2022 Thought Leadership

JOHNSTON ALLISON HORD

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JOHNSTON ALLISON HORD

January 19, 2022

VACCINE MANDATE AND HEALTHCARE EMPLOYERS

Attention Healthcare Employers: As you have probably already seen, on Thursday, January 13th the Supreme Court entered a stay barring the enforcement of the Biden Administration's OSHA ETS vaccinate-or-test mandate. At the same time, however, the Court ruled that a separate federal vaccination mandate known as the CMS Mandate, was lawful and that enforcement of it could proceed. The stay barring enforcement of the vaccine mandate has direct implications for healthcare employers.

The CMS Mandate provides that facilities that receive federal Medicare and Medicaid payments must ensure that all of their covered staff are vaccinated against COVID-19. There are of course, carve-outs to the CMS Mandate, including ones for individuals with medical or religious exceptions.

Our **Employment Practice Group** is keeping up to date with all changes and updates in regard to COVID-19 and the CMS Mandate, and will continue to provide updates. If your organization is a recipient of federal Medicare or Medicaid funding and you wish to discuss the implementation of a policy or the analysis of exceptions to it, give us a call at 704.332.1181 or complete our **General Contact Form**.

Please note that the above JAH article does not constitute legal advice nor does it create an attorney-client relationship. Should you be in need of legal services regarding a particular matter, please reach out directly to one of our attorneys. Click ***here*** *for our full website disclaimer.*

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January 25, 2022

NEW TAX EXEMPTION AMOUNTS 2022 | ESTATE PLANNING

The IRS adjusts the federal transfer tax exemption amounts for inflation each year. As of January 2022, the unified estate and gift tax exemption* and the generation-skipping transfer tax exemption amounts are $12,060,000 (increased from $11,700,000 in 2021). The unified estate and gift tax exemption is the maximum amount a person can give during life, or transfer from an estate at death, without paying gift or estate taxes. A deceased spouse's executor may elect to transfer any unused estate and gift tax exemption amount to the surviving spouse, which effectively doubles this exemption for married couples. The generation-skipping transfer tax exemption applies to gifts made to third generation (or beyond) family members or unrelated individuals who are at least 37.5 years younger than the grantor, but is not portable between spouses like the unified estate and gift tax exemption.

Additionally, the gift tax annual exclusion is $16,000 (increased from $15,000 in 2022) to an unlimited number of people each year. If an individual gift over $16,000 to the same person in the same calendar year, a federal gift tax return (Form 709) should be filed to account for the excess which deducts against the individual's remaining unified estate and gift tax exemption amount. Any gifts in excess of the applicable exemption amount are taxed at a maximum 40% gift tax rate.

Further, tuition payments made directly to an educational organization on behalf of a person and payments for a person's medical care made directly to the provider are not considered gifts. This exclusion from gifts is important as such payments would otherwise utilize all or a portion of the annual gift tax exclusion available to such person. Additionally, such payments are exempt from the generation-skipping transfer tax. These annual, tax-free gifts are useful for spending down one's taxable estate during life to minimize tax liability upon death.

It is important to note that absent Congressional action, the federal transfer tax exemption amounts are scheduled to be reduced to pre-Tax Cuts and Jobs Act amounts (approximately $6,500,000 after being adjusted for inflation) beginning January 2026. Once the exemption amounts drop, taxpayers that have not utilized the currently available exemption amounts will likely have lost the opportunity to do so.

Click **here** to learn more about how JAH can help with your estate plan. You can also complete our general contact form **here**.

*The estate tax basic exclusion amount as defined in Internal Revenue Code Section 2010 and the lifetime gift tax exemption amount derived from the unified credit against gift tax defined in Internal Revenue Code Section 2505.

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JOHNSTON ALLISON HORD

February 28, 2022

INDEMNIFICATION AND ADVANCEMENT: WHAT YOU SHOULD KNOW

The majority of U.S. companies are closely-held businesses owned by a small group of principals that also serve as corporate officials (e.g. officer, director, or manager). When starting a new business, the focus tends to be directed towards concerns like product development, differentiating the business, or profit distribution. Far from the mind is how best to allocate risk between the business and its owners serving as corporate officials. The reality is, however, that corporate service can be risky. Internal disputes will inevitably arise, especially when the performance of the company does not meet expectations. Deals and decisions made in good faith sometimes go south, and long-simmering issues and disagreements surface. When this occurs, the company or some of its owners may bring legal claims against the corporate official they believe responsible. Corporate officials often fail to consider the risk of bearing the cost of a lawsuit arising from their corporate service. Additionally, companies often forego purchasing directors and officers (D&O) liability insurance, thinking it an expendable cost. That is why knowing your business's policies regarding indemnification and advancement is so important.

Indemnification

A zealous legal defense is not cheap, and an official named in a lawsuit may soon be questioning his or her decision to accept a corporate position. The first thing that any officer, director, or manager should do upon becoming aware of a claim against them in their corporate capacity is review the company's governing documents. Documents like the corporate bylaws or the LLC's operating agreement will likely include a section concerning indemnification. This is the company's promise to reimburse officials for all out-of-pocket expenses and losses incurred in defending against claims arising out of their corporate service.

Unfortunately, a provision requiring indemnification of officials does not require the advance payment of expenses as they are incurred. Under North Carolina law, a corporation cannot indemnify an official in connection with a proceeding in which the official is found liable to the corporation or is found liable on the basis of receiving an improper benefit or engaging in bad faith conduct. An LLC's operating agreement is likely to include a similar restriction.

As a result, before the right to indemnification kicks in, the official must mount a successful defense against claims of bad faith and misconduct. The effect is that the official will have to self-fund the ongoing costs of defense. If the official doesn't have the financial resources to achieve a favorable outcome, the promise of indemnification becomes a mirage.

Advancement

Advancement is a related concept to indemnification that provides immediate relief. For qualifying claims, an advancement agreement obligates the company to pay litigation expenses as the official incurs them and before the right to indemnification is established. The official must agree to pay back the funds received if it is found they are not entitled to indemnification. Advancement ensures that company officials have the resources to resist unjustified lawsuits without relieving them of responsibility for any bad faith conduct established.

From the company's perspective, however, an agreement to advance expenses can have serious drawbacks. It places the company in the unenviable position of incurring expenses associated with prosecuting an official it believes to have engaged in misconduct. Simultaneously, the company is required to fund the defense of said official. This creates a dynamic in which the more aggressive the prosecution of the official, the more money the company is required to fund the official's ongoing defense. This is especially problematic for the company when the official is not creditworthy, and therefore, may be unable to reimburse the company upon a determination that indemnification is not justified.

JAH Can Help

Parties involved in disputes relating to alleged misconduct by a corporate official should confirm whether there is an agreement to advance expenses as early as possible, alert the court to the presence of an advancement claim so that a case management schedule may be tailored to account for early motions practice, and the corporate official should be sure to document and segregate those expenses reasonably subject to advancement from those expenses not subject to advancement.

The **attorneys at JAH** are available to counsel executives on how best to minimize their personal legal exposure, including the negotiation of indemnity and advancement provisions. In addition, the attorneys at JAH are ready to assist employers and business owners seeking to minimize the risks associated with indemnification and advancement provisions and executive general employment agreements. If a dispute should arise, our **Litigation Practice Group** has experience litigating all manner of business disputes, including claims for advancement and indemnification.

Click **here** to contact a member of our **Litigation Practice Group** if you are in need of assistance.

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JOHNSTON ALLISONHORD

March 23, 2022

WHAT IS THE DIFFERENCE BETWEEN SECTION 4(A)(2) AND REGULATION D?

Section 5 of the Securities Act of 1933, as amended, requires all offers and sales of securities to be registered with the SEC unless there is an available registration exemption. Failure to comply with these requirements grants the purchaser a right to sue to rescind the purchase or seek damages against the issuer. The two most common exemptions provided for in the Securities Act are Section 4(a)(2) and Regulation D. Despite their common use, there is often confusion regarding the difference between these two key exemptions.

Section 4(a)(2)

Section 4(a)(2) exempts from registration offers and sales by the issuer that do not involve a public offering or distribution. These smaller, private offerings are often referred to as private placements. The exemption of Section 4(a)(2) only applies to that particular offering and does not exempt the private placement securities from potential registration in the future, including in the event of resale. An issuer is defined as any person who issues, or proposes to issue, a security. The Securities Act does not define the term public offering but relevant case law and SEC rulings have introduced a number of factors that help determine if an offering should be considered public:

- Whether the investors are suitable for the offering.
  - If the investors are sophisticated or knowledgeable about the investment, it is less likely to be a public offering.
- The number of investors.
  - The fewer number of investors in an offering makes it less likely to be a public offering.
- Whether there is general solicitation and advertising.
  - If the offering is advertised to the public, it is more likely to be considered a public offering.
- The information provided to investors.
  - Although Section 4(a)(2) does not require particular information to be provided to investors, the more information provided makes it less likely to be a public offering.
- The existence of transfer restrictions on purchased securities.

  - The fact that securities are subject to restrictions provides further evidence that this is less likely to be a public offering.
- Investor intent with regard to purchased securities.
  - Evidence that investors intend to quickly sell purchased securities make it more likely that the sale of securities is a public offering.
- Integration with other offerings.
  - Issuers conducting a series of offerings suggests that the sale of securities are more likely to be a public offering.

Although these factors are helpful, they do not provide certainty to business owners that their offer and sale of securities will be considered a private placement exempt from registration. Issuers who believe they qualify for the Section 4(a)(2) exemption are not required to file anything with the SEC and receive no confirmation of their exemption. Additionally, Section 4(a)(2) only provides a federal exemption to registration—state blue sky laws may still require registration with state agencies even where Section 4(a)(2) applies. To provide a safe harbor mechanism to reassure business owners that their offer and sale of securities is exempt from SEC registration, the SEC adopted Regulation D in 1982.

Regulation D

Regulation D provides several separate safe harbor exemptions from the Securities Act registration requirements under Rules 504, 506(b), or 506(c). Each of these rules comes with its own different qualification requirements and restrictions with respect to the offer and sale by the issuer. Regulation D as a safe harbor mechanism is non-exclusive, so failure under Regulation D does not mean that the offering is not exempt under another exemption, including Section 4(a)(2). Similar to Section 4(a)(2), securities sold under Regulation D are considered restricted securities and cannot be resold without registration with the SEC or qualification under another exemption. As a result of the National Securities Markets Improvement Act of 1996, exemptions provided under Rule 506 of Regulation D also provide the additional blanket exemption from registration requirements under state-level blue sky laws. This exemption from state blue sky laws does not apply to Section 4(a)(2) exemptions or to exemptions under Rule 504 of Regulation D. Unlike Section 4(a)(2), Regulation D allows for a filing with the SEC of Form D no later than 15 days after the first sale of securities made under Regulation D. The filing of Form D is not a condition to the availability of Rules 504, 506(b), or 506(c), however the SEC does incentivize filing and some state regulators view the filing of Form D as a requirement for a valid Rule 506 exemption for the security for the purposes of preemption from state blue sky laws.

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JAH Can Help

The attorneys at **JAH** are available to counsel you under Section 4(a)(2) or Regulation D so you can protect your business from potential liability under the **Securities Act**. Our **corporate attorneys** will navigate these complicated rules so that you don't have to. Click **here** to contact a member of our **Corporate Group** if you are in need of assistance.

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JOHNSTON ALLISON HORD

April 18, 2022

WHAT DOES SIGNED UNDER SEAL MEAN?

Archaic legal jargon remains in modern U.S. contracts due to the historic influence of English law, particularly on the Eastern seaboard states. Some Latin phrases, such as *inter alia*, may be used without great risk of harm. The same is not true, however, for the word "SEAL." In the State of North Carolina, for example, the presence of this word in a legal document under the right circumstances could increase the statute of limitations for filing a lawsuit related to that document from three years to ten years. Understanding what a seal is and what it means for a contract to be signed under seal can help you avoid this potential trap for the unwary.

History of the Seal

Seals were historically used in English law to provide further verification of the identity and assent of the party affixing such seal. A common example is pressing a signet ring bearing the signatory's family crest into hot wax poured on the document. The resulting imprinted symbol was unique and provided verification of the party's identity above and beyond a signature. A sealed document was more likely to be authentic, and thus the law accorded it greater legal significance. As time went on, courts relaxed the requirements for seals from wax imprints to other methods such as embossing paper, drawing symbols, and finally to simply printing the word "SEAL" in brackets or parentheses by the signature of the party (or simply an encircled "L.S." standing for the Latin phrase ***locus sigilli*** meaning "place of the seal").

Seals Under North Carolina Law

North Carolina statutorily recognizes the concept of seals at N.C.G.S. § 1-47(2) which provides for a ten year statute of limitations "upon a sealed instrument." The extent to which a particular contract constitutes a seal instrument is, generally speaking, a question of law for the court. *Square D Co. v. C.J. Kern Contractors, Inc.*, 314 N.C. 432, 426 (1985). "[I]f it appears without ambiguity on the face of a contract that a party ***signed under seal***, it is held as a matter of law that the contract is under seal." *Central Systems, Inc. v. General Heating & Air Conditioning Co.*, 48 N.C. App. 198, 201-02 (1980). Therefore, where the word SEAL appears in brackets or parentheses on a contractual document adjacent to each of the parties' signatures, the instrument in question will likely be considered executed under seal. See *Biggers v. Evangelist*, 71 N.C. App. 35, 39 (1984). These rules continue to be applied by North Carolina courts, including in the 2013 case *Davis v. Woodlake Partners, LLC* where the North Carolina Court of Appeals ruled that the statute of limitations did not bar the claim at hand because the purchase agreement in question was signed under seal. 230 N.C. App. 88, 95. North Carolina law even prohibits oral testimony that a particular litigant did not intend to adopt the seal where the sealed nature of the contract is apparent on the document. *Id.* at 97-

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98. Therefore, signing a contract under seal without understanding the consequences of that action can have disastrous consequences.

JAH Can Help

The **attorneys at JAH** are available to counsel you on your commercial contracts, including the legal consequences of signing under seal. **Our corporate attorneys** will navigate these and other complicated legal concepts so that you don't have to. Click **here** to contact a member of our Corporate Group if you are in need of assistance.

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JOHNSTON ALLISON HORD

May 16, 2022

WHEN WAS THE LAST TIME YOU REVIEWED YOUR NON-COMPETES?

Many employers rely heavily on noncompetition covenants to protect their company's vital customer relationships and confidential information. However, they frequently rely upon standard, one-size-fits all form documents which not only appear unreasonable to the employees being asked to sign them, but are less likely to be enforceable in court. If an employers' interests to be protected are indeed valuable, it may be worth a bit more time and effort on the front end to develop noncompetition covenants that are reasonable and enforceable.

Over the last five years, the case law governing noncompetition covenants (including non-solicitation covenants) in employment agreements has continued to evolve. Covenants which may have been enforceable a few years back may no longer be enforceable. So, if you haven't reviewed your covenants in the past three to five years, especially for your most valuable employees, it may be time to do so.

Although North Carolina courts as a general rule dislike noncompetition covenants, they will enforce t hem if the covenants are "reasonable" in time, territory, and scope of prohibited activities, and are narrowly drawn to protect the employer's legitimate business interests. If the covenants are too broad and restrictive, vague, or not closely tied to the protection of the employer's legitimate business interests, courts will not enforce them. And if a court strikes down or refuses to enforce all or part of an employer's covenant in one case, the practical impact can be to render all of the employer's similar covenants unenforceable.

We generally advise clients: i) not to use one-size-fits all covenants but to tailor them to the employee's position and responsibilities; ii) not to require that every employee execute non-competition covenants, only key employees; and iii) to draft the covenants more narrowly and focus o n protecting the company's vital interests, not on trying to protect every conceivable interest.

This approach requires more thought on the front end, but is more likely to pay dividends later. Current and prospective employees will be more inclined to sign agreements which are not overreaching, and will be less likely to ignore or challenge them later. And if the employer is forced to go to court to enforce the covenants, a narrowly tailored covenant is more likely to be upheld.

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JAH Can Help

If you have questions regarding your existing noncompetition covenants, particularly if they have been in place for more than five years, please reach out to a member of our **Employment Practices Group**. We will be glad to evaluate your covenants and, if appropriate, suggest improvements. If your covenants are adequate for your purposes, we will tell you that too.

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June 07, 2022

KEEP DOING BUSINESS AS USUAL: RE-REGISTER YOUR ASSUMED NAME (DBA) BY DECEMBER 1ST, 2022

Some business owners choose to present their business to the public using a name different than its formal legal name. Many jurisdictions refer to this as a doing business as (or "DBA") name, but under North Carolina law this is known as an "assumed name." In 2017, North Carolina enacted new legislation as Chapter 66, Article 14A (the "Assumed Business Name Act") which simplified the process by which businesses register an assumed name by creating a new public, state-wide database. This new filing system streamlines businesses' ability to acquire a state-wide assumed name, but it also requires that businesses operating under an assumed name filed prior to the enactment of the Assumed Business Name Act re-register the assumed name before December 1st, 2022. Those businesses who do not re-register their assumed name prior to the expiration date risk losing access to their assumed names. Failure to properly register an assumed name creates the risk of personal liability for owners operating a business under a name other than the legal entity's formal name because the benefit of limited liability is generally only granted to those using either such business entity's formal name or a properly registered assumed name.

Registering an Assumed Name Before 2017

Prior to the 2017 law change, anytime a business registered for an assumed name in North Carolina, it would fill out a form and file the assumed name certificate in its local county register of deeds office, where it would be recorded in the county records. Unfortunately, if a business wanted to operate under that assumed name in multiple counties, it would have to file that same form with each prospective county's register of deeds office. For businesses operating under an assumed name in all of North Carolina's 100 counties, this meant 100 separate filings and an administrative headache. To modernize the process, the state legislature enacted the 2017 changes to the assumed name filing process and created a centralized database with the North Carolina Secretary of State's office. This new consolidated system allows a business to efficiently file for an assumed name in as many or as few counties as it plans to operate (including all 100 counties) and the filing goes into the uniform state-wide database.

Businesses Have Until December 1, 2022 to Register a New Assumed Name Certificate

The North Carolina Secretary of State's office began accepting assumed name certificates under the Assumed Business Name Act and the new filing system on December 1, 2017. To file for a new

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assumed name certificate, a business needs to provide its assumed business name, its legal name and SOSID number, the nature of its business, the street address of the principal place of business, and the counties where the assumed business name will be used. Pursuant to the Assumed Business Name Act, all certifications of assumed names filed under the previous law, N.C.G.S. Chapter 66, Article 14, will expire on December 1, 2022. The expiration date is less than six months away, but there is still plenty of time to certify your assumed name under this new system.

JAH Can Help

The **corporate attorneys** at JAH are available to assist you with the forms and procedures required to remain in compliance with the new Assumed Business Name Act and retain the business name that your clients and customers see every day. Moreover, proper registration will maintain the crucial limited liability protection afforded to you under North Carolina business law. Click **here** to contact a member of our **Corporate Group** if you are in need of assistance.

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June 29, 2022

CAN I RECOVER MY ATTORNEY FEES?

In recent months, the ordinary challenges of home buying have been compounded by an extremely competitive market. Home buyers wager unprecedented due diligence fees and earnest money deposits to have their offers considered, often committing to such deposits without first viewing the subject property. But what happens when a party to the purchase and sale agreement breaches, and can the buyer recover the attorney fees associated with suing for breach of contract?

The North Carolina Supreme Court recently addressed this issue in an opinion published on June 17, 2022. In *Reynolds-Douglass v. Terhark* (2022-NCSC-74), the Court considered the scope of language in a residential real estate contract providing that a "prevailing party . . . shall be entitled to recover from the non-prevailing party reasonable attorney's fees and costs incurred in connection with the proceeding." *Reynolds-Douglass* arose after a buyer breached the purchase contract and the seller sued to recover the earnest money deposit, as well as the due diligence fee that the buyer had failed to remit following full execution of the parties' agreement. The seller prevailed at the trial court level, as well as on appeal. Success, however, comes at a cost. Between the trial court proceeding and the appeal, the seller incurred $13,067 in attorneys' fees—an amount that exceeded the actual deposits at issue. The fees were assessed against the buyer, as the non-prevailing party in the litigation.

The buyer challenged the award of attorneys' fees, arguing that there was no authority to award the fees under N.C. Gen. Stat. § 6-21.2 (allowing for fee recovery based on an "evidence of indebtedness"). Still further, the buyer argued that even if there was authority to award attorneys' fees, that the fees should be capped at the statutory limit of fifteen percent (15%) of the indebtedness. In a divided opinion, the North Carolina Supreme Court rejected both arguments, instead holding that residential real estate contracts fall within the parameters of N.C. Gen. Stat. § 6-21.2 and that while fees are only recoverable up to fifteen percent (15%) of the indebtedness at the trial court level, fees incurred in defending a judgment on appeal are not so capped.

Particularly given the competitiveness of the present residential real estate market, our North Carolina Supreme Court's ruling in *Reynolds-Douglass v. Terhark* is significant. It confirms a viable option for recovering at least some attorneys' fees in cases where the value of an ultimate judgment might otherwise be diminished by attorneys' fees. Nonetheless, it is important to keep in mind that the fee recovery is not boundless, and instead, remains capped at fifteen percent (15%) of the outstanding indebtedness with respect to fees incurred at the trial level, notwithstanding the fact additional fees may be recoverable on appeal to defend a successful outcome in the trial court.

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JAH Can Help

The **litigation attorneys** at Johnston Allison Hord are available to help with you legal needs. If you you are in need of assistance or have any questions regarding whether you are able to recover attorney fees, you can contact an experienced member of the **Litigation Practice Group**.

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JOHNSTON ALLISONHORD

August 08, 2022

YOUR COMPANY CREATED A WEBSITE: NOW WHAT?

More and more businesses are increasing their online presence, whether for advertising, community outreach, or e-commerce. While a well-designed website can bring many benefits to your company, it's important to stay protected online. At a minimum, company websites should have policies covering the website's terms of use, the company's privacy policy, and, if your company uses its website for e-commerce, terms of sale. While these policies might not be as exciting as the visual and interactive components of your company's online presence, they lay important legal groundwork for the relationship between the company, its users, and its customers.

Terms of Use

A terms of use sets the ground rules that people agree to when visiting a website. They generally cover every aspect of the relationship between a user visiting the website and the website's owner, including account creation, permitted uses, and prohibited uses. A carefully crafted terms of use not only sets expectations for the users of your company's website, but also serves as an important tool for limiting potential liability. For example, the terms of use may contain specific representations and warranties on the part of the user and express limitations of liability on the part of the website's owner. Because a website can be viewed anywhere in the world, it is also vitally important that a website's terms of use specify whether the law of a certain state will apply to any disputes, and terms of use often include venue and arbitration provisions that control when and where any actions may be brought against a website's owner.

Privacy Policy

Websites provide data about their users, and a privacy policy dictates how that data will be collected, managed, stored, and used. Users may volunteer personal information like names and addresses during account creation, and certain other data such as a user's IP address and web browser, and the pages viewed on the company's website, may be collected automatically. A privacy policy sets rules for when the website will collect data, what kind of data it will collect and the method of collection, and whether the website may disclose that data to other firms or affiliates. Setting clear rules about the collection and disclosure of user information not only allows users to make informed decisions related to their personal information, but also protects a website's owner and makes compliance with various federal and state privacy and consumer protection laws simpler.

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Terms of Sale

E-commerce has allowed for retailers to grow exponentially without increasing their brick and mortar footprints, and well-crafted terms of sale are vital to protecting that growth. A website's terms of sale serve as the contract for goods and services provided through the site, and well-crafted terms provide important protections for sellers. A typical terms of sale agreement covers prices listed on the website, shipping and return policies, and any warranties that the seller might include with purchases. In the event that a customer is unhappy with their purchase, the terms of sale also provide the governing law for any disputes, as well as the method of dispute resolution.

JAH Can Help

These terms and policies are legally binding agreements between a website's owners and users, and therefore they should be carefully drafted to protect your company's interests. Our **corporate attorneys** are experienced in these matters and will navigate these and other complicated legal concepts so that you don't have to. Click **here** to contact a member of our **Corporate Group** if you are in need of assistance.

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JOHNSTON ALLISON HORD

August 25, 2022

MECKLENBURG AND GASTON COUNTIES TO REVALUE COMMERCIAL PROPERTY IN 2023

North Carolina law requires counties to revalue all property within their jurisdiction every 4 to 8 years. The resulting value is used to calculate property taxes for the next 4 to 8 years. The year in which a county decides to revalue properties is called the Revaluation Year. Mecklenburg County's last Revaluation Year was 2019. This means that your property tax bill for the years 2019, 2020, 2021, and 2022 has been based on the value of your property as of January 1, 2019. Mecklenburg and Gaston Counties' next Revaluation Year for commercial and residential property will be 2023. The new value will be the value of your property as of January 1, 2023. ("New Value") Property owners will receive a Notice of New Value in the mail during the month of January, and should review the Notice carefully and make note of any appeal period deadlines.

How is Property Value Assessed?

Property value includes both the value of the land and improvements thereon. **Land** might be a lot in a neighborhood, a 5-acre shopping center site, or 100 acres of woods. Improvements include both buildings and structures, as well as site improvements such as parking lots, pools, patios, and/or other features that add value to your property. It is important for property owners to use the County Tax Assessor's **website** to confirm that the County valued property based on the correct acreage and improvements.

The Counties will use prior sales from 2020, 2021, and 2022 to determine the New Value, and that is what your property tax bill for 2023 until the next Revaluation Year will be based upon. The County cannot increase or decrease the New Value based on changes in market values between Revaluation Years.

Given that the market has seen unprecedented highs in **real estate** values over the past couple of years, we can expect to see a significant increase in both commercial and residential New Values. For example, when Union County revalued its property in 2021, real estate tax values increased an average of 35%, with property owners seeing a corresponding increase in property taxes.

Can You Appeal Your Property Value?

If the County's New Value substantially exceeds what your property is actually worth, you have the right to appeal the New Value either through an informal appeal process or directly to the Board of Equalization and Review. An appeal to the Board of Equalization and Review is a quasi-judicial process. This means that the Board acts as a judge or jury and renders its decision based on

material, competent and substantial evidence presented during the Hearing. In making its decision, the Board has the authority to reduce the New Value, increase the New Value, or confirm the New Value. If you are dissatisfied with the Board of Equalization and Review's decision, you have the right to appeal the Board's decision to the Property Tax Commission in Raleigh. If your appeal is successful, the resulting reduced New Value will be used to calculate your property taxes until the next Revaluation Year.

Whether or not to appeal depends on a variety of factors, including property type, the amount by which the New Value exceeds the current market value, and how much in tax savings you can expect to receive from the desired reduction. You should consider your time, as well as the costs and expenses associated with mounting an appeal.

You should know that you can only challenge the New Value based on market value during the 2023 Revaluation Year. The New Value can be appealed in 2024 or after; however, the reasons to appeal between Revaluation years are limited. You can appeal the New Value if, for example, the County based the New Value on incorrect information, or a change has occurred on your property. You cannot appeal between Revaluation years because you sold property for less than tax value, or because the real estate market has declined.

How JAH Can Help

Johnston Allison Hord attorneys secured millions of dollars in reductions for our clients during the 2011, 2014, and 2019 Revaluation Years. These properties included **mixed-use developments**, multi-family, **commercial**, **retail**, office, residential, and special use properties such as golf courses. We look forward to working with you to navigate this process. If you have any questions regarding the upcoming Mecklenburg and Gaston Counties' property Revaluation, **contact us here.**

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October 03, 2022

FOREIGN BANK AND FINANCIAL ACCOUNTS: FBAR REPORTING AND PENALTY DETERMINATION

Foreign asset reporting continues to be a high priority for the internal revenue service ("IRS") and the Justice Department. The Bank Secrecy Act of 1970, P.L. 91-508, as amended, requires taxpayers to submit a Report of Foreign Bank and Financial Accounts ("FBAR") each year. Although the FBAR form is issued by the Treasury's Financial Crimes Enforcement Network ("FinCEN"), it is filed electronically with the IRS and due every year on April 15 (or October 15 with an automatic extension) for the preceding calendar year.

FBAR Reporting

U.S. persons (i.e. U.S. citizens, green card holders, and resident aliens) must report on an FBAR all financial interests in, or signature or other authority over, financial accounts located outside the United States if the aggregate value of those financial accounts exceeded $10,000 at any time during the relevant calendar year. Foreign financial accounts include, but are not limited to, foreign bank accounts, securities accounts, mutual funds, life insurance or annuity contracts, and retirement accounts. A person has signature authority over a financial account if he or she has some degree of control over the disposition of the assets by way of direct communication with the institution where the account is held.

Non-willful and Willful Penalties

The penalty for failing to file an FBAR is $10,000 for each non-willful violation and the greater of $100,000 or 50% of the account value for each willful violation. In its upcoming term, the Supreme Court of the United States will address a circuit split between the Fifth and Ninth Circuit Courts of Appeals with respect to the maximum civil penalty that may be levied for a non-willful violation. Specifically, the Court will consider whether the applicable penalty for a non-willful violation is assessed per FBAR form (i.e. a single $10,000 penalty each year) or per account (i.e. a $10,000 penalty for each unreported foreign account), which the penalty statute in question (31 U.S.C. § 5321(a)(5)(B)) does not make clear.

Disputed FBAR Penalty Issue

In the Ninth Circuit case, the IRS penalized Jane Boyd for a non-willful failure to report thirteen accounts she had in the United Kingdom on an individual FBAR. After the district court granted the government's motion for summary judgment and held that the penalty applied per account, Boyd

appealed to the Ninth Circuit, which reversed the district court's decision and concluded that the statute authorized a single $10,000 penalty for failure to file the FBAR.

Conversely, in the Fifth Circuit case, the IRS assessed FBAR penalties for 2007 through 2011 against Alexandru Bittner, a dual citizen of the United States and Romania, totaling $2.72 million (imposing a penalty for a total of 272 unreported foreign accounts). After the IRS assessment, the Justice Department sued Bittner to reduce the penalty to a civil judgment. The trial court determined that the penalty was unlawful under the penalty statute and that the proper penalty amount was $50,000 (i.e. $10,000 per form per year). On appeal, the Fifth Circuit reversed the trial court's ruling and held that each instance that Bittner failed to report a foreign bank account constituted a violation for purposes of the penalty statute and that the penalty, therefore, applied on a per account rather than per form basis.

By granting *certiorari* with respect to the Fifth Circuit's decision, the Supreme Court should settle the issue of whether the penalty imposed pursuant to an FBAR violation is assessed on a per FBAR form or per account basis.

JAH Can Help

Foreign asset reporting is complicated and can come with substantial penalties if you fail to comply. If you have any questions regarding FBAR reporting and penalty determination contact a member of our **Trusts and Estates Group** or fill out our **General Contact Form**.

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October 10, 2022

NEW BENEFICIAL OWNER REPORTING REQUIREMENTS UNDER THE CORPORATE TRANSPARENCY ACT

Historically, state and federal laws afforded small business owners a great deal of anonymity. However, the Corporate Transparency Act ("CTA") is set to change this. The CTA was enacted by Congress on January 1, 2021, as part of the Anti-Money Laundering Act of 2020 and is intended to curtail money laundering and terrorist financing. To achieve the CTA's goals, domestic and foreign entities doing business in the United States will soon be obligated to meet certain reporting requirements. In September, the Department of Treasury's Financial Crimes Enforcement Network ("FinCEN") finalized one of three sets of regulations specifying the procedures and methods of reporting. Companies can look to these rules, as well as the proposed rules, to understand how to comply with this new law to avoid criminal and civil penalties.

Reporting Requirements: Who, What, and When?

The CTA requires "reporting companies" to submit specific information about their beneficial owners to FinCEN. The definition of reporting companies includes any domestic corporation, limited liability company, or similar entity created by filing a document with the secretary of state or similar office. Foreign entities doing business within the United States are also included in this definition. However, the CTA sets out an exception from the definition of "reporting companies" for companies that have more than 20 full-time employees in the United States, more than $5 million in gross receipts or sales, and an operating presence at a physical office in the United States. Other highly regulated organizations like banks, credit unions, and investment funds as well as charities and publicly traded companies are also excluded from the definition. The reporting company must provide FinCEN information about itself and those involved with the entity. First, the reporting company must report (i) its name, (ii) any DBAs it uses, (iii) its address, and (iv) other identifying information including its taxpayer identification number. Second, the company must identify the natural persons controlling the entity and the persons who filed formation documents. This includes the person's (i) name, (ii) date of birth, (iii) address, and (iv) unique identifying number from an acceptable identification document. This is a stark departure from the anonymity that some small business owners enjoy with respect to their companies; however, importantly, information provided to FinCEN will not be public record and will be kept in a confidential database available only to certain government agencies, including the IRS and FBI. To further safeguard this information, the CTA subjects government employees to civil and criminal penalties for unauthorized disclosure or use of reported information. The timing for reporting under the CTA will depend on the date of the entity formation. Entities formed before the

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regulations take effect will have one year from the effective date of the regulations to file initial reports. Entities formed after the effective date must file initial reports within 30 days of formation. The effective date of the CTA's reporting requirement is January 1, 2024, but businesses should prepare now to disclose ownership information. Failure to comply with the CTA's reporting requirements carries potential criminal and civil penalties, including a civil penalty of up to $500 per day and criminal penalties of up to $10,000 and up to two years' imprisonment.

JAH Can Help

These rules are complicated and can come with hefty penalties if your business fails to comply. The **corporate attorneys** at JAH are available to assist you with the procedures needed to fulfill the Corporate Transparency Act requirements. If you are in need of assistance, contact a member of our **Corporate Group** or complete our **General Contact Form.**

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JOHNSTON ALLISON HORD

November 10, 2022

WHAT ARE A NONPROFIT DIRECTOR'S FIDUCIARY DUTIES?

Nonprofit directors should be aware that Article 8 of Chapter 55A of the North Carolina General Statutes prescribes the standard of conduct for directors of **nonprofit organizations** and specifically imposes three duties the directors hold to the company: the duty of good faith, the duty of care, and the duty of loyalty. It may come as a surprise to many nonprofit directors, therefore, that there is an additional and equally important duty the law imposes on nonprofit directors, which is not enumerated in the statute: the duty of obedience. A director's failure to act in accordance with all of these **fiduciary duties** could lead to the possibility of litigation and even personal liability. Therefore, it is key for every nonprofit director to be aware of their fiduciary duties in North Carolina.

The Three Statutory Fiduciary Duties

Section 55A-8-30(a) of the North Carolina Nonprofit Corporation Act states that:

"A director shall discharge his duties as a director, including his duties as a member of a committee:

(1) In good faith;

(2) With the care an ordinarily prudent person in a like position would exercise under similar circumstances; and

(3) In a manner the director reasonably believes to be in the best interests of the corporation."

These fiduciary duties are typically summarized as the duties of good faith, care, and loyalty. In short, they require that a nonprofit director stay informed of the nonprofit's corporate business and use reasonable judgment in decision-making, refrain from **corporate transactions** in which he/she would benefit, and generally act in the best interests of the nonprofit corporation. A director breaches one or more of these duties when he/she acts in a way that harms the nonprofit or benefits himself/herself at the nonprofit's expense, exposing the nonprofit (and possibly him or herself) to the threat of **litigation**.

The Duty of Obedience

The duty of obedience is slightly different than those listed by statute and rarely mentioned; however, failure to abide by this common law fiduciary duty carries the same consequences as breaching the duties of good faith, care, and loyalty. The duty of obedience has developed from the well-recognized notion that a director may not act outside of the scope of or contrary to the nonprofit corporation's

purpose. In other words, it captures a sense of obligation that a nonprofit director must possess to stay true to the nonprofit's primary goals. Although it is different from the other three duties, it is encompassed in them and is no less important. The duty of obedience is particularly important in the area of nonprofit corporations because many of these companies have specific, limited missions rather than the often broad, all-business-purpose missions of for-profit corporations. A nonprofit director adhering to his or her duty of obedience will therefore need to be cognizant of the nonprofit's purpose and overarching goals, such as its mission statement and any instructions related to disbursement of charitable funds. It is crucial as a nonprofit director to always keep the mission of the nonprofit in mind, not only to fulfill the nonprofit's goals but also to protect yourself from potential liability for breaching your duty of obedience.

JAH Can Help

The rules surrounding fiduciary liability for nonprofit directors are complex and breaching a duty can expose both the nonprofit and the director to liability. The corporate attorneys at JAH can navigate these complex matters so you don't have to. Contact a member of our **Corporate Practice Group** or complete our **General Contact Form** if you are in need of assistance.

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JOHNSTON ALLISON HORD

October 31, 2022

THE NORTH CAROLINA BUSINESS COURT CONSIDERS BUSINESS INTEREST DISPOSITION FOLLOWING AN OWNER'S DEATH

For the second time this year, the North Carolina Business Court considered the disposition of a business interest following an owner's death. On October 19, 2022, the Court issued its opinion in *Phe, Inc. v. Dolinsky*, 2022 NCBC 62*. Phe* involves the issue of whether a corporation could maintain claims against an executor where a shareholders' agreement required the redemption of shares upon a shareholder's death, but the executor nonetheless failed to move forward with the redemption.

The Court dismissed the claim for breach of fiduciary duty, holding that the issue was one of contract; thus, the claim was barred by North Carolina's economic loss rule—a rule which precludes monetary recovery in tort when a contract governing the same subject matter exists. In reaching this holding, the Court deferred to remedies sounding in contract—here, the shareholders' agreement. In doing so, the Court underscored the importance of the governing instrument.

The North Carolina Business Court considered a similar issue earlier this year in *Agarwal v. Estate of Agarwal*, 2022 NCBC 7 (N.C. Super. Ct. Feb. 9, 2022). *Agarwal* arose out of ownership of three Dunkin' Donuts franchise locations, each owned by a separate limited liability company. While the default rule in North Carolina is that a person's interest in an LLC turns into a non-economic voting interest at death, the rule can be supplanted by clear language to the contrary in an operating agreement. *See* N.C.G.S. § 57D-3-02.

In *Agarwal*, the Court held the language of the operating agreements was ambiguous and presented a question of fact as to whether the intent was for the deceased owner's interest to convert to a nonvoting economic interest. Accordingly, the Court ordered the case to proceed to discovery so the parties could develop evidence as to the intent of the parties at the time the operating agreements were entered.

How JAH Can Help

Phe and *Agarwal* highlight the importance of ensuring that a corporation's governing documents clearly provide for what happens upon an owner's death, as well as remedies which may be available after death. At Johnston, Allison & Hord, P.A., our **corporate practice group** can help with this on the front-end by preparing governing documents which address these issues. For those who find

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themselves in disagreements relating to how an owner's death impacts ownership of a company, our **litigation team** is ready to assist.

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December 12, 2022

IRS ANNOUNCES 2023 INFLATION ADJUSTMENTS

The IRS recently announced annual inflation adjustments for the 2023 tax year. With the inflation adjustments, Revenue Procedure 2022-38 provides for the tax year 2023:

Unified credit against estate tax. Estates of decedents who die during 2023 have a basic exclusion amount of $12,920,000 (which is an increase of $860,000 from 2022).

Annual gift tax exclusion. The annual exclusion for gifts increased to $17,000.

The standard deduction. The standard deduction amounts for 2023 are:

- $27,700 for married couples filing jointly (up $1,800 in 2022);
- $13,850 (up $900) for single taxpayers and married individuals filing separately; and
- $20,800 (up $1,400) for heads of households.

Marginal rates. The top tax rate is still 37% for individual single taxpayers with incomes greater than $578,125 ($693,750 for married couples filing jointly). The other rates are:

- 12% for incomes over $11,000 ($22,000 for married couples filing jointly)
- 22% for incomes over $44,725 ($89,450 for married couples filing jointly);
- 24% for incomes over $95,375 ($190,750 for married couples filing jointly);
- 32% for incomes over $182,100 ($364,200 for married couples filing jointly);and
- 35% for incomes over $231,250 ($462,500 for married couples filing jointly).

The lowest rate is 10% for single individuals with incomes of $11,000 or less (or $22,000 for married couples filing jointly).

For trusts and estates, the rates are as follows:

- 10% for incomes less than $2,900;
- 24% for incomes over $2,900;
- 35% for incomes over $10,550; and
- 37% for incomes over $14,450.

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Long-term capital gains. For 2023, the capital gains tax rates will be as follows:

- 0% for incomes less than $44,625 ($89,250 for married couples filing jointly);
- 15% for incomes over $44,625 ($89,250 for married couples filing jointly); and
- 20% for incomes over $492,300 ($553,850 for married couples filing jointly).

Alternative Minimum Tax. The AMT exemption amount for tax year 2023 is $81,300 (up from $75,900) and it begins to phase out at $578,150 ($539,900). The AMT exemption for joint filers is $126,500 and their exemption begins to phase out at $1,156,300 (up from $1,079,800).

Earned income tax credit. The maximum EITC amount for 2023 is $7,430 for qualifying taxpayers who have three or more qualifying children, which is up from $6,935 for 2022. Rev Proc 2022-38 contains a table that provides the maximum EITC amount for other categories, income thresholds, and phase-outs.

Qualified transportation fringe. For tax year 2023, the monthly limitation for the qualified transportation fringe benefit and the monthly limitation for qualified parking increased by $20 to $300.

Health flexible savings accounts. Beginning in 2023, the dollar limitation for employee salary reductions based on contributions to health FSAs increased to $3,050. For cafeteria plans that permit the carryover of unused amounts, the maximum carryover amount is $610, which is an increase of $40 from 2022.

Medical savings accounts. For tax year 2023, an HSA participant with self-only coverage must have a high-deductible health plan with an annual deductible of at least $2,650, but not more than $3,950. The maximum out-of-pocket expense amount is $5,300 (up from $4,950 in 2022). For family coverage, the HDHP must have an annual deductible of not less than $5,300 and no more than $7,900 (up $500 from 2022). The out-of-pocket expense limit is $9,650 (a $600 increase over 2022).

Foreign earned income exclusion. For tax year 2023, the foreign earned income exclusion is $120,000, which is up from $112,000 in 2022.

Adoption credit and exclusion for adoption assistance. The maximum credit allowed for adoptions in 2023 is $15,950, (up from $14,890 for 2022). Employees who receive adoption assistance can exclude up to $15,950 of such assistance from income.

Kiddie tax. The exemption for the kiddie tax for 2023 will be $2,500 (up from $2,300 in 2022).

MAGI limits for deductible contributions to traditional and Roth IRAs.

- For 2023, for single tax payers and heads of household, the otherwise allowable deductible contribution will be phased out ratably for MAGI between $73,000 and $83,000 (which is up

from $68,000 and $78,000 in 2022). For married couples filing jointly, the deduction is phased out ratably for MAGI between $116,000 and $136,000 (which is up from $109,000 and $129,000 in 2022).

- In 2023, for single tax payers and heads of household, the maximum annual contribution that can be made to a Roth IRA is phased out ratably for taxpayers with MAGI between $138,000 and $153,000 (which is up from $129,000 and $144,000 in 2022). For married couples filing jointly, the otherwise allowable contributions to a Roth IRA will be phased out ratably for 2023 for MAGI between $218,000 and $228,000 (which is up from $204,000 and $214,000 in 2022).

Items not indexed for inflation. By statute, certain items that previously were indexed for inflation no longer are adjusted. Those items include:

- The personal exemption for tax year 2023 remains at 0, as it was for 2022. Since 2018, there also has been no limit on itemized deductions. Both the personal exemption and the limit on itemized deductions were eliminated by the Tax Cuts and Jobs Act.
- The modified adjusted gross income amount used by joint filers to determine the reduction in the Lifetime Learning Credit provided in § 25A(d)(2) is not adjusted for tax years beginning after December 31, 2020. The Lifetime Learning Credit is phased out for taxpayers with modified adjusted gross income in excess of $80,000 ($160,000 for joint returns).

JAH Can Help

If you have any questions regarding the IRS 2023 inflation adjustments and Revenue Procedure 2022-38 contact a member of our **Trusts & Estates Group** or complete our **General Contact Form**.

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