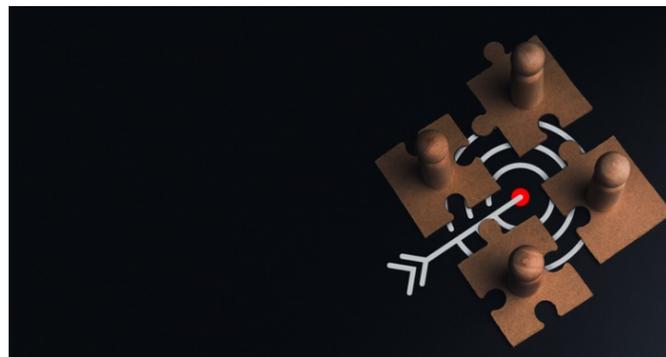


Rapid Fire Legal Update on Tax Provisions, E-Discovery, Lobbying Issues, and ADA Compliance

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We recently provided timely updates on new tax provisions, electronic discovery, lobbying issues, and ADA compliance during Ward and Smith's 2021 Virtual In-House Counsel Webinar.

The following article highlights key takeaways from the Rapid-Fire Session from the attorney-speakers themselves. Topics covered are relevant to business owners and organization leaders, including:

- Key tax law updates
- Electronic document discovery
- Lobbying compliance
- ADA accessibility and website compliance

Tax Law Changes

Richard Crow is a business and tax attorney with significant experience in a broad range of business law matters, including mergers and acquisitions, tax planning, private securities offerings, and start-up businesses. To provide business leaders with an understanding of how their tax liabilities may change, Crow provided a quick analysis of key implications of the Infrastructure Investment and Jobs Act, Build Back Better Act, and the State and Local Tax Cap (SALT).

When the Infrastructure Investment and Jobs Act was signed into law on November 15, it resulted in the early termination of the employee retention tax credit. "That tax credit was a lifeline for businesses that suffered a full or partial suspension of their operations due to a governmental order related to limitation on commerce, travel or group meetings because of Covid-19," said Crow. Since the Infrastructure Investment and Jobs Act ended the employee retention tax credit on September 30, businesses will lose a quarter of the credit for 2021.

Understanding that many had consternation over the Build Back Better Act, Crow mentioned the version passed by the House did not include increases to:

- Individual income tax rates
- Long term capital gains rates
- Qualified dividend tax rates

The version passed by the House also did not reduce or eliminate the qualified business income tax deduction. This allows for a percentage of qualified business income from a business operated as a sole proprietorship, partnership, or S corporation to be used as a deduction.

Also, the House bill did not change the general corporate tax rate, lifetime estate, and gift tax exemption amount. A provision contained in the House version that is currently being considered by the Senate is the SALT, previously set at \$10,000 per individual. The version that is now being deliberated by the Senate would increase the deduction to \$80,000, providing a substantial benefit to business owners.

A few other items that are being weighed by the Senate include:

- A minimum tax rate of 15 percent on certain large corporations
- A surcharge on stock buybacks
- New limit on the amount of deductible net interest expense
- Reduction of capital gains tax exclusion from the sale of qualified small business stock

“If your taxable income is over \$400,000, some of these acts are going to apply to you to increase your tax liability,” adds Crow.

Electronic Discovery

Chris Edwards, a civil litigator whose multifaceted practice focuses on complex legal issues related to business, intellectual property, and appellate matters, provided a deep dive into the evolving field of electronic document discovery.

Since it can result in significant financial costs as well as missed opportunities and lost time, document discovery can be a major disruption. “We do not empty out file cabinets anymore, instead we keep basically everything, and that elevates the expense,” Edwards said.

To reduce costs and streamline the discovery process, it is vital to encourage counsel to employ search terms. “It really is as simple as it sounds,” noted Edwards. “We can run searches against your database and identify a world of potentially responsive documents.”

This can have a dramatic impact on efficiency, as it involves the attorney’s office searching the system for relevant documents. “There might be minor slowness in your system, but you’re not going to experience any sort of slowdown of the type you would if you were going and looking for those documents yourself,” commented Edwards.

The process can be applied to any type of litigation. In many cases, search terms are designed to be over-inclusive, so any pertinent documents are not accidentally left on the server. This can create an extremely large pool of data, however.

Using predictive coding to review documents can significantly reduce the cost and time involved. This process, also known as technology-assisted review, involves training an algorithm to identify keywords, phrases, people, and timeframes. “Once the algorithm is fully trained and stable, it can be run against the entire universe of potentially responsive documents,” added Edwards.

For documents that are potentially responsive, a competence range can be set, typically around 75 percent.

“If a document has a 75 percent likelihood of being responsive, that document will be reviewed. But if it is 74 percent or less, we don’t review the document,” Edwards said.

In an example case with two million documents, using predictive coding made it possible to only review about 45,000 documents, resulting in substantial cost savings.

Lobbying and Government Relations

Jamie Norment, a government relations attorney who works with individuals, corporations, and governmental entities, provided an insight into the definition of lobbying, when individuals have to register as a lobbyist, and how to remain in compliance with the federal Lobbying Disclosure Act (LDA) and the North Carolina lobbying registration law.

Norment began by asking participants whether they believe politics has an impact on their bottom line. Around 75% said yes, they believe politics can affect the success of their business. “A company that would have in-house counsel often has specific policy needs that can be addressed directly through lobbying,” Norment said.

Lobbying laws are essentially based on a disclosure system, where companies lobbying a specific issue must report the name of the lobbyist, how much they’re getting paid, and what the issues are. A series of behavioral compliance issues flow from these disclosures. These define what a lobbyist can and cannot do, what the lobbyist's clients can and cannot do. For example, there are special rules for lobbyists related to contributions to political campaigns.

The lobbying rules can be confusing. For example, determining whether an individual needs to be registered to ensure they are not in violation of federal or state law requires a multi-step analysis. Failure to follow the disclosure laws can trigger civil fines as well as criminal prosecution. A good general rule to remember is that if a business (or its owner personally) pays anyone who is not an employee more than \$1 to lobby, that individual or entity must register as a lobbyist at the state level and might need to register at the federal level. Even more rules apply to in-house lobbyists.

“As attorneys, we need to be engaged with whoever is driving the policy side of the business strategy,” Norment explained. Reaching out to the compliance team can ensure the registration process is dealt with properly and help to avoid expensive punishments for non-compliance.

ADA Accessibility

Hayley Wells, an attorney who regularly advises clients in matters of covenants not to compete, employment discrimination, discipline and termination, harassment, wrongful discharge, wage issues, personnel policies and employee agreements, provided an update on the Americans with Disabilities Act.

When most people think about the ADA, the topic that comes to mind is the removal of physical barriers. “There’s another type of ADA accessibility that should be on your radar when it comes to risk management within your organization, however, and that is website accessibility,” commented Wells.

Whether pertaining to real-world or virtual accessibility, claims may be presented to a business in one of two ways:

- Demand letter from attorney - describes accessibility issue, asks for compensation and remediation
- Federal or state law complaint - asserts a claim for attorney fees and seeks a permanent injunction requiring the accessibility issue be addressed

These claims can have a negative impact on an organization from both a reputational and a financial standpoint. “In our experience handling a number of these claims, they tend to be brought by plaintiff firms that file hundreds of them every year. Their tactic seems to be to look for businesses or websites that are not strictly compliant with the ADA,” Wells explained.

Many claims related to physical barriers involve a place where the public is coming onto the premises. A variety of issues can result in a claim being filed. To prevent these claims, individuals should include a provision in their contract with a general contractor (GC) when seeking to modify an existing facility or build something new, stating it must be ADA compliant. The contract should also indemnify the organization if the GC fails to meet the design specifications.

Wells pointed out that, unlike physical barriers, under the ADA, there are no clear regulations on what is required for a website to be ADA compliant. Those who want to limit risk exposure should refer to the Website Content Accessibility Guidelines. Maintaining a compliant website requires vigilance and there is no such thing as a fix-it-and-forget-it solution.

The accessibility guidelines pertain to websites that have online stores as well as sites that only function as a business card. To check on website compliance, Wells recommended visiting webaim.org.

An indemnity provision can also be included in a contract between a business and a web developer, explained Wells. A few other steps that businesses facing a claim should take include putting their insurance carrier on notice, and pursuing any available options for remediation.

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