KEMPKLEIN
LAW FIRM

Commentator

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In a time where in-person relationships have turned remote and our homes are serving as not only offices but classrooms as well, many find comfort in having a reliable source to turn to when questions arise. Even throughout these difficult and rapidly changing times, Kemp Klein is committed to providing you with consistent, up-to-date legal information.

While Brian Jenney and Kate Ringler shed light on which estate planning documentation is most important to have completed prior to an emergency situation popping up, lawyers, employers, and employees alike can turn to Mark Filipp for OSHA related information shared from an excerpt of his co-authored Employment Law Answer Book. Additionally, Stuart Sinai and Jay Morse discuss a new development related to the prosecution of insider trading.

We hope you are all staying safe and healthy.

Best Wishes,

Do Not Go into an Emergency Without Protection

BRIAN R. JENNEY & KATE L. RINGLER

When clients think of the most important estate planning document, they most often think of a will. Lawyers tend to think of trusts as the most important. The COVID-19 epidemic has shown that we were all wrong; the Power of Attorney and Patient Advocate have proven to be the most important estate planning documents to have completed.

No, it isn't because you need someone to act on your behalf in the event you cannot make your own decisions (although that is, of course, important).

The statues that govern the execution of estate planning documents in Michigan set forth the requirements for witnesses and notaries when executing each document. MCL §700.2502 requires that a will be signed by at least two individuals, however these witnesses do not need to be present when the testator signs. They must merely sign a reasonable amount of time after witnessing the signing of the will OR witnessing the testator's acknowledgement of their signature or an acknowledgment of the will itself. The statute goes on to allow for holographic (or "handwritten") wills that do not have a witness requirement at all. There is also another statute (MCL §700.2503) that allows a document that the testator intended to be a will to be treated as a will for probate purposes. Thus, it is possible for our clients to create or execute a will without the customary two witnesses present.

On the other hand, a Durable Power of Attorney must be signed in the presence of two witnesses

or acknowledged by the principal before a notary public (MCL §700.5501). A Designation of Patient Advocate must be executed in the presence of and signed by two witnesses (MCL §700.5506). The statute pertaining to the Designation of Patient Advocate also limits who may serve as a witness. Health Care Workers, including doctors and nurses, are not authorized to serve as witnesses for a patient attempting to execute a Designation of Patient Advocate.

The electronic notarization statutes passed by the State of Michigan in recent years require that notaries use one of a selected group of pre-approved notarization services. Most of these services are limited in use for mortgages and real property, and one of the electronic notary statutes even prohibits its use for things like wills and trusts. So in light of the "in the presence of" requirements, executing estate planning documents are impossible without action taken by the courts or the state legislature. This lack of ability to witness and notarize highlights the importance of having powers of attorney (both medical and financial) in place, regardless of your age, prior to an emergency situation.

Governor Whitmer's Executive Order (2020-74) gave temporary relief in the "presence of" requirements. This relief is only temporary and helps during this current situation. Until the law is changed, "presence" could prove to be a continuing hurdle for executing estate planning documents. Now is also a good time for our clients to pull out their will and trust and review the terms of the will and trust to ensure that their wishes and intent are properly written in their documents. We have procedures in place and are able to execute estate planning documents remotely with our clients.

brian.jenney@kkue.com
kate.ringler@kkue.com

Employment Law Q & A

MARK R. FILIPP

The following Q & A has been selected from Employment Law Answer Book, co-authored by Mark R. Filipp.

Q 7:1 Which law governs job safety?

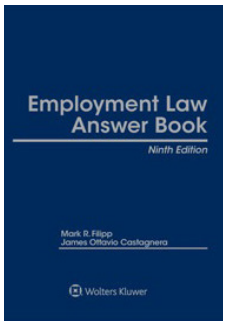
The primary law governing on-the-job safety is the OSH Act, which was passed by Congress in 1970.

Q 7:2 What was Congress's intent in enacting the OSH Act?

During the late 1960s, approximately 14,500 workers were killed each year as a result of occupational or industrial accidents. Many others were exposed to hazardous substances and contracted diseases related to their working conditions. Congress passed the Act to limit workers' exposure to occupational hazards.

Q 7:4 What are the goals of the OSH Act?

The Act has two broad goals: (1) to assure safe and healthful working conditions for working men and women; and (2) to provide a framework for research, education, training, and information in the field of occupational safety and health.



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248.619.2580
mark.filipp@kkue.com

Insider Trading — Fed's Employ New Weapon

STUART SINAI & JAY L. MORSE

Although the Justice Dept. has accumulated over 100 criminal convictions in the last several years, including a congressman, and maybe more to come whose recent trading is suspicious, it could have had more wins if not hampered by the principal law used to prosecute. That law, Section 10(b), and its Rule 10b-5, passed in 1934, although it banned manipulative, deceptive behavior and actions, it did not address specifically insider trading. Accordingly, the federal courts were left to determine the contours of "insider trading" and what a defendant had to have done to be guilty of such a crime.

"Classic Insider Trading" is an officer, director or other executive or employee of a publicly traded company using undisclosed information concerning a material event about the company that is likely to effect the price of its trading securities, to buy or sell those securities, depending upon whether that undisclosed information is favorable or damaging.

For there to be a "crime" the government must prove under that 1934 law that the accused abused h/his "fiduciary duty" to the company. That it had violated a duty to the company and its shareholders by using, stealing, and trading on the basis of that the confidential information, for h/his own "personal benefit" or that of a close relative or friend.

However, fact scenarios often involve "tippees," persons not directly working for the company who were tipped off by the company officer about the confidential information with the obvious intent that such tippee would engage in h/his own trading before the public became aware of the news.

To convict such a tippee s/he must know that the tipper-leaker, e.g., officer, received a "personal benefit,"

e.g., a bribe, a share of the profits or some other quid pro quo. However, sometimes tippees don't receive their tip directly from the company tipper, but from the first (or a prior) tippee.

These, down the line, "remote tippees," often do not know the identity of the company tipper/ leaker nor whether s/he received any personal benefit for h/his leak. Without knowing there was a personal benefit, courts have ruled that such remote tippee could not have known that there was a breach of fiduciary duty and could not be convicted.

Along comes Sarbanes-Oxley Act in 2002. It also has a securities fraud provision. It took the government 17 years to figure out it could also use Section 1348 of that 2002 statue to prosecute insider trading including dealing with the remote tippee who had formerly gotten off scot-free. In December 2019, a NY federal court of appeals upheld a verdict that such that law does not require a breach of fiduciary duty or a personal benefit to the tipper. All that it requires for conviction is that the trading tippee obviously knew the information was confidential, as-of-yet undisclosed, important enough to move markets, and traded while in possession, using, that confidential information.

Remote tippees now beware. You are the next target and could face 25-year prison terms.

stuart.sinai@kkue.com
jay.morse@kkue.com

COVID-19 Business Alerts

For your convenience, Kemp Klein has put together a compilation of COVID-19 resources. Visit https://kkue.com/covid-19-business-alerts/ to read about the latest on the CARES Act, Paycheck Protection Program, EID Loans, workplace preparedness, and guidance on employee leave under the Families First Coronavirus Response Act. We are here to help you navigate through the rapidly changing legal alerts and how they might have an impact on you, your business and your family.

KEMPKLEIN
LAW FIRM
201 W. Big Beaver Rd. Ste. 600, Troy, MI 48084

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Firm News

Sinai Appointed Arbitrator in Puerto Rico

Stuart Sinai was appointed by the Financial Industry Regulatory Authority to serve as principal arbitrator in San Juan Puerto Rico in a Puerto Rican Bonds matter. As principal arbitrator he conducted the six days of hearings which included at times eight lawyers for the litigants and several expert witnesses and ruled upon all evidentiary issues and testimonial objections that arose. The case was not concluded and will continue again in San Juan in June.

Seminar

Ringler to Speak at ICLE Medicaid and Health Care Planning Update

Attorney Kate L. Ringler will be presenting at the ICLE Medicaid and Health Care Planning Update 2020 on June 30. Her talk is titled "Latest Developments in Medicaid Planning" and will review new numbers, include case law and litigation updates, changes at the federal level and recent BEM/BAM changes. Kemp Klein attorney Thomas V. Trainer will be moderating. The seminar will be held at the Inn at St. John's in Plymouth. Register at icle.org.

Martella Presenter in BisNow Webinar

In May, a BisNow webinar featured KKUE attorney Christopher Martella and Real Estate Interests, LLC as they discussed "Moving the Needle and What to Do with Projects Underway."