KEMPKLEIN LAW FIRM

Commentator

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By failing to prepare, you are preparing to fail. — Benjamin Franklin

Regardless of the venture ahead, a bit of planning in the forefront has never put anyone behind. While attorneys are always happy to step in and help out when a plan is derailed, Richard Bruder cleverly reminds us that when you allow your lawyer to function as your wingman, the outcome is almost always more favorable on both ends. Similarly, Jason Seaver conveys the importance of planning ahead in real estate, specifically when it comes to the intent of owning a short-term rental property.

Additionally, Mark Filipp shares details of the *Families First Coronavirus Response Act* and how this law can help families affected by COVID-19 related employment issues as we all continue to navigate this temporary new normal.

Best wishes,

Do Your Homework Before Buying a Property and Expecting to Use it as a Short-Term Rental

JASON P. SEAVER

The short-term leasing of properties, particularly vacation properties, has been a hot topic of discussion for the last several years. Leasing out a vacation property when not in use by the property owners has been done for decades to help defray the cost of maintenance, or even as a regular income stream to the owners. The explosion of short-term rentals like VRBO and AirBNB have expanded the market to a much wider audience which in turn has unearthed more issues. Anyone interested in investing in a property that they plan to offer on a short-term rental basis needs to be aware of those new issues.

There has been a recent trend of municipalities seeking to restrict the usage of short-term rentals by designating any rental of less than X number of days, as commercial activity. The commercial designation makes renting out property on a short-term basis a violation of zoning restrictions for most residential areas, and also opens the door to legal action by neighboring property owners if there are residential only deed restrictions on the property.

The Michigan Supreme Court dipped its toes in the water on this issue recently in *Reaume v Township of Spring Lake*, where the court determined that a single family home that was being used as a short-term rental was a "motel" under the Spring Lake Township ordinance, and thus was not able to be located within a residential only neighborhood. The court did not establish any overarching principals relating to short term rentals however, so the decision making on this issue is largely up to the local municipality.

There has been some push at the State level to address this issue, with House Bill 4046 of 2019 attempting to define short-term rentals as residential activity across the entire state, but the bill has been stalled out in committee

for some time now.

In more built-up vacation areas, purchasing a condominium unit to use as a short-term rental has become very popular, but that has led to some pushback from owner occupiers within those condominium complexes.

In some ways, an apartment style or townhome condominium is the perfect vacation/short-term rental property. Most often the grounds and the structure itself are maintained by the association, which means that there is generally someone there to watch over the property year-round and address any critical issues, and there is usually insurance in place to cover large hazard or liability issues that come up. Buyers are paying a known fee for association dues on a monthly/quarterly/yearly basis for this service, which allows easier budgeting. But a condominium unit also comes at the cost of being subject to the terms of the condominium by-laws, and those by-laws can be amended.

Most condominium associations are run by permanent residents, and those residents in turn may not like having rental units in the complex. That is particularly true if it means a higher frequency of new people cycling in and out of condominium common areas such as pools and exercise facilities – the very things that help make a short-term rental more attractive. There has been a recent surge of condominium associations amending their by-laws to restrict the ability of property owners to rent their properties out on a short-term basis.

Property owners should also be aware that there is no "grandfathering" of their usage of the unit as a short-term rental. This means that if you are considering purchasing a condominium unit to be utilized as a short-term rental, not only do you need to carefully review the by-laws for any restrictions, but you also need to pay attention to the materials that come from the association. A change to the by-laws may slip by you otherwise, and suddenly your investment property may no longer be viable.

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Tow-Truck Driver or Wingman? How to Get the Most Value From Your Lawyer

RICHARD C. BRUDER

Tow-Truck: A service you call when you've driven off the road and land in the ditch.

OMG! It all happened so fast. Epic Fail! Didn't see that coming.

Wingman: Someone who helps protect or guide a friend or associate.

Yikes! I almost drove into the ditch; good thing my wingman was there to steer me back onto the right path.

Too many lawyers are tow-truck drivers. Or, do our clients *just think of us* that way? I've driven my share of tow-trucks in 35+ years of practice. But my greatest value to my clients comes when I am their wingman.

Solving problems *after* they arise is expensive. Avoiding problems *before* they arrive is much more affordable. Advice that helps you *see and seize opportunities* that you otherwise might miss doesn't cost – it pays!

A short story: a few weeks ago, a client called to tell me he was interested in joining the executive team of a company led by a local founder – how quickly could I review the Employment Agreement? "Pretty fast", I said, "but before you send it over, you might want to know this guy was recently sued by his executive team in a former company; I'm not judging him, but I'll send you the opinion and you can decide if you want to go forward." I sent along the opinion. End of story. In this case, I knew of and remembered the lawsuit involving this particular founder – but oftentimes, before a client embarks on a key relationship with another party, I will search a service we have that reports all pending and resolved cases nationwide to see if the other party has a track record of litigation. Unearthing this knowledge ahead of time is pure "wingman law" – I never needed to don my overalls and fire up the tow-truck and my tipoff to him didn't cost him a thing – but could have saved him years of his life.

Another example: when entrepreneurs start-up a company, the question always arises: "Should I be an LLC, a C Corporation or an S Corporation?" Statistics show that the vast majority of new companies

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Employment Law Q & A's

MARK R. FILIPP

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

Q 1:83.1 What is The Families First Coronavirus Response Act ("FFCRA")?

The FFCRA, signed into law on March 18, 2020, provides several emergency provisions to provide for reimbursable paid family leave and paid sick leave for circumstances related to COVID-19. The FFCRA is applicable to all private employers with fewer than 500 employees from April 1, 2020 through December 31, 2020. The FFCRA contains two key components. One involves the expansion of the FMLA under the Emergency Family and Medical Leave Expansion Act ("EFMLEA") and the other provides for paid sick leave under the Emergency Paid Sick Leave Act ("EPSLA").

Under the EFMLEA, employees that have been on their employer's payroll for at least 30 days may use emergency FMLA leave for up to 12 weeks for a qualifying need related to COVID-19, as follows:

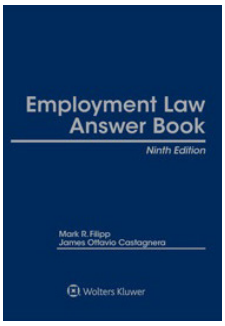
> When the employee is unable to work or telework due to a need to care for their son or daughter under 18 years of age if the child's school or place of care has been closed, or the child care provider of the child is unavailable due to COVID-19.
>
> Under the EFMLEA the first 2 weeks of leave are unpaid. After the first 2 weeks of unpaid leave, the employer must pay the employee at a rate no less than 2/3 of the employee's usual rate of pay, up to a maximum of $200 per day, or $10,000 total.

Under the EPSLA, employers are required to provide full-time employees with 80 hours of paid sick leave for specific reasons related to the COVID-19 pandemic. According to the EPSLA, the employer shall provide each employee with paid sick time to the extent the employee is unable to work, or telework due to a need for leave because:

> The employee is subject to a federal, state or local quarantine or isolation order related to COVID-19;
>
> The employee has been advised by a health care provider to self-quarantine due to concerns related to COVID-19;
>
> The employee is experiencing symptoms of COVID-19 and is seeking a medical diagnosis;
>
> The employee is caring for an individual who is subject to an order as described above;
>
> The employee is caring for a son or daughter because the school or place of care of the son or daughter has been closed or the child care provider of such son or daughter is unavailable due to COVID-19 reasons.

If the use of paid leave is attributable to the employee's quarantine order or COVID-19 symptoms, the employee is entitled to 80 hours of pay at the employee's regular rate, up to a maximum of $511 per day and $5,110 in the aggregate. If the paid sick time is attributable to circumstances of caring for a son or daughter, the employee is entitled to 2/3 of their pay up to a maximum of $200 per day and $2,000 in the aggregate.

The costs attributable to providing paid family leave and paid sick leave under the FFCRA are reimbursable by the federal government through the employer's utilization of tax credits.



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in Michigan are formed as LLCs – and often for good reasons. But in a narrow set of cases (where the entrepreneur plans to grow the company very quickly and then sell it to a much larger company 5+ years later), the C Corporation may actually be the best result. Section 1202 of the Tax Code would allow that entrepreneur to sell his or her company virtually federal income tax free. Its one of the biggest tax bonanzas in the entire Code – but (with a few exceptions) you have to start life as a C Corporation in order to take advantage of this. Not a case of a problem solved, or a problem avoided – but rather seizing an opportunity that could have been missed.

How can you move away from putting out fires, to preventing them in the first place – or, even better, lighting a few of your own? Working with a "wingman lawyer" requires an attitude adjustment – both the client's attitude and (in some cases) the lawyer's attitude.

Some clients view their lawyers as someone to be called only as a last resort, because "the clock starts running awfully fast." *Clients should view their lawyer as part of their executive team* – invite them to attend board meetings or key executive meetings (or, at a minimum, set up quarterly calls or visits with them). Many lawyers *(yours truly included)* are willing to participate in these for a reduced fee *or no fee*.

Lawyers view themselves as tow-truck drivers (because that's what law school taught us – read the case law then make an argument for your side). Of coure, I keep up with trends in the law, but I also love to attend seminars and read books about entrepreneurship and strategic planning. Several years ago, I devoted a year to Dan Sullivan's Strategic Coach course. Transformational. If you're interested, I'd be happy to walk you through what Dan calls the "DOS Conversation," a way for entrepreneurs to see the road ahead, seizing opportunities and choosing the best path to follow. I'll bet it will be one of the most powerful couple of hours you've spent in recent memory.

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