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Automobile Dealers Group at Hamburg, Rubin, Mullin, Maxwell & Lupin

Members of the Automobile Dealers Association of Greater Philadelphia and the Greater Lehigh Automobile Dealers Association

Recent Changes Made to THE PENNSYLVANIA BOARD OF VEHICLES ACT

Much of the focus over the past year has been on the power of the Federal bankruptcy courts to allow termination and revision of automobile dealership franchise agreements even though such actions would otherwise have been prohibited or limited by state franchise laws. However, despite the recent impact of manufacturer bankruptcies, state laws should continue to have a significant role going forward in governing the legal relationship between dealers and manufacturers.

There has recently been a surge of new state franchise legislation favorable to dealers. Some of this legislation has included limitations on manufacturer site control, limitations on factory mandates to upgrade stores, more flexibility for dualing, increased minimum distances between dealerships, shortening look back periods for audits and chargebacks for incentives and warranty work, and requirements that payment for incentives and warranty work be made to dealers within specified time periods.

In light of this recent drive to strengthen state franchise laws, it should be noted that Pennsylvania made some significant changes to the Board of Vehicles Act ("the Act") in August of last year.

For example, Section 11(a) of the Act has required mandatory mediation before a dealer may file a complaint with the State Board of Vehicle Manufacturers, Dealers, and Salespersons ("the Board") against a manufacturer regarding an establishment, relocation or termination of a franchise agreement. However, the 2009 law adds a new exception to the Section 11(a) mediation requirement, providing that a dealer is not required to enter into mandatory mediation before filing a complaint with the Board, when a manufacturer denies a dealer's dualing request, or when a manufacturer denies a dealer seeking a relocation involving a request to dual two or more franchises. The 2009 law also added definitions to the Act for the terms "dual" or "dualing" which means having two or more lines of new vehicles located in the same dealership facilities.

In addition, the 2009 law reduced the manufacturer's required response time to a dualing request from 60 days to 45 days. If a dualing request is denied by a manufacturer, the 2009 law now requires that a hearing shall be held within 45 days of the filing of a complaint and the Board must render a determination within 90 days. Furthermore, the burden of proof is now on the manufacturer to show that the dualing request is unreasonable.

The 2009 law also added a provision to the Act prohibiting a manufacturer from requiring a dealer to expand or modify facilities if it is unreasonable considering the market and economic conditions.

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HIRE ACT Provides Tax Incentives for Hiring Unemployed Workers

The Hiring Incentives to Restore Employment Act (the HIRE Act), signed into law on March 18th, provides employers with immediate tax incentives relating to qualified employees that are hired after February 3, 2010 and before January 1, 2011. The Act provides both a payroll tax exemption for new hires, and a tax credit if those newly hired employees remain employed for at least one year.

The payroll tax exemption is an exemption from the employer's 6.2 percent share of Social Security tax on all wages up to the "wage base" ($106,800 for 2010). Tax savings are immediately available to employers, by reducing their Social Security tax deposits for qualified new employees and reflecting the reduced taxes on the Form 941-Employer's Quarterly Federal Tax Return.

The exemption actually starts with the second quarter of 2010. First-quarter payroll taxes on wages subject to the exemption are recouped through an offset to second-quarter payroll taxes. The Hire Act does not change other payroll taxes, so the employer must continue to deduct the worker's share of social security taxes (6.2 percent) and the employer's and worker's respective shares of Medicare tax (1.45 percent each).

The new hire must certify that he or she has not worked more than 40 hours in the past 60 days. The IRS has created a form (Form W-11) for this certification to meet the Act's requirements. The exemption contains no cap or limit on the number of new hires that qualify.

The HIRE Act also allows an increase in the general business tax credit for an employee (1) who is hired in this same period (after February 3, 2010, and before January 1, 2011), (2) who is continuously employed for 52 weeks, and (3) whose wages during the final 26 weeks are at least 80 percent of his or her wages for the first 26 weeks. The tax credit is the lesser of: (1) $1,000, or (2) 6.2 percent of the wages the employer paid to retain the employee for the 52 weeks.

The HIRE Act does not apply to wages paid to an employee who was hired to replace an existing worker, unless the existing worker voluntarily resigned or was terminated for cause. An employer therefore cannot terminate and then rehire its workforce just to take advantage of the tax incentives.

To be a qualified employee, there is no requirement that the individual was previously employed or even in the workforce. For example, the IRS has indicated that an individual who was a student for some or all of the 60 days preceding the start of employment may be a qualified employee.

The HIRE Act provides significant tax incentives for the hiring and retention of previously unemployed or underemployed individuals. Although the Act imposes an increased burden of record keeping on employers, it would appear that qualifying for the Social Security tax exemption and the tax credit are worth the effort.

TEMPORARY FEDERAL ESTATE TAX REPEAL CAUSES UNCERTAINTY

The federal estate tax has been repealed effective January 1, 2010 – at least for the time being.

It had widely been predicted that Congress would act before 2010 and would not allow the estate tax to be repealed. The House of Representatives did in fact pass a bill extending the tax, but the Senate failed to act. As a result, the provisions of a tax law that was adopted by Congress in 2001 have taken effect and the following has occurred:

1 *The estate tax has been repealed effective January 1, 2010, __but only for one year__. Unless Congress acts sometime in 2010, the estate tax will then be reinstated effective January 1, 2011.*

2 *The federal gift tax has not been repealed.*

3 *Estates of individuals dying during 2010 are subject to a new complicated "carry-over" income tax basis regime.*

It is possible that Congress will act to reinstate the estate tax during 2010. However, timing is very uncertain. Constitutional issues may prevent the tax from being reinstated retroactively to January 1, 2010.

It is now particularly important that you review your estate plan.

Until this year, the Federal estate tax has been imposed on transfers on death. The Federal gift tax continues to be imposed on lifetime transfers by gift.

A specified amount has been exempted from the estate tax. This "credit exemption" continually increased in recent years up to $3.5 million in 2009. The lifetime exemption for gift taxes remains fixed at $1,000,000. The estate tax rate in 2009 was 45%. The gift tax rate in 2010 is 35%.

Many wills and trusts use a "formula clause" which provides for the distribution of the assets of the estate in a manner designed to minimize or eliminate estate tax liability. Now that the estate tax has been repealed (at least for now), some formula clauses may produce unanticipated consequences which will not properly carry out the intention of decedent. **If your estate plan contains a formula clause, we advise that you consult with an estate planning attorney to determine how your estate will pass under 2010 law, and to examine whether or not that result accomplishes your goals.**

Under the law in effect before 2010, the income tax basis of inherited property which appreciated in value during the decedent's lifetime is generally "stepped-up" to equal the fair market value of the property as of the date of the decedent's death (or as of the date six months after the date of death, if an alternative valuation is elected on the estate tax return). This basis rule has been extremely beneficial to heirs because it allowed them to sell highly appreciated property at a new stepped-up basis, and thereby pay little or no capital gains tax. Capital gain is based on the difference between the sale price and the adjusted basis.

Under the new rule which is in effect for one year commencing January 1, 2010 (unless repealed by Congress during 2010), the basis of inherited assets will generally "carry-over" from the decedent, rather than being stepped-up to fair market value. When property which appreciated during the decedent's lifetime is then subsequently sold by the heirs, they may be subject to significant capital gain tax under the new rule. Unless detailed records are kept during the decedent's lifetime, often for many decades, executors and trustees may have a difficult time establishing the carry-over basis of property. In order to determine carry-over basis, substantial information will often be needed, including the original purchase price of the property, the annual depreciation claimed on the decedent's tax returns and the cost of all improvements made to the property.

There are two exceptions to the new carry-over basis rule. A step-up in basis will be allowed for certain assets up to a total of $1,300,000. Also, the basis of property inherited by a surviving spouse can also be increased by an additional $3,000,000. These exceptions do not apply to all property, and careful planning will often be required to take advantage of the exceptions. The executor of the estate will be responsible for determining which assets and to what extent each asset receives a basis increase under these exceptions. When allocating the limited stepped-up basis, executors may be put in difficult positions among competing heirs and may be subject to litigation. ***__As noted above, subject to additional action by Congress, these new basis rules presently apply only to estates of individuals dying during 2010.__***

You should always periodically review your estate plan to make sure it is in line with your current objectives. The 2010 tax law developments now make it particularly important that you implement this review and consider any new planning opportunities that now exist.

If you have any questions about the 2010 tax law changes or if you would like to review your estate plan, please contact our office.

Recent Changes…The PA Board of Vehicles Act *continued*

This new provision also prohibits a manufacturer from requiring separate facilities for each brand if the market and economic conditions do not clearly justify the separate facility.

The Act has previously required manufacturers to repurchase new vehicle inventory within 60 days of return by the dealer if a franchise was terminated, and defined new vehicle inventory as vehicles of the current model year, or vehicles purchased from the manufacturer within 120 days prior to termination. The 2009 law now broadens the vehicle inventory that the manufacturer is required to repurchase. Now, in the event of a franchise termination, the manufacturer is required, within 60 days of return by the dealer, to repurchase from the dealer any new, undamaged and unsold vehicle inventory, whether acquired from the manufacturer or distributor or from another dealer of the same line-make in the ordinary course of business within 18 months of the termination date, provided the vehicle has less than 750 miles registered on the odometer.

Please contact our office if you want to learn more about the recent changes in the Board of Vehicles Act.

Hamburg, Rubin, Mullin, Maxwell & Lupin's Automobile Dealers Group focuses on areas of acquisition and sale of dealerships, franchise litigation, succession planning, tax and estate planning, real estate law, environmental issues, employee relations and regulatory issues.

For Further Information, Please Contact:

Steven H. Lupin *slupin@hrmml.com* or Jonathan Samel *jsamel@hrmml.com*

HRMM&L

HAMBURG, RUBIN, MULLIN, MAXWELL & LUPIN, PC

ATTORNEYS AT LAW

Lansdale • Perkasie • Limerick • Allentown, PA

Phone **215.661.0400** • www.hrmml.com

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