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Is A Letter of Intent Really A Binding Contract?



Robert V. Hawn, Esq.

Did you know that a letter of intent can be a binding contract? Many clients bring signed letters of intent to their attorneys without realizing that these are actually binding documents. These letters of intent have been prepared

with no input from the tax or legal advisors for these companies. At the time the letter of intent is signed, little due diligence has been performed on the target company and a number of issues may still require resolution.

Letters of intent are known by several different names including a Memorandum of Understanding or a Term Sheet. The letter of intent is usually a brief letter that outlines the basic business terms of a deal. If the letter doesn't contain any language stating that it is nonbinding and that no obligations arise except under a definitive agreement, then that letter of intent could be a legally binding contract. Even if this language is in the letter, the letter can still become a binding contract if the companies behave as if the target company had been acquired. For example, announcing a deal and combining operations before the closing of the deal can

create a contract from conduct. The letter of intent can then be used as evidence to set the terms of the deal.

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So why is it important for letters of intent to be nonbinding? As mentioned above, a letter of intent is signed before the target company has been investigated in depth by the acquirer because both sides do not want to spend a lot of time and money on due diligence investigations without having a deal. If a letter of intent is binding, the acquiring company may end up purchasing a company with a lot of problems that it wasn't aware existed when the letter of intent was signed.

At the same time, the acquirer may have not properly investigated or structured the purchase price, and it may end up with, for example, stock it cannot sell.

Even if a letter of intent is nonbinding, there are still several provisions that should bind the companies. SLG Attorneys can help you properly prepare a letter of intent.

Success Story



SLG attorneys were preparing a letter of intent for a client selling its business. The Buyer felt that the client's company was not worth as much as the client believed it was. In the letter of intent, SLG attorneys were able to negotiate a higher purchase price by making the increased purchase price contingent on meeting certain milestones that they were confident would be met. As a result both sides were satisfied with the purchase price. The client has since met the milestones and earned the purchase price increase.

Terminating Employees

“I have an employee that I need to let go. What do I do?” We are asked this question regularly by our clients. When terminating employees, there are a few key points to remember.

- Review any employment agreements or offer letters to make sure you did not promise any term of employment to the employee.
- Pay all earned but unpaid wages at the time of termination.
- Include vacation pay or PTO pay for accrued unused vacation or PTO in the final paycheck. You do not need to pay for accrued but unused sick time.
- Give the employee a copy of the pamphlet “For Your Benefit” Employment Development (EDD) Form DE 2320 regarding unemployment benefits.
- Issue a “Change of Status Notice” which can be done in the form of a memo or letter to the employee identifying the employee name, social security number, employer name, date of action and type of action. This is not required for employees who quit.
- For employers who provide medical benefits issue a notice to employee and dependents of their right to extend their group health plan coverage. Your health insurance provider should supply you with this notice or send it out for you as soon as you inform them that the employee has been terminated.
- Obtain any keys or other company items such as laptops or cell phones.
- Change all passwords for alarm systems and computers that the employee may have access to.
- If the employee has remote access, terminate the remote access immediately.

You should also make sure that there are no discrimination issues that may arise as a result of terminating an employee. Please contact our office if you have any questions regarding terminating an employee, including whether there may be some potential discrimination issues, drafting a severance agreement, or assistance documenting employment terms before a problem arises.

Tax Corner

Mileage Rate

Effective July 1, 2011, the standard mileage rate is 55.5 cents per mile, up from 51 cents. The IRS made this decision due to the spike in gas prices earlier this year, but the rate is good for the rest of the year even though prices seem to be falling now. The mileage rate for medical and moving expenses also goes up by 4.5 cents to 23.5 cents per mile, but the mileage rate used when driving for charity is unchanged at 14 cents per mile. The IRS will announce the mileage rate for 2012 in the fall.

Decrease in Sales and Use Tax Rate

Effective July 1, 2011, the sales and use tax rate for the State of California decreased by one percent from 8.25% to 7.25% because the one percent increase that was approved with the April 1, 2009 state budget has expired. In areas where there are voter approved district taxes, the total sales tax rate will be 7.25% plus the applicable district tax. For example, in San Jose the sales and use tax rate has dropped from 9.25% to 8.25%.



Undisclosed Real Estate Gifts Targeted by IRS

The IRS has begun a nationwide investigation examining taxpayers who have made significant real estate gifts but have not disclosed those gifts by filing IRS Form 709—United States Gift (and Generation-Skipping Transfer) Tax Return. The annual exclusion amount for gifts is currently \$13,000 per recipient. The IRS requires any person making a gift in where the fair market value exceeds \$13,000 to file Form 709. Gifts under the lifetime exemption amount (currently \$5,000,000) are not taxable. Failure to file Form 709 can lead to significant penalties and in some cases, criminal prosecution.

Tax Break for Real Estate Professionals

The IRS just made it easier for real estate pros with rental losses to get a tax break. Individuals who spend more than 1/2 of their working hours and at least 750 hours/year materially involved in real estate can avoid passive loss rules. However, if they have multiple rental properties, they must meet the time tests on each one or elect to treat all rentals as a single unit. If they miss the deadline to make the elections request for relief is allowed within 6 months of the due date. (Kiplinger Tax Letter, May 13, 2011, Vol. 86, No. 10)

The Latest News At



Tamara Pow and Bob Hawn were both recently awarded the prestigious **AV® Preeminent Rating™** from Martindale-Hubbell. Martindale-Hubbell is the facilitator of a peer review rating process. Ratings reflect the anonymous opinions of members of the Bar and the Judiciary. Martindale-Hubbell Peer Review Ratings fall into two categories - legal ability and general ethical standards. An AV Rating is a significant accomplishment and shows that lawyers are ranked by their peers with the highest level of professional excellence. AV® Preeminent™ and BV® Distinguished™ are certification marks of Reed Elsevier Properties Inc., used in accordance with the Martindale-Hubbell certification procedures, standards and policies.

Wedded Bliss!

Maichi Hoang, one of the paralegals in our office, recently got married to her longtime boyfriend Dang Nguyen. We wish you a lifetime of happiness. **Congratulations Dang and Maichi!**



SLG Upcoming Events

Our resident jazz cat, Bob Hawn, will be appearing at the San Jose Jazz Festival with his band, The Poblano Project, on **Friday, August 12th at 6p** at the 48-Hour Jazz Club stage located in San Pedro Square in Downtown San Jose.

At **6 pm on Thursday, July 28th**, Tamara Pow will be giving a seminar on "Choosing a Business Structure" at Keypoint Credit Union, 2805 Bowers Avenue in Santa Clara. This free seminar is open to the public.

Real Estate Corner

Qualified 1031 Exchange Intermediaries Are Always A Good Idea

When exchanging an investment property it is always a good idea to use a qualified intermediary to hold the funds in escrow in a 1031 exchange account used expressly for the purchase of replacement real estate. Recently, a couple sold their investment property and decided to put the proceeds in an escrow account instead of going through an intermediary. However, the terms of the escrow arrangement did not expressly state that the account was set up for an exchange, and the taxpayers were still able to access the funds. As a result of trying to do it themselves they were deemed to be in receipt of the funds, the 1031 exchange was disqualified, and taxes on the exchange of the property were not deferred and had to be recognized by the taxpayers. (Kiplinger Tax Letter, March 4, 2011, Vol. 86, No. 5)



Employment Corner

Below is a list of the top 10 websites that are banned at work and the percent of employers that block them:

- Facebook - 23%
- MySpace - 13%
- YouTube - 12%
- Ad manager, DoubleClick - 6%
- Twitter - 4%
- Hotmail.com - 2%
- Orkut - 2%
- Ad.Yieldmanager.com - 2%
- Meebo - 2%
- eBay - 2%



(The HR Specialist, March 2011, Vol. 9, No. 3)



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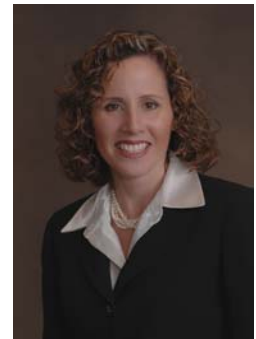
**Business Transactions • Corporations • Mergers & Acquisitions • Business Litigation
Limited Liability Companies • Partnerships • Tax Planning • Real Estate • Employment**

Dates To Remember

Parents Day	July 24
Friendship Day	August 7
Labor Day (Courts and government offices closed)	September 5
Grandparents Day	September 11
International Day of Peace	September 21
First Day of Autumn	September 23



Mark R. Figueiredo, Esq.



Tamara B. Pow, Esq.

Did You Know?

- The first breakfast cereal ever produced was Shredded Wheat.
- To burn off one plain M&M candy, you need to walk the length of a football field.
- The average American child will eat 1500 peanut butter and jelly sandwiches by the time he or she graduates from high school.
- There are an average of \$680 worth of transactions every second on eBay.
- “Stewardesses” is the longest word typed with only the left hand.
- “Typewriter” is the longest word in the English language that can be typed using one line on a keyboard.



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*We appreciate
your referrals!*

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