mutual benefit societies, organized for the exclusive benefit of their members, such as clubs, chambers of commerce, labor organizations, and trade associations. In any event, whatever their underlying purposes may be, organizing as a nonstock corporation provides its members with (i) limited liability, and (ii) centralized management, just as in the case of a for-profit corporation, and those benefits of the corporate model are compelling enough to justify the effort needed to form and operate as a nonstock corporation.

Unless a specific provision or the context of a provision clearly provides or suggests otherwise, the provisions of the Maryland General Corporation Law, as

applied to corporations that have shareholders, apply to nonstock corporations as well. The primary exception is the requirement that the charter of a nonstock corporation must provide that the corporation has no authority to issue capital stock, and thus can have no shareholders. However, there is no requirement that the charter of a nonstock corporation must provide for members either. Under Section 5-204 of the Act, if neither the charter nor the bylaws of the nonstock corporation provides for members, or in fact there are no members, then the board of directors of the corporation shall be deemed the members for certain purposes. In *Glass v. Doctor Hosp.*, 213 Md. 44, 131 A.2d 254 (1957), the Maryland Court of Appeals held that a nonstock corporation can restrict its membership to only its board of directors. Thus a nonstock corporation may take the form of a self-perpetuating board of directors, with no other constituency but the members of the Board themselves.

On the other hand, the charter of a nonstock corporation may envision the active participation of the membership regarding certain issues, and may require the election of directors by the members themselves. If the membership is large and diverse geographically, however, getting a required quorum of the membership together at a meeting to transact business may be difficult. Section 5-206 of the Act resolves that problem by providing a mechanism whereby a meeting at which a quorum was not present can be adjourned, notice of a subsequent meeting can be advertised in a newspaper published in the county where the principal office of the corporation is located, and the members who appear at the subsequent meeting, no matter how few they may

be, will constitute a quorum.

There are other unique provisions that apply to nonstock corporations only. For example, a nonstock corporation can only merge or consolidate with another nonstock corporation. Similarly, in the event of the dissolution of a nonstock corporation, assets held by the corporation subject to limitations permitting their use only for charitable, religious, benevolent, educational, or similar purposes, and which are not held subject to return or transfer to a designated beneficiary in the event of a dissolution, may only be transferred to organizations whose stated purposes are of a similar type. On the other hand, the charter of a nonstock corporation, or a plan of distribution adopted by the corporation's board of directors, may provide for a distribution of assets to the members in the event of a dissolution of the corporation, just as there would be a distribution to the shareholders in the event of a dissolution of a standard, for-profit corporation.

Nonstock corporations are a large and diverse group of organizations, and drafting their corporate charters and bylaws requires unique provisions and an understanding of their special needs and purposes. Lerch, Early & Brewer, Chtd. attorneys have substantial experience in both corporate law, as applied to nonstock corporations, as well as the tax laws as applied to non-profit organizations.

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COMMERCIAL LENDING

Negotiating A Commercial Loan? Here Are Some Points To Consider:

By: Michael D. Smith, Esq.



Negotiating commercial loan documents is often a complex exercise, simply because the relationship between the borrower and lender will govern those documents for a long time. It requires a delicate balance between the lender's requirements and the borrower's needs. The lender wants to be paid on time

and preserve all of its rights and remedies to mitigate the risks of a loan default, keeping in mind that even the best covenants cannot turn a bad loan into a good loan. The borrower, on the other hand, wants to preserve flexibility, run its business as it sees and obtain returns on its assets that exceed the debt-service of the loan.

Below is an overview of a few basic but material provisions of loan documents that are often heavily negotiated before a loan is closed.

PREPAYMENT PREMIUM

Borrowers and lenders should be aware of what will occur when their loan matures, or, more importantly, if it is paid before it matures. In most states, a borrower does not have the right to prepay a commercial loan unless that right is expressly provided for in the loan documents. If the note is silent regarding prepayment, the borrower has no right to pay early. It is generally understood that the borrower may have to pay some type of prepayment or yield maintenance fee to the lender if the borrower prepays all or a portion of the loan before it matures.

In the majority of prepayment situations, the borrower prepays the loan in connection with the sale of the property securing the loan, or in connection with the refinancing of the loan. These prepayments are voluntary acts on the part of the borrower. Often times, however, the parties do not contemplate whether the prepayment fee is payable when the borrower is forced to prepay the loan due to circumstances that are not of the borrower's choosing.

Both parties should contemplate and discuss whether the prepayment premium will apply to an acceleration of the loan, the application of insurance proceeds or eminent domain proceeds to the principal balance of the loan, as well as any other "involuntary event" the parties can anticipate. Accordingly, in order to enforce a prepayment premium, the loan documents must clearly and unambiguously provide for the payment of the fee under such voluntary and involuntary circumstances.

REPRESENTATIONS AND WARRANTIES

Generally, the representations and warranties section of a loan agreement includes statements that the borrower makes to the lender regarding such things as the borrower's organizational status, financial status, compliance with laws, authority to borrow money, business and contractual restrictions, and other matters. Many of these representations and warranties are absolute, and the borrower's counsel will request that they be qualified by a standard of materiality, reasonableness or knowledge, the theory being that the borrower should not be in default for a condition it did not know about or could not entirely control. While this may be a reasonable comment, many times the lender will not agree to this since the lender does not want to be in the position of arguing whether or not the borrower should have known about a condition or whether a condition was

a "material" condition, especially when these issues generally only arise when there is a default under the loan agreement.

DEFAULTS

The event of default section is often the most negotiated section in a loan agreement. Events of default typically include a payment default, covenant defaults, breaches of representations and warranties, and bankruptcy default. The borrower will generally request a grace period or notice and cure periods or longer grace periods and notice and cure periods than originally provided. Generally, lenders are hesitant to agree to lengthy notice and cure periods since the borrower will likely have notice of a problem before the lender.

As an additional method of securing loans, lenders often place a "cross-default" provision in loan documents which states that a default under any loan between the borrower and lender triggers a default under all of the loans between the borrower and lender. For example, if the borrower has four separate loans with the lender and defaults on just one of them, the lender can accelerate payment or declare an "event of default" under all four loans.

The borrower will want to minimize the scope of agreements and transactions that apply to this provision to documents and transactions that are material and easily identifiable to the borrower. A lender, on the other hand, will want to expand the scope of documents and transactions to include other loan documents relating to the loan, documents evidencing other loans from the lender to the borrower and documents evidencing other loans and transactions between the borrower and third party lenders. The lender's primary concern in this regard is that the borrower is complying with the terms and obligations of its creditors; if the borrower cannot meet its debt obligations then it is in distress, and the lender should have the option of exercising its remedies, preferably before any of the borrower's other creditors have a chance to do the same.

Another default provision that is heavily negotiated is the judgment default. This provision generally states that any judgment against the borrower triggers an event of default under the loan. While the threshold is generally a credit decision for the lender, the key issue for the borrower is the size of the dollar amount and the amount of time that it takes the borrower to have the judgment set aside or dismissed. For some borrowers, the nature of their business (i.e., car dealerships, retail vendors) entails

a certain amount of anticipated litigation. Accordingly, the borrower will generally request that the judgment dollar amount is high enough so that it is not forced to settle a small claim that it would otherwise litigate just because the claim could result in a monetary judgment that triggers the event of default under loan agreement.

CONCLUDING POINTS TO CONSIDER

The relationship that will exist between the lender and its borrower over the life of a loan can be tempered by the initial negotiation. Below are a few points and recommendations that may make the loan negotiations and closing process a smooth one:

What one party may consider irrelevant, the other may consider material to the loan transaction. Both parties should directly communicate their expectations and concerns early in the loan process. Examples include the ability of a business owner to transfer stock or membership interests in the company to family members for estate planning

purposes or the ability to obtain subordinate financing. These types of concerns should be communicated to each party's respective attorneys and accountants.

If the borrower has prior loan facilities with the lender, the borrower should ask the lender whether its counsel will work from documents from a previous similar transaction. This can be an effective way to bypass most of the loan negotiations and control the associated costs of closing the loan.

The borrower should undertake significant research to completely understand the loan process. If the borrower does not have a high comfort level negotiating the loan, it should seek assistance from accountants, attorneys, and other business advisors.

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News & Notes

LEB GROWS STRONGER!



Mimi L. Magyar has joined the firm as a principal within the Family Law practice group. Ms. Magyar's practice includes the drafting of pre-marital agreements, facilitating adoptions, negotiating separation agreements, and bringing contested family matters to trial. Prior to joining us, she practiced at Shulman, Rogers in Rockville, Maryland.



The firm also welcomes **Ruth O. Katz**, who recently became an associate in the firm's Community Associations practice group. Prior to joining us, Ms. Katz worked as an attorney for Grenadier, Anderson, Simpson & Duffett P.C., in Alexandria, Virginia.

BARR & GOLDBERG ELECTED AS SHAREHOLDERS



Stuart R. Barr and **William A. Goldberg** have been elected as shareholders in the firm. Mr. Barr practices in the area of land use and zoning, with a focus on historic preservation, administrative law, and real estate. Mr. Goldberg practices in the area of commercial



litigation, with a focus on complex commercial litigation. Mr. Goldberg also has been appointed to the Advisory Committee for the Montgomery County Office of Consumer Protection.

MAKING STRIDES

Robby Brewer has been appointed by County Executive Isiah Leggett to the Montgomery County Economic Advisory Council, by the Montgomery County Planning Board to the Zoning Advisory Panel to rewrite the Zoning Ordinance, and by his fellow partners as the firm's Board Chair for 2009.



Steve Robins was recently recognized by the Montgomery County Council for his leadership in public safety matters. On March 20, he chaired (for the eighth time!) the Montgomery County Public Safety Awards luncheon, attended by more than 1,100 people and a host of dignitaries. The event annually honors individuals from public safety divisions for their heroism in action.

Patrick O'Neil was recently elected as Chair-Elect of the Greater Bethesda-Chevy Chase Chamber of Commerce, for a term commencing in July, 2009. He also recently

NEWS & NOTES – IN THE NEWS

appeared on News Channel 8 on behalf of the Chamber to discuss President Obama's stimulus package and its impact on our regional economy.

IN THE NEWS

Harry Lerch was quoted in the Thursday, February 12, 2009 edition of *The Washington Post* regarding new options for government office space in Silver Spring.

Rick Vernon was featured in an article in the January 4, 2009 edition of the *Maryland Daily Record* in reference to The Americans With Disabilities Act. He was recently elected to the Board of Directors of the Montgomery County Mental Health Association.

Alison Rind & Arnie Spevack recently spoke on SBA lending and the federal stimulus package to the Greater Silver Spring Chamber of Commerce and the Greater Bethesda-Chevy Chase Chamber of Commerce.

CONGRATULATIONS to **Alex Tanouye**, an associate within the Estate Planning & Probate practice group, who married

Daphne Downs, VMD, in Kekaha, Hawaii, on January 10.

WELCOME to **Miguel Andolong**, new Director of Litigation Support, to **Toni Coley**, Legal Assistant within the Estate Planning and Probate practice group, and to **Christa Hoyos**, Legal Assistant within the Estate Planning and Probate practice group.

FAREWELL to **Kathy Fields**, who has been with the firm since 1981, and **Genevieve Quarfoot**, an associate within the Litigation practice group.

YEAR END FIRM PHOTO



Shown above are the firm's employees who were able to attend the annual year end luncheon in December, 2008.

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