Mandelbaum Salsburg
Attorneys at Law

VIEW FROM THE BAR
FALL/WINTER 2018

A Letter from Our CEO & Chairman

Our Firm's commitment to its clients extends beyond just the legal work that we do. It's a commitment to give back to the communities in which we serve and one which has been present in the Firm since its founding 88 years ago. As you'll read in our "In the Community" section of this issue, our attorneys and staff have been extremely active with charitable endeavors. We sponsored a "Fill a bag to end hunger" event within the Firm that was donated to a local food pantry; we hosted a "diaper drive" women's initiative event that supported the needs of an Essex County women's charity; we raised money for lung cancer and brain injury research; our Member Raj Gadhok, President of the Essex County Bar Association, launched a gun-buy back program for which every one of our attorneys donated funds; we participated in events to help those with special needs and on September 29, 2018 we pulled a full size airplane for the Special Olympics New Jersey. An event for which we raised over $11,500. We are members of the communities in which we work and our "family" roots run deep. The community service values that we hold as the Firm's leadership are echoed by the Firm's attorneys and staff year after year.

As we enter the fourth quarter of 2018, we also want to thank all of our clients who have been supportive of the law firm (some for nearly 50 years) and our newer clients, for helping us make this the best year in the Firm's history.

Very truly yours,

William S. Barrett, Esq.
Chief Executive Officer

Barry R. Mandelbaum, Esq.
Chairman of the Board

Personal Liability of Business Executives for the Cost of Environmental Cleanups

By Gordon C. Duus, Esq.

Recently, in *Morris Plains Holding VF, LLC v. Milano French Cleaners, Inc.*, the New Jersey courts held the sole shareholder of a corporation personally liable for the cost to clean up the property on which his business operated. The defendant operated a dry cleaning business in a shopping center. When dry cleaning solvents were discovered in 1999, the defendant spent $140,000 over 10 years remediating the property before closing its business and filing for bankruptcy in 2012. At that point, the corporate defendant had no assets to complete the cleanup. Plaintiff, who owned the shopping center and assumed responsibility for the remediation, sued the dry cleaner's sole shareholder, individually, and the trial court found he was personally liable under the New Jersey Spill Compensation and Control Act. Thus, the corporate shareholder was required to spend his own money on the cleanup costs.

Defendant argued that the facts proven at trial did not show that he was a "discharger" as defined in the Spill Act or was responsible for the discharge of hazardous substances or that there was a basis for piercing the corporate veil to hold him personally liable.

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Independent Contractors V. Employees: The Risks of Misclassifying Dentists *As reprinted from DrBicuspid.com*

By William S. Barrett, Esq.
and Casey Gocel, Esq., LL.M.

I. What is an Independent Contractor?

The general rule is that a dentist is an independent contractor if she has control over the number of patients she sees and her work schedule. A dentist is not an independent contractor if she performs services that can be controlled by the practice.

Practices often classify dentists as independent contractors to avoid having to comply with state and federal withholding requirements and payroll taxes. Instead, the practice simply issues a 1099 to the dentist at the end of each year and the dentist is responsible for reporting her income, which is subject to self-employment tax.

II. What is an Employee?

If the practice has control over the dentist's patient load and schedule, she is an employee of the practice. An employee is supervised by the practice. Employees may be entitled to certain benefits and protections under state and federal laws and the practice is responsible for withholding a portion of an employee's earnings for tax purposes.

III. What Factors are used to determine whether a Dentist is an Independent Contractor versus an Employee?

Independent contractors have complete autonomy over their work lives, whereas employees must answer to and abide by their employers. There are four primary factors that state and federal agencies consider when determining if a dentist is an employee or an independent contractor.

1. Supervision:

- Is the dentist under direct control of the practice's supervisors?
- Does the dentist work for other practices?
- Who is responsible for corrective treatment and addressing such issues with the patients?
- Does the practice provide the dentist with any training?

2. Scheduling:

- Do the patients belong to the practice or the dentist?
- Who schedules the patients?
- Who determines the dentist's hours?
- Can the dentist refuse to treat patients offered to her?
- Does the dentist have to request time off?

3. Benefits and Insurance:

- Who pays for the dentist's health insurance?
- Who pays for the dentist's malpractice insurance?
- Who pays for the dentist's licensing fees and continuing education credits?
- Is the dentist entitled to any benefits from the practice (i.e., 401K, paid time off)?

4. Payment and Expenses:

- Who determines the rates paid by the dentist's patients?
- How is the dentist paid?
- Does the practice provide the dentist with tools, supplies and equipment?
- Who pays for laboratory fees?
- Does the dentist independently pay to advertise her services?

V. What are the Consequences of Misclassifying an Employee as an Independent Contractor?

Recently agencies, such as state departments of labor and the Internal Revenue Service, have intensified their efforts to audit the independent contractor classification of dentists. If an agency audits a practice and finds that the practice has misclassified a dentist as an independent contractor, the agency will likely seek payment of unpaid employment, disability and social security taxes, including interest and penalties. This could potentially cost the practice millions of dollars in taxes and fees.

In addition, the misclassified dentist may be retroactively entitled to insurance coverage and other benefits which should have been offered by the practice if the dentist had been properly classified as an employee. If the dentist is deemed to be a non-exempt employee and worked more than 40 hours in any given week, the practice will also be responsible for back payment of overtime.

VI. What can a Practice do to protect itself?

The only fail-safe way to survive an audit is to classify dentists and staff in compliance with the criteria established by federal and state law. Although this list is not exhaustive or fool-proof, the best practices for maintaining an independent contractor classification are as follows:

- The dentist holds herself out as self-employed and solicits patients from other sources, deriving income from those sources.
- The dentist advertises her personal expertise and services in an effort to originate new patients.

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Mandelbaum Salsburg
Attorneys at Law

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Personal Liability of Business Executives for the Cost of Environmental Cleanups

The Appellate Division affirmed the trial court's decision that there was no need for a "smoking gun witness" who had seen the sole shareholder actually discharge the solvents onto the property, since the dry cleaning business used 15 gallons of dry cleaning solvent annually for 25 years, was the only dry cleaning business ever on the property, the machinery sat on a concrete floor with no drains, and the soil located directly beneath the machinery was contaminated with the dry cleaning solvents. The Appellate Division agreed that the evidence supported holding the sole shareholder personally liable because he was "everything" vis-à-vis this business: its sole shareholder, the operator of the business, responsible for handling the dry cleaning solvents and charged with ensuring legal and regulatory compliance. The court concluded that by imposing liability on persons "in any way responsible," the New Jersey legislature intended to expand the scope of liability under the Spill Act "without regard for corporate veils and the like." Thus, the court concluded that a shareholder of a close corporation could not contaminate property, put his corporation in bankruptcy and walk away from the problem.

This case expands the liability of corporate shareholders under the Spill Act. Previously, courts had required that the test for corporate veil piercing must be met to hold shareholders, officers or directors personally liable under the Spill Act for cleanup costs. Basically, those cases refused to hold shareholders personally liable where they were acting for the corporation, not for themselves individually, so that they would not be personally liable unless the corporation was used to perpetrate fraud, to accomplish a crime or to otherwise evade the law. Previously, under the federal Comprehensive Environmental Response, Compensation and Liability Act which was modelled after New Jersey's Spill Act, the most significant exception to the rule that the shareholders, officers and directors could not be held personally liable absent veil piercing was where the shareholder, officer or director was shown to have personally participated in the hazardous substance disposal activities so that he or she was held to be an "operator." The court in the *Morris Plains Holding* held that New Jersey's Spill Act imposes the same liability on shareholders as "operators," without the need to pierce the corporate veil. Those operating businesses that involve hazardous substances should take affirmative steps to insulate themselves from liability arising from either being an "operator" or the piercing of the corporate veil, including by buying environmental insurance to protect their businesses and personal assets.

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Independent Contractors V. Employees: The Risks Of Misclassifying Dentists

- The dentist establishes her own business entity with its own Federal Employer Identification Number (EIN), with whom the practice will contract, instead of the dentist personally.
- The dentist obtains business cards, stationery and other supplies in the name of the independently formed entity.
- The dentist procures her own general and professional liability insurance.
- The dentist provides the practice with an invoice of charges representing the monies earned by the dentist, which the practice will pay within a certain amount of business days.
- The dentist is solely responsible for paying appropriate taxes on revenue she receives from the practice.
- The dentist is solely responsible for her own business expenses, and provides her own tools, supplies and materials, as necessary.
- The dentist does not receive any benefits or bonuses from the practice.
- The dentist establishes her own work schedule and vacation schedule.
- The dentist signs a written agreement that provides that she is an independent contractor, that she meets the criteria of an independent contractor and will indemnify and hold the practice harmless in the event the DOL or the IRS determine otherwise.
- The practice specifically states that the Employee Handbook does not apply to the individuals who are independent contractors.
- The practice does not train the dentist.
- The dentist picks and chooses the work to be performed pursuant to her engagement and has the ability to decline particular patient assignments.

Compliance with a well-crafted independent contractor agreement is the best defense in a reclassification audit.

William S. Barrett is CEO of Mandelbaum Salsburg and Chair of the Firm's Professional Practice Transitions Group. Casey Gocel, Esq., LL.M. is a Member in the Firm's Professional Practice Transitions, Corporate and Tax Practice Groups.

Recent Appellate Division Decision Impacts Residential Foreclosure Actions

By Arla D. Cahill, Esq.

On August 31, 2018, the New Jersey Appellate Division reversed a trial court's dismissal of a residential foreclosure action filed more than six years after the date of the loan's maturity in *Pfeifer v. McLaughlin*. The facts of *Pfeifer* are straightforward. In July 2007, Pfeifer lent property owners, Joanne and Claude Owen, $53,000, which was secured by a residential non-purchase money mortgage recorded in September 2007. The term of the loan was one year and required monthly payments until the July 26, 2008 maturity date at which time all sums due were to be paid. The Owens defaulted on the loan in May 2008 by failing to make payments. Although a foreclosure action was initiated in 2009, it was dismissed in 2013 for lack of prosecution. In 2010, the Owens sold the mortgaged property to the McLaughlins. Because the title company searched for liens under Joanne Owens' maiden name only (since she initially owned the property prior to her marriage), it failed to identify the 2007 recorded mortgage executed with her married name. Thus, the McLaughlins unknowingly purchased the property subject to Pfeifer's 2007 mortgage lien.

In 2011, Pfeifer filed a foreclosure action against the McLaughlins. Both parties filed summary judgment motions. The McLaughlins argued that Pfeifer's action was barred by the six-year statute of limitations period codified in N.J.S.A. 2A:50-56.1, enacted on August 6, 2009. Prior to the enactment of that case, there was no statutorily defined period of limitation for bringing a residential foreclosure action. Now, N.J.S.A. 2A:50-56.1 provides that a foreclosure action must be commenced by the *earliest* of: (1) six years from the date of maturity; (2) thirty-six years from the date of recording or execution; or (3) twenty years from the date of default by the debtor. Pfeifer argued that, because the maturity date of the note and mortgage occurred prior to the enactment of N.J.S.A. 2A:50-56.1, the twenty-year limitations period was applicable. The trial court dismissed *Pfeifer's* complaint as untimely because, relying upon N.J.S.A. 2A:50-56.1, the foreclosure action was filed more than six years after the maturity date of the Owens' note and mortgage.

The Appellate Division reversed the trial court. In general, statutes are given prospective application unless the Legislature expressly states that the statute is to be applied retroactively and so long as retroactive application will not result in an unconstitutional interference with vested rights or a manifest injustice. Retroactive application typically occurs where the statute clarifies an existing statute or corrects judicial misinterpretation of an existing statute. The court held that N.J.S.A. 2A:50-56.1 was not curative. Further, Pfiefer had a vested substantive right prior to the enactment that provided her with 20 years from the maturity date in which to institute the foreclosure action.

The facts and outcome of *Pfeifer* identify two important lessons. First, it underscores for real estate attorneys and buyers the importance of ensuring that the title company perform its lien search on real property utilizing all prior names of the sellers and carefully examine the chain of title documents for discrepancies. Second, lenders should promptly determine, with the assistance of counsel, the correct limitations period applicable to any contemplated mortgage foreclosure actions. In instances where the time to file a foreclosure action is imminent, such actions should be pursued without delay, despite any potential ongoing efforts by the lender to resolve the default with the borrower.

Arla D. Cahill is a Member in the firm's Litigation Department and Education Law and Special Needs Practice Groups. She can be reached at acahill@lawfirm.ms.

Firm Notches Appellate Division Victory for Mother Fighting for Son with Special Needs

Parents of children with special needs are often confronted with difficult choices when seeking the appropriate care for their children. Such was the case for L.M., who fought to ensure a proper placement for her severely autistic son who had been civilly committed out of concern for both his own safety and the safety of his mother. The lower court overseeing the commitment process unfortunately ignored her pleas to discharge her son to a group home for his and her well-being and safety, and, instead, the court held L.M. in contempt and fined her a crippling sum of $10,000.

Representing L.M. on appeal to the Appellate Division, Mandelbaum Salsburg litigation associate Brian M. Block, Esq. successfully obtained a complete reversal and vacation of the contempt citation and fine. On June 21, 2018, the appellate court granted Mr. Block's rare motion for "summary disposition," issuing an order agreeing with his position that the lower court failed to follow the proper contempt procedures and that the $10,000 fine violated both the court rules and L.M.'s right to trial by jury.

The attorneys at Mandelbaum Salsburg understand the unique obstacles and challenges facing parents like L.M. everyday and are ready to fiercely advocate on their behalves to achieve positive outcomes.

The Diane B. Allen Equal Pay Act: A Compliance Nightmare

By Dennis J. Alessi, Esq.

The Diane B. Allen Equal Pay Act ("The Act") is unique from other employment anti-discrimination laws in New Jersey because it creates a compliance nightmare for employers. It is important to understand the four main differences of the Act, and the challenges they bring.

First, the Act is not an equal pay for equal work law. It is actually an equal compensation for substantially similar work law. Employees, who are in those categories protected from employment discrimination under the New Jersey Law Against Discrimination ("NJLAD") must receive not only equal pay, but also equal employment benefits (i. e., insurances, retirement plans, paid time off, severance pay, etc.), when these protected employees perform substantially similar work as employees who are not protected by the NJLAD. This comparison must be made based on a composite consideration of skill, effort and responsibility.

"Similar work" is not the same as equal work. Similar work means almost or nearly the same work. And "substantially" means in most respects but not in all. Consequently, if an employee, who is in a category protected by the NJLAD, performs almost the same work in most respects as an employee who is not in a protected category, then this protected employee must receive equal salary and all other benefits of employment.

Deciding what equal work is appears to be an easy task by comparison to this type of analysis, which an employer must perform to ensure compliance with the Act.

Second, the Act is not an anti-discrimination law for women in the workforce. It was initially proposed as such but, as ultimately enacted, it applies to approximately 14 categories of employees who are protected against employment discrimination by the NJLAD. (Just some of these protected categories include, gender, race, color, national origin, age, religion, disability, family and marital status, veterans status, and sexual orientation, among others.) This means that an employer, with any degree of diversity in its employees, must analyze its entire workforce to ensure compliance with the Act.

Third, the Act does not appear to require that the employer have any intent to discriminate. Apparently, for an employer to have violated the Act, an employee need only prove that he/she is a member of a protected category under the NJLAD; that the employee performed substantially similar work as another employee who is not in a protected category; and that this protected employee received less compensation, in salary and/or in any benefits of employment, as compared to the employee not in a protected category.

Admittedly, an employer can raise three defenses: that the differential in compensation is due to a seniority system, a merit system, or some legitimate, bona fide and job-related difference(s) in characteristics between the employees in the protected categories and those that are not so protected. For example, inequality in compensation does not violate the Act if it is directly and wholly the result of job-related differences in training, education, experience or the quantity and quality of production. Obviously in many situations these differences will be subjective; difficult to measure; will require extensive supporting documentation developed over time; and the burden will be on the employer to prove them.

Fourth, the most distinctive and troublesome aspect of the Act is what actions employers must take to comply with it. For most employment discrimination laws an employer need only adopt a personnel policy to implement the law, and then follow the policy wherever situations arise to which the law applies. But with the Act, an employer needs to implement and maintain, on an on-going basis, a comprehensive compliance plan.

The plan necessitates a comparative evaluation of the education, training, knowledge/skills and experience of each employee and their individual productivity; an analysis of the duties, tasks and responsibilities of each position in the workforce; then a determination of which employees in which positions are performing substantially similar work. Once these substantially similar employees are identified, then the final step, undoubtedly the easiest, is to determine if the salary and other benefits of these employees are equal as between protected and non-protected categories of employees under the NJLAD. (The employer cannot reduce the compensation of the higher paid substantially similar employee, not; but must raise the compensation of the lower paid employee).

Such an in-depth analysis of an entire workforce is a monumental task for an employer, even with a fully staffed HR Department. We appreciate the even greater difficulty for an employer with far less HR resources. Nevertheless, the need for compliance is of paramount importance because of the severe penalties for a failure to do so. These include trebel damages (i.e., the employee receives three dollars for each dollar of equal compensation which the employee did not receive in violation of the Act), and the employer having to pay the employee's attorneys' fees.

In addition, the Act provides a six (6) year statute of limitations, and allows an employee to potentially claim damages for even a longer period of time in the past under the "discovery rule." This rule means that the six (6) year statute of limitations only begins to run after the employee discovers that he/she was not paid equally. Finally, a separate violation of the statute occurs each time the employer issues a paycheck which is less than equal pay for substantially similar work.

The "bottom line" is that, while implementing a compliance plan for the Act may be a nightmare, failure to comply could be a real life horror show for any employer.

Dennis J. Alessi, Esq., is Co-Chair of Mandelbaum Salsburg's Employment Law and Healthcare Law Practice Groups. He can be reached at dalessi@lawfirm.ms.

New York v. New Jersey Medicaid

By Eric R. Goldberg, Esq.

Many of our clients have the opportunity to choose whether they receive long term care services in New Jersey or New York. For seniors who are impoverished, or conducted elder care planning, Medicaid is the primary government benefit for long term care services. While Medicaid is a federal program, it is administered at the state level. Therefore, there are often vast differences in how states determine eligibility. Below, I will explain the basic distinctions between New York and New Jersey Medicaid for a single individual. This is not designed to be an exhaustive discussion, but I hope the reader will gain a rudimentary knowledge of how the programs differ and will then seek experienced elder law counsel to discuss options.

Asset Limits (2018)

In order to qualify for Medicaid, New Jersey requires that the applicant have no more than $2,000 in *countable* assets. Countable assets include everything, except: a primary residence with equity not exceeding $858,000; one automobile; various personal possessions; an irrevocable burial trust; and certain Medicaid compliant annuities.

On the other hand, New York requires that the applicant have no more than $15,150 in countable assets. In addition to New Jersey's list of exempt assets, New York does not count individual retirement accounts ("IRA") under certain circumstances. If the IRA belongs to the non-applicant spouse it is not counted. Also, the IRA is not counted if the applicant has elected to receive periodic payments rather than retaining the ability to take IRA assets at will. If the applicant is younger than 59 ½ the IRA is not an available resource and is exempt.

Income Limits (2018)

New Jersey is an income cap state but allows those with excess income to fund a Qualified Income Trust. The income cap is $2,250 per month. If the applicant's income exceeds that cap, she must fund a Qualified Income Trust with the entire income source that caused the excess income. This is a complicated solution to a simple problem and should be attempted only with the counsel of a competent elder law attorney.

Likewise, New York has an income cap of $842/month. Any monthly income in excess of that amount must be spent down on medical or home care services before Medicaid will provide coverage. Due to this restriction, Medicaid recipients living at home in New York would not be able to afford their monthly living expenses. The solution is to fund a Pooled Income Trust. A Pooled Income Trust is a trust run by a non-profit to allow Medicaid applicants to become financially eligible for Medicaid home care. Trust income is not counted as available income. Again, this solution should be attempted only with the advice of a competent elder law attorney.

Look Back Period

Both New Jersey and New York follow the five-year federal look back rule. In short, the Medicaid agency caseworker will examine financial records for the five years preceding the Medicaid application. The caseworker is looking for transfers meant to impoverish the applicant and qualify her for Medicaid sooner. However, unlike New Jersey, New York does not have a true look back for home care. This can act as a trap for those Medicaid recipients who later require a higher level of care or move to another state, such as New Jersey.

Medicaid Services Availability

New Jersey's Medicaid program does not cover as many hours at home. However, many of New Jersey's finest assisted living facilities and nursing facilities accept Medicaid. New York has fewer Medicaid accredited facilities, especially in the assisted living space.

The above distinctions exclude certain differences that are beyond the scope of this article. Furthermore, the two most important criteria for choosing the location in which your loved one will receive care are quality of care and proximity to family members who will visit on a regular basis.

As you can see, receiving Medicaid services for long term care needs is not as simple as running out of money and applying for government benefits. There are various nuances that must be considered. Consultation with a competent elder law attorney licensed in both New York and New Jersey is imperative to make certain that you or your loved one receive the best care in the right location.

Eric R. Goldberg is Of Counsel in Mandelbaum Salsburg's Elder Law Practice Group and can be reached at egoldberg@lawfirm.ms.

Family Law Case Spotlight: Preserving Assets for Valuation and Distribution in a Divorce Case

In a recent case involving the preservation of assets for valuation and distribution in a divorce case, Matrimonial and Family Law Co-Chair, Lynne Strober, went to court on behalf of her client, the wife, and restrained and enjoined the husband from dissipating known assets. In this case, the husband had a very valuable collection of sports cars which were acquired during the marriage, some of which may not be insured or registered. This was done before the husband retained counsel.

By going to Court in this manner, the husband was required to provide a full accounting of all vehicles and an appraisal value for them. This move prevented the husband from potentially transferring them and the vehicles were preserved.

To do this, Lynne filed an application by way of an Ex Parte Order To Show Cause to immediately secure the assets. This type of situation does not come up that frequently but when it does we move quickly. Emergent applications without notice to the other side are not always granted. In this particular case it was necessary. It caused no harm to the husband, and he had the right to apply to the Court for modification.

Prenuptial Agreements and the LGBTQ Community

By Lynne Strober, Esq.
and Jennifer Presti, Esq.

Prenuptial Agreements are legal agreements that state what will happen to assets and liabilities during the marriage, in the event of separation, divorce or death. Prenuptial Agreements have to be tailored to the needs of each client and are carefully prepared to be sure that the final document best protects each client.

Prenuptial Agreements are vital to the LGBTQ community, where, often, couples have been together for a long period of time before being able to wed in their state, and have acquired assets together that, more likely than not, are only in one party's name. Some couples want those assets to be considered joint in the event of death or divorce. While the asset may be in one party's name both parties may have contributed to that asset either with money, effort, or by assuming other responsibilities to enable the other partner to obtain or grow the asset. Or, perhaps, one partner has a large amount of debt and wishes to remain solely responsible for it; he or she would spell out in the Prenuptial Agreement that this particular financial burden would be one party's sole responsibility.

Under N.J.S.A. 2A:34-23.1, all assets acquired during a marriage are subject to equitable distribution except for premarital assets, gifts from a third party to one party alone or inheritances to one party. Any increase in value of an active asset acquired before a marriage is also subject to equitable distribution. An active asset is an asset where effort effects value. For example, if before the marriage one party purchased a Picasso; any increase in value would be due to the market place. If, however, a party before the marriage wrote a book and the book was then published and marketed during the marriage, the increase in the value of the book would be subject to equitable distribution.

Any increase during the marriage due to effort is subject to equitable distribution. If it is merely keeping a Picasso on the wall there is no increase for equitable distribution purposes except, for example, in the event of a Picasso, an argument could be made that the cost of the increase in homeowner's insurance should be borne by the party that is the owner of the Picasso.

If a gift is provided before the marriage the question is whether it is an active asset, such as a corporation, and the value of the corporation increased in value during the marriage, or, if an inheritance is received and part of that inheritance is an interest in a business and after receipt the business increases in value.

In New Jersey ordinarily marital assets are shared equally unless they are active assets. Liabilities are shared equally unless there is some reason that they should be excluded or treated differently. The Prenuptial Agreement can establish the agreed upon percentage each party receives. Alimony can be addressed and planned for in advance and the Prenuptial Agreement can provide for a payout in lieu of alimony or no payment whatsoever. Alimony is based upon various factors including the disparity of income, the lifestyle of the parties and need. It can be knowingly waived in a Prenuptial Agreement.

Premarital Agreements can address a party's desire to retain sole ownership of an asset and create a trust concurrently, if the intent is to keep the asset separate. Trusts may be needed to segregate certain assets and as a way of addressing income. We recommend that when applicable our client consult with our tax and corporate attorneys to be sure all possible protections are provided.

Child support and custody issues cannot be addressed in a Prenuptial Agreement. Issues addressing life insurance can be handled as well as the obligation to pay the other party's legal fees and the division or sole retention of retirement assets.

Each party is required to have an attorney review the Prenuptial Agreement before it is executed. Each party's representation by counsel should not be waived as it would jeopardize future enforceability.

Full disclosure with schedules of all assets and liabilities and one to two years of tax returns need to be exchanged in advance of execution and need to be attached to the Prenuptial Agreement as Schedules. The Agreement has to be entered into voluntarily, and not unconscionable to either party, at the time of execution. NJSA 37:2-38(c) The parties also need enough time between the entry of the Agreement and the date of their marriage; usually at least a month. However, if it is less time the Agreement needs to indicate that the parties waive the time frame proximity to the wedding.

Frequently parties leave planning for distributions upon death to a Will rather than having the estate planning incorporated into their Prenuptial Agreement and the Prenuptial Agreement needs to reflect this. The first question is whether the parties intend to have each other inherit their assets. Our family law attorneys recommend that each party have a Trust and Estates tax attorney involved to handle the estate planning so it best mirrors the intentions of our client.

Mid-marriage agreements are generally not enforceable as such agreements are not deemed to have consideration. The consideration for the entry into the Premarital Agreement is the marriage itself. Therefore, parties should not look at the Prenuptial Agreement as a document that can be changed during the marriage; if it is changed its' enforceability is subject to challenge. Parties can potentially waive any challenge and seek to have the mid-marriage agreement be binding but there is no guarantee that it would be upheld by a Court.

Of course, Prenuptial Agreements can be ripped up during a marriage or specifically voided by the parties in writing. Parties may also transfer assets into joint names during the marriage and circumvent the initial intentions of the Prenuptial Agreement, but a concurrent writing signed by both parties is the proper way to invalidate the Prenuptial Agreement.

Our goal at Mandelbaum Salsburg is to prepare a document that is well drafted, will be deemed valid by a Court and, of course, meets the needs of our client and protects our client.

Lynne Strober, Esq. is Co-Chair of Mandelbaum Salsburg's Matrimonial & Family Law Practice Group and Jennifer Presti, Esq. is an Associate in the Group. Lynne can be reached at lstrober@lawfirm.ms. Jennifer can be reached at jpresti@lawfirm.ms.

Immigration Law Update

By Laurie J. Woog, Esq.

While Mandelbaum Salsburg continues to obtain approvals of visas for skilled workers and family members, we have seen a lot of changes in immigration law since January. Although Congress has not passed any major legislation updating or reforming laws pertaining to immigration and naturalization, executive action and shifts in policy have resulted in a greater number of requests for additional evidence, and increased delays affecting both family and business-related cases. When faced with this landscape, it is important for employers, employees and individuals to make sure they hire competent counsel who are up to date on the latest developments to ensure the greatest likelihood of success.

Here are a few of the changes we have seen in the past year:

- **RFEs:** Immigration practitioners across the U.S. report a large increase in the number of "Requests for Evidence," often requesting evidence that has already been supplied or is arguably not required by regulations, thus increasing the length of time for adjudication, injecting uncertainty into the extension process, and adding greater expense for employers and applicants, particularly for business visas such as H-1bs and L-1s.
- **Travel Ban 3.0:** President Trump's third version of the Travel Ban was held to be lawful and is in place, affecting travelers from certain Muslim-majority countries.
- **Family Separation:** A federal judge declared the separation of immigrant families at the border to be unconstitutional, but the Administration is still working to reunite parents and children who have previously been forced apart.
- **Fewer grounds for asylum:** Attorney General Jeff Sessions reversed years of immigration rulings to declare that immigrants who flee domestic violence or gang-related violence in their home countries are usually ineligible for asylum.
- **Naturalization:** Expect delays in adjudication of over a year as USCIS has a record number of applications for citizenship in the pipeline.
- **Interview requirements:** USCIS will now require an in-person interview for the employee for all employment-based green card cases, reversing a long-standing practice.
- **Temporary Protected Status:** The Administration ended TPS for Hondurans, Salvadorans and others, which would leave many workers in the Tri-State area without employment authorization or sanctioned status in the U.S. However, in early October, a federal judge blocked termination of TPS, leaving the program in place for now.

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Tax Department Roundup

By Martin D. Hauptman, Esq.

Seriously Delinquent Tax Debt

As part of the "Fixing America's Surface Transportation Act", Congress has added Section 7345 to the Internal Revenue Code which requires the Internal Revenue Service to notify the State Department about any taxpayer "certified as owing a seriously delinquent tax debt". The Act generally prohibits the State Department from issuing to or renewing the passport of a taxpayer with a seriously delinquent tax debt.

Seriously delinquent tax debt is defined as tax debt, including penalties and interest, totaling more than $51,000 for which:

1. the IRS has filed a notice of federal tax lien; or

2. the IRS has issued a levy to collect the debt.

If the taxpayer applies for a passport or passport renewal, the State Department will deny the application and will not issue a passport or renew a current Passport. If the taxpayer currently has a valid passport, the State Department may revoke the taxpayer's passport or limit the taxpayer's ability to travel outside of the United States.

One of the ways to avoid the possible passport restrictions is to enter into a bona fide payment plan with the IRS.

Tax Amnesty

New Jersey has adopted a tax amnesty program to encourage taxpayers to pay their outstanding tax liability. The tax amnesty will cover tax liabilities arising after February 1, 2009 and before September 1, 2017.

To be eligible for a tax amnesty, the taxpayer must pay the tax in full. New Jersey will reduce the interest liability by 50% and will waive the following costs and penalties as part of the amnesty program:

1. cost of collection
2. penalties
3. late filing penalty
4. recovery fees

Taxpayers who do not take advantage of the tax amnesty will be assessed an additional 5% non-abatable penalty on any eligible debts not resolved during the tax amnesty period.

The taxpayer will be responsible for paying any civil or criminal fraud penalties arising from the tax obligations imposed under any state tax law.

The tax amnesty program is not available to any taxpayer who at the time of payment is under criminal investigation or charged with any state tax matter.

Previous tax amnesty programs in New Jersey have generated significant sums of money for the State:

1. The 1987 amnesty program generated $68 million of revenue;
2. The 1996 amnesty program generated $244 million of revenue; and
3. The 2009 tax amnesty program generated $647.1 million of revenue.

Martin D. Hauptman, Esq. is Chair of Mandelbaum Salsburg's ERISA and Employee Benefits Practice Group and a Member in its Tax, Trusts & Estates Groups. He can be reached at mhauptman@lawfirm.ms.

The Times They are A-Changin' for New Jersey Employers

Reprinted Op-Ed piece from ROI-NJ

By Steven I. Adler, Esq.

Nobel laureate Bob Dylan was writing about different times, but his song The Times They Are a-Changin' surely applies to the state of employment law since New Jersey Governor Phil Murphy took office in January.

No New Jersey employment lawyer would argue with the general proposition that our State has been far more liberal than most when it comes to protecting employees' rights. While Governor Christie did his best to put a halt to that trend, since his first day in office our new Governor has made it clear the direction he wants to travel. The train is now barreling down the tracks toward more employee rights.

Day one Governor Murphy signed an executive order to address gender pay disparity by precluding state government from asking job applicants about their pay history. Subsequently, Governor Murphy signed the New Jersey Equal Pay Act ("NJEPA") to further close the pay gap not only for women but all minorities covered by New Jersey's discrimination law. Governor Christie previously vetoed these measures, arguing they were unfriendly to businesses and a threat to our economy. This new law enables workers to assert claims that go back six years, and sometimes even longer, rather than being bound by the two year statute of limitations for all other types of state discrimination claims. The NJEPA also provides for treble (triple) damages and other provisions that are also extremely unfriendly to NJ employers.

Governor Murphy's next employment law move was to require employers, regardless of size, to provide workers with paid sick and domestic violence leave. New Jersey is now one of only about ten states to require such paid leave. A few months ago he also signed another executive order to create a task force to investigate misclassification of workers as independent contractors rather than employees. This crack down could result in significant awards against employers.

Finally, the New Jersey Legislature is considering a bill that would cut back the use of non-compete agreements in this State. The bill would enable workers to compete with their former employers in New Jersey if they go to work in New York City, limit any non-compete to one year and allow employees to continue to provide services to customers of their former employers as long as they don't solicit them for that business. Last, but not least, an employee terminated without good cause could be restrained from competing only if his or her former employer continues to pay the former employee during the non-compete period.

Was Governor Christie correct that these types of measures would be a threat to our economy? That may be overstating it a bit, but not by much. Most people are not against women and minorities earning equal pay for equal or substantially similar work. However, it seems that the pendulum has swung too far the other way when allowing for a six year or longer statute of limitations and gutting legitimate defenses employers previously had when fighting disparate pay cases. Likewise, while non-compete agreements are overused by employers, requiring employers to pay former employees during their non-compete periods would impose a large financial burden on many employers and be a measure that could cause employers not to operate in the Garden State. A better approach would be to limit non-compete clauses to salespeople or others with access to confidential information that could harm their former employers.

So gather round employers, there's a battle outside and it is ragin'. The new employment laws will soon shake your windows and rattle your walls, for the times in New Jersey they are a-changin'.

Steven I. Adler is Co-Chair of Mandelbaum Salsburg's Labor and Employment Law Practice Group. He can be reached at sadler@lawfirm.ms

Mandelbaum Salsburg in the Community

Lectures and Publications

Casey Gocel, a Member in Mandelbaum Salsburg's Corporate and Tax practice groups provided advice for new startups in a blerrp.com blog post on March 1st. Blerrp is an online forum to help entrepreneurs and provide a platform for questions to be asked and answered.

In April, CEO and Chair of the Firm's Professional Practice Transitions Group, **William S. Barrett,** and Co-Chair of the Firm's Employment Law and Healthcare Law Practice Groups, **Dennis J. Alessi,** authored an article on harassment in the dental office featured in *Dentistry Today*.

Also in April, Member, **Lauren X. Topelsohn,** was interviewed on iHeart Radio 106.7 where she provided a legal perspective on workplace harassment.

On April 24th, **Steven I. Adler**, Member and Co-Chair of the Firm's Labor & Employment Law Practice Group was quoted in an *ROI-NJ* article about Governor Murphy signing the equal pay law which seeks to close the wage gap. Additionally, on April 25th, Steven was quoted in the *Asbury Park Press* about the equal pay law.

Laurie J. Woog, Of Counsel to the Firm and Chair of its Immigration Law Practice Group, was quoted in a *New Jersey Business Magazine* article on April 30th on how immigration laws are impacting New Jersey employers.

On May 7th, Labor and Employment Law Practice Group Co-Chair, **Steven Adler**, was quoted in *NJBIZ* about the potential cost of salary inequity.

William S. Barrett was interviewed on May 9th for the American Express Open Forum on "Winning the Endgame: How to Create an Exit Strategy."

On May 12th, **William S. Barrett** was the guest speaker on a Dentaltown Podcast where he and host Howard Farran, DDS, MBA talked about practice transitions and what doctors need to know to time it right and what legal considerations they should be thinking about.

Ronald D. Coleman, Chair of the Firm's Intellectual Property and Brand Management Practice Group spoke at the NYIPLA Annual Meeting on May 15th on "Predictability and the Standard of Review in IP Cases.

On May 16th, **Steven I. Adler** authored an op-ed piece for ROI-NJ entitled "The times they are a-changin' for N.J. employers."

Steven Holt (Chair, Tax, Trusts & Estates), **Lynne Strober** (Co-Chair Family Law) and **Lisa Fox** (Member, Tax, Trusts & Estates) gave expert advice in a May NJ.com article highlighting many of the changes brought on by the Tax Cuts and Jobs Act and what you need to start thinking about now for your 2018 return.

Joel MacMull, (pictured below) Vice Chair of the Firm's Intellectual Property & Brand Management Practice Group, participated in a panel discussion at the 140th INTA Annual Meeting, which took place in Seattle on May 19th through the 23rd on Disparaging Marks and Mascots.

Mandelbaum Salsburg in the Community, *con't.*

On May 30th, **Dennis J. Alessi** presented alongside Gary Sherman CPA of RRBB Accountants & Advisors at the New York County Dental Society's "Protecting Your Dental Practice from Employee Theft and Fraud" Seminar

In June, **Joseph J. Peters**, Co-Chair of the Firm's Personal Injury and Workers' Compensation Practice Group, was one of the guest speakers at a BNI Developer's meeting.

On June 8th, **Steven I. Adler**, was interviewed by ROI-NJ on "Are Gov. Murphy's worker protections eliminating the need for unions?"

On June 12th, **William S. Barrett** authored an article for *Dentistry IQ* on guidelines dentists should be aware of when planning background checks for new employees.

Robin F. Lewis, a Member in the Firm's Real Estate Practice Group, presented at the New Jersey State Bar Association's Real Property Trust and Estate Law Section on June 29th on "Commercial Real Estate Transactions: From Handshake to Closing."

Douglas I. Eilender, Co-Chair of the Firm's Environmental Law Practice Group wrote for the Environmental Bankers Association's Summer Journal on construction and development related issues during environmental due diligence and the importance of not ignoring such findings.

Steven W. Teppler, Of Counsel to the Firm and Chair of its Privacy and Cybersecurity Practice was quoted in a June article on komando.com about the latest data breach to impact companies and individuals. He was also interviewed in June on the Exactis data breach.

On June 27th, **Joseph Peters** answered NJ.com BizBrain reader's question as to whether or not an attorney was overcharging a client after a car accident.

David Carton, Co-Chair of the Firm's Family Law Practice Group, was quoted in a June 19th *Forbes* article entitled "Read This Before You Sign a Prenuptial Agreement."

In July, **Steven Teppler**, participated in a 2 part podcast series "Cyberlaw Now" where he talks with Jake Simpson, a Dark web expert with Sylint Group in Sarasota, Florida.

Steven Holt, answered a reader's question on July 23rd on NJ.com about unpaid taxes on a deceased parent's behalf and the statute of limitations that may apply.

Richard I. Miller, Chair of the Firm's Elder Law Practice and a Certified Elder Law attorney, answered a *Star Ledger* reader's question on July 30th on the importance of having a will.

Lynne Strober was quoted in the August issue of *New Jersey Business* about new tools attorneys have to navigate divorce.

In August, **William S. Barrett** and **Casey Gocel** authored an article for drbicuspid.com on employee classifications to help avoid the serious financial ramifications of misclassification.

On August 8th, **Steven I. Adler**, wrote an article for the *New Jersey Law Journal* which looks at the state of employment laws in New Jersey since Governor Murphy took office in January.

Steven Holt was featured on Leon Grassi's August 10th DSM blog post where he discussed the value of a strong brand in Business Succession Marketing and Planning.

Lynne Strober was a guest speaker at the Second Saturdays NJ Divorce Support Group on August 16, 2018 at the Park Avenue Club.

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Steven Teppler participated in an August podcast, The Kim Komando Show, where he spoke with Craig Zeigler of the Sylint Group about the "Internet of Things" and what happens when smart devices fail.

Dennis J. Alessi commented in the *Asbury Park Press* on August 14th on a recent incident at Jenkinson's Aquarium and cautioned employers to properly train their staff before an incident, instead of waiting until one occurs.

Mandelbaum Salsburg's Strategic Veterinary Counsel Group, led by **Peter H. Tanella,** released the first issue of its new publication VETNEWS.

William S. Barrett, was quoted in an article in *Dentists Money Digest* on the "Importance of Understanding Employee Overtime Rules."

Ronald Coleman was quoted in an *Adweek* article on Brand Marketing and the request filed by P&G to with the US Patent and Trademark Office to register popular catch phrases such as "WTF" "LOL" "FML" and "NBD" as protected trademarks.

Michael Saffer, Co-Chair of Mandelbaum Salsburg's Litigation Practice wrote about minimizing litigation attorneys' fees and costs in an informative article for *ROI-NJ*.

This August, **Steven Holt**, authored an article for the New Jersey Society of CPAs (NJCPA) on the Offshore Voluntary Disclosure Incentive Program which is ended September 28th.

Thinking of secretly taping someone at work? The legality of doing so may not be as cut and dry as you think as **Steven I. Adler** explained in a recent *ROI-NJ* article on August 31st.

Richard I. Miller, presented on September 5th to seniors at Brightview Senior Living in Randolph about "The Myths and Misconceptions of Elder Care Planning."

Lynne Strober, Associate **Jennifer E. Presti** and Joan D'Uva, Partner at EisnerAmper LLP, recently authored an article for *New Jersey Family Lawyer Magazine* on identifying and valuing Intellectual Property and intangible assets during divorce.

William S. Barrett presented to dentists at the New York County Dental Society's CE program on October 4th entitled, "Know Before You Sign: Associate Dental Agreements."

Ronald Coleman recently published an Expert Analysis piece for Thomson Reuters Westlaw entitled, "Play-Doh's trademark registration passes the smell test."

Firm Accomplishments

In April, Real Estate Associate, **Joshua M. Gorsky**, was asked to join the Rutgers University Real Estate Center's Emerging Leaders Council. The Council is a collection of rising stars in New Jersey's commercial real estate sector.

Steven A. Holt, was appointed to the board of the Estate Planning Council of Northern, NJ in April.

In May, **David S. Carton** was named Co-Chair of the Firm's Matrimonial and Family Law Practice Group. David is Certified as a Matrimonial Law Attorney by the Supreme Court of New Jersey and has practiced Family Law for over 20 years.

Lynne Strober was invited to serve on the New Jersey State Bar Association Family Law Executive Committee for the 2018-2019 year.

Mandelbaum Salsburg's Real Estate Practice Group, led by **Barry Mandelbaum**, was featured in the April Issue of Real Estate New Jersey's Professional Spotlight.

Mandelbaum Salsburg in the Community, *con't.*

Mark T. Banner Award winner and Mandelbaum Partner **Ronald Coleman** (right) with client Simon Tam, owner of the trademark registration THE SLANTS, poses with co-awardee John Connell of Archer & Greiner and Scott Partridge, Chair of the ABA Intellectual Property Section, at the awards reception in May. Mandelbaum partner **Joel MacMull**, who also received a Banner Award, is not pictured.

Lynne Strober was listed by the National Academy of Family Law Attorneys as one of the "Top 10 Family Law Attorneys in New Jersey."

Congratulations to Members **Ronald Coleman** and **Joel MacMull** on being recognized as part of NJBIZ's Vanguard Series: Leaders in Law. This award recognizes local attorneys who stood out for their roles in important and often landmark cases or were instrumental in giving back to their profession.

We are pleased to announce that seven of our attorneys have been voted by their peers to be included in Morris/Essex Health & Life Magazine's Essex County's Top Lawyers List for 2018. Congratulations to **Barry R. Mandelbaum** (Real Estate), **Robin F. Lewis** (Real Estate), **Richard Miller** (Elder Law), **Vincent J. Nuzzi** (Criminal Defense), **Michael Saffer** (Commercial Litigation), **Lynne Strober** (Family Law), and **Douglas I. Eilender** (Land Use and Environment).

Congratulations to **Ronald Coleman**, Chair of Mandelbaum Salsburg's Intellectual Property and Brand Management Practice Group on being featured in the WTR 1000 list of "The World's Leading Trademark Professionals for 2018." He was also again named to the World Intellectual Property Review Leaders list for 2019.

We are excited to announce that 10 of our attorneys have been recognized by their peers for publication in the 2019 issue of "Best Lawyers in America." Congratulations to **Steven Adler, Gordon Duus, Arthur Grossman, Owen Hughes, Robin Lewis, Barry Mandelbaum, Jeffrey Rosenthal, Michael Saffer, Barry Schwartz** and **Lynne Strober.**

Congratulations to **Stuart Gold**, Co-Chair of the Firm's Bankruptcy and Creditors Rights Practice, who has been appointed as Chair of the District VC Fee Arbitration Committee for the 2018-2019 term. The District Fee Arbitration Committees are appointed by the Supreme Court of New Jersey to screen, hear and decide disputes by clients over legal fees.

Recent Additions to the Mandelbaum Salsburg Family

As our Firm continues to grow, we are excited to welcome **Steven Teppler** as Chair of our Privacy & Cyber Security Practice group, **Barry M. Schwartz** as a Member in the Firm's Corporate Practice Group, **J. Russell Bulkeley** as a Member in our Corporate and Securities Practice Group, **David Flaxman** as an Of Counsel in our Banking and Financial Services Group, **Eric Goldberg** of the Elder Law Center/Goldberg Law Group as Of Counsel in our Elder Law Group and **Benjamin D. Heller** as an Associate in our Litigation Practice Group.

Mandelbaum Salsburg in the Community, *con't.*

Charitable Endeavors

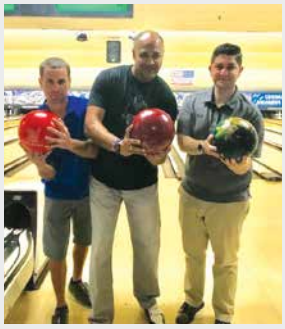
In April, **Raj Gadhok**, President of the Essex County Bar Association and Member of Mandelbaum Salsburg, announced a cooperative initiative between the Essex County Bar Association and the Essex County Prosecutor's Office to establish a Gun Buy Back Program in Essex County and in connection with municipal law enforcement agencies throughout the County. Our Founder and Chairman **Barry Mandelbaum** immediately pledged $5,000 on behalf of the law firm in support of this program. In addition, every one of our Firm's attorney's personally committed to donating to this cause. We are committed to protecting the communities we serve.

Team Mandelbaum hosted a Tricky Tray event on June 29th to raise money for Special Olympics New Jersey! We were able to raise over $1,700 at the event. A special thank you to Tumi, Zero Haliburton, Rezza and Lithos for their generous prize donations.

On April 26th, Mandelbaum Salsburg's Women's Initiative hosted a cocktail party where we networked with women leaders from across New Jersey and raised awareness for a great cause. We collected baby, toddler and adult diapers for the Modestly Cover Diaper Bank of Essex County and helped raise awareness for their wonderful organization.

On July 27th the attorneys and staff of Mandelbaum Salsburg donated to the Essex County Bar Association Foundation and Essex County Prosecutor's Office's "Gun Buy-Back Program" and got to wear jeans to work. The Firm's denim day helped raise more money towards this great cause.

Mandelbaum Salsburg in the Community, *con't.*



On August 14th, Team Mandelbaum participated in a Bowling Tournament which raised money for the Essex County Bar Foundation's Gun Buyback Initiative. Pictured are attorneys **Nicholas Waltman, Raj Gadhok** and **Edward Dabek**.

Team Mandelbaum is proud to announce that the Firm's August denim day raised nearly $2,000 for "The Ally Project." The Ally project is near and dear to the Mandelbaum Family as it was created by the children of one of our Partners and it is dedicated to raising funds for lung cancer research.

The Firm awarded $8,000 in September as part of its Irving Mandelbaum Scholarship Fund Program. This program, started by our Chairman **Barry Mandelbaum** in honor of his late father over 15 years ago, is awarded to staff members and their children who are furthering their education to be used towards tuition, books and other education related expenses. The scholarship program is funded 100% by the Shareholders of the Firm.

Team Mandelbaum raised over $11,500 for Special Olympics New Jersey and participated in the 2018 Plane Pull competition at Newark Liberty Airport on September 29th.

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