page 2
Know the tax rules for gifts to employees and customers

Company gets sued for mentioning a celebrity in its advertising

page 3
What businesses need to know about commercial leasing

page 4
Buyout provisions can have unexpected consequences

Legal Matters®

Business Law
summer 2015

New rules make it easier for unions to organize workers

The National Labor Relations Board has adopted new, "streamlined" rules for union elections that create additional requirements for businesses and could dramatically shorten the time between when a union files a notice and when a vote is held.

Union elections could now be held as little as 13 days after a union files a petition. This means companies will have to scramble to meet very short deadlines, and may have little or no time to respond and make their case to their workers about why they don't need a union.

Here's a brief look at the changes and what they mean:

► Unions can now file petitions with the NLRB electronically and simultaneously provide notice by e-mail to the employer. (In the past, the NLRB would notify the employer, usually by mail, which took longer.)

► Within two days of being notified, the employer must post a detailed employee notice about the election. It must also e-mail employees about it (if the employer typically communicates with employees via e-mail).

This is new; employers didn't generally have to post a notice before. The short two-day time period means that many companies may miss the deadline. If you miss the deadline, you might have the union election results invalidated even if you win.

A serious problem is that the e-mail notice from the union might not go directly to the person most responsible for handling the employer's relevant responsibilities. As a result, many more employees will need to be trained regarding what to do if they receive an e-mail notice and the importance of reacting quickly.

©istockphoto.com

► If an employer wants to challenge the appropriateness of the proposed bargaining unit, a hearing will be held a mere eight days after the petition is served. By the day before the hearing, the employer must provide a searchable list of prospective voters in the proposed unit, including job classifications, shifts, and work locations, along with the same information for any other workers the employer thinks should be included or excluded. Failure to do so means the employer can't

continued on page 3

The Law Office of
LYNNETTE ARIATHURAI
A Professional Corporation
39300 Civic Center Dr., Suite 110, Fremont, California 94538
510-794-9290 • Fax: 510-794-9260 • website: arialawfirm.com

©istockphoto.com

Know the tax rules for gifts to employees and customers

If you provide bonuses, awards, gifts or prizes to employees or customers, it's important to understand the tax consequences. It's particularly important if the recipient is going to have to pay a tax – you'll want them to understand this fact from the start, so they don't get an unpleasant surprise later.

In general, any gifts made by a company to an employee are considered wages. They're subject to both employment tax and income tax, and must be reported on an employee's W-2 form.

Certain very minor forms of compensation are usually considered "perks" rather than wages. For instance, if a business allows its employees use its copying machines for personal purposes for free, that's a perk. But if you give an employee cash (or a cash equivalent), that's always considered wages, even if the amount is de minimis. So if you give an employee a $10 Starbucks gift card as a thank-you for working late, the $10 is considered taxable.

Stock options are also taxable, and can be subject to complex rules. It's a good idea to explain these rules to employees who may be receiving options for the first time, since it's possible for employees to make big mistakes and end up resenting the employer. (There have been cases where workers ended up owing more in taxes than they received from selling their stock.)

One exception to the general rule is employee achievement awards, which can sometimes be considered non-taxable – but there are strict limits.

In general, to be tax-free, the award must be a tangible thing (not cash or a gift certificate) given for safety or for length of service at a meaningful ceremony. If it's a safety award, it can't be given to a manager, professional or clerical employee, and no more than 10% of your employees can receive the award. If it's a length-of-service award, the employee must have worked there at least five years and not have received a similar award within the past four years. The tax-free amount is limited to $1,600.

In theory, it's possible that a gift from a business owner to an employee could be a purely personal gift and not a form of compensation. But according to the U.S. Tax Court, you'd have to establish that the gift "is completely unrelated to the employment relationship and reflects no expectation of a business benefit." That's a tough thing to prove, and it seldom works.

Gifts to vendors, suppliers and customers have their own rules.

In general, "thank-you" gifts are deductible by a business up to $25 per person. The $25 figure includes "indirect" gifts to someone (such as a gift made to his or her spouse).

Gifts of this sort are typically not considered taxable income to the recipient. However, if a gift is large enough and related closely enough to business dealings, there might be an exception.

For instance, in one case the president of a metals company gave the president of another company some extremely valuable sales leads. The other president responded by giving the first president a car.

The first president didn't report the value of the car as income, because he considered it a gift. But the U.S. Supreme Court ruled that the value of the car was subject to income tax because it wasn't really just a present; it was a repayment for the sales leads and an inducement to provide additional leads.

We welcome your referrals.
We value all our clients. And while we're a busy firm, we welcome all referrals. If you refer someone to us, we promise to answer their questions and provide them with first-rate, attentive service. And if you've already referred someone to our firm, thank you!

Company gets sued for mentioning a celebrity in its advertising

The Duluth Trading Company was looking for a way to promote its men's Henley-style collarless polo shirts. It thought of Don Henley, the lead singer of the Eagles, whose first big hit in 1974 was called "Take It Easy." So it created an ad that said, "Don a Henley and take it easy."

Result: The company got sued – by Don Henley.

Under the law, celebrities often have a "right of publicity" – that is, they've worked hard to create positive associations with their name, and they have a right to keep other people from profiting from their celebrity status.

The Duluth company eventually settled the lawsuit, and part of the settlement was that it posted a formal apology to Henley on its Facebook page.

It's important to know that the right of publicity might still exist even if a celebrity has died, because the right can become part of the celebrity's estate. For instance, the U.S. Trademark Trial and Appeal Board recently ruled that even though late-night comedian Johnny Carson died in 2005, a portable toilet entrepreneur still couldn't call his product "Here's Johnny."

This newsletter is designed to keep you up-to-date with changes in the law. For help with these or any other legal issues, please call our firm today. The information in this newsletter is intended solely for your information. It does not constitute legal advice, and it should not be relied on without a discussion of your specific situation with an attorney.

New rules make it easier for unions to organize workers

continued from page 1

challenge whether the bargaining unit is appropriate.

In the past, an employer could have seven days to file briefs after the hearing, and could put things on hold if it appealed the result of the hearing. Now, whether an employer can file briefs after the hearing is up to the hearing officer, and an appeal will not put the process on hold.

► Once an NLRB regional director announces the date and other details of the election, it can happen very quickly. In the past, there was a 25-day waiting period after the announcement, but that has been eliminated.

► Within two days after a decision is made about the date of the election, the employer must give the union all the employees' names, addresses, personal cell phone numbers, home telephone numbers, and personal e-mail addresses, to the extent that it has them. Once a union gets this information, it can insist that the election be put off for 10 days to give it time to contact the workers, although it can also waive this 10-day waiting period. If the union waives the 10-day period, the election could be held in as little as 13 days after the petition was first served on the employer.

As a general rule, the longer a union election takes, the more likely it is that an employer will win, because the employer has more time to make its case and get out information about its side of the story.

©istockphoto.com

It's entirely possible that many businesses will be scrambling so quickly just to meet their obligations to post notices, provide information about employees and prepare for a hearing that they won't have time to make an argument against the union. This is why some critics of the new rules say that they allow for "ambush" elections.

In any event, if there's any likelihood of a union challenge, employers need to be prepared. In general, employers would be wise to plan ahead as to what message they want to get out about unionization and how they will communicate that message. If you wait until you receive notice of a union petition, it may be too late to formulate a winning strategy.

What businesses need to know about commercial leasing

Companies that are leasing their own space for the first time are often surprised by the terms of a commercial lease – and even companies that have leased space before sometimes overlook important points where they might be able to negotiate matters to their advantage. Here's a quick guide to what to look for:

Letter of intent. This sets out the basic terms of the agreement so everyone is on the same page before a formal lease is drafted. Be careful – the document should say that it's non-binding. You don't want to sign a general expression of interest and suddenly discover that it's a legal contract.

Rent. Commercial rent is more complicated than apartment rent. In addition to the "base rent," there can be separate charges for metered electricity, janitorial services, excess utility use, and personal property taxes. In addition, you may be charged a share of expenses the landlord incurs in operating the building.

Other terms. Besides rent, you'll want to consider whether the other terms of the lease meet your needs. These can include the security deposit, building access, kitchen use, telephone and Internet service, rules for pets and bicycles, and so on. These terms are often fertile ground for negotiation.

Build-out. If the space is going to be built out, you almost always want to insist that the landlord perform the work itself at its cost. This might result in higher rent, but it's worth it. If you're not in the construction business yourself, you don't want to bear the risk of contractor delays and compliance with the many complicated laws that are involved in the building process.

©istockphoto.com

Insurance. Commercial leases often require the tenant to indemnify the landlord in the event something goes wrong with the property. You'll want to make sure you have adequate insurance to cover these indemnities – and in fact, the landlord might require proof of such insurance.

Personal guarantees. In general, avoid them at all costs. The business entity should be the one signing the lease.

Subletting. Look carefully at the lease's provisions on assignment and subletting. What happens if you share space with another business? What happens if you bring in an outside investor, with the result that there's a technical change of ownership? You want to understand all these issues upfront, before you sign.

The Law Office of
LYNNETTE ARIATHURAI
A Professional Corporation

39300 Civic Center Dr., Suite 110, Fremont, California 94538
510-794-9290 • Fax: 510-794-9260 • website: arialawfirm.com

Buyout provisions can have unexpected consequences

©istockphoto.com

Many businesses have a buyout agreement that says that if one owner retires or resigns, the others can buy out his or her interest at a certain price.

These agreements are a smart idea for retaining control of a company. But you should keep in mind that they can sometimes be used in ways you wouldn't expect.

For instance, Irvin Gordon was a member of a professional firm in New Hampshire. His agreement said that if he died or resigned, the other owners would buy out his interest according to a fixed formula. Gordon was not allowed to sell his interest to anyone other than the firm.

Sometime later, Gordon got divorced. So the question was how to value his membership interest (so that his wife could get her fair share of the couple's assets).

Gordon argued that his interest was worth about $25,000 – which was what a third party could be expected to pay for the right to receive his buyout payment at his expected retirement date.

But his wife Priscilla claimed his interest was worth about $180,000 – the amount he'd receive if he retired immediately.

The New Hampshire Supreme Court sided with Priscilla. It said using the $180,000 figure was more reasonable than a figure based on a speculative retirement date and a hypothetical sale to a third party that was prohibited by the agreement.

It's not clear if a different buyout agreement would have led to a different result – but if you're signing one, it's worth speaking to an attorney about any possible unintended consequences.