Tax, Retirement, and Probate Developments

Elizabeth W. Abel, J.D., LL.M.
Lanier Ford Shaver & Payne P.C.
2101 West Clinton Ave., Suite 102
Huntsville, AL 35805
256-535-1100
EWA@LanierFord.com
www.LanierFord.com

© 2015

I. Income Tax Developments

A. Legislation Enacted to Create Savings Accounts for People With Disabilities

- Stephen Beck, Jr., Achieving a Better Life Experience Act of 2014 (the "ABLE Act") was enacted on December 19, 2014 as part of The Tax Increase Prevention Act of 2014 (P.L. 113-295).
- The IRS issued proposed regulations under the ABLE Act on June 22, 2015.

LANIER FORD

- The ABLE Act permits a state to establish and maintain a savings program called a "qualified ABLE program," under which contributions may be made to an account that is established to meet the qualified disability expenses of the beneficiary of the account.
  - Beneficiary must be resident of such state and be disabled. IRC §529A(b).
  - Beneficiary may deposit funds into an ABLE account without affecting the beneficiary's eligibility for Social Security or other government benefits.
  - To maintain Social Security Income ("SSI") eligibility, however, the ABLE account balance may not exceed $100,000.
  - Medicaid coverage may be maintained no matter the amount that has accrued in the ABLE account. Section 103 of Pub. L. 113-295, Div. B.

- Beneficiary also must be the owner of the ABLE account, IRC § 529(b)(6).
  - If the beneficiary is unable to establish the account, a guardian, parent or agent under a durable power of attorney may establish the account.
  - Also, another person besides the beneficiary may have signature authority over the account and manage it for the sole benefit of the beneficiary. Prop. Reg. § 1.529A-1(b)(4); -2(c).

- Generally, all assets held in an ABLE account are exempt from taxation. IRC § 529A(a).
  - Contributions to an ABLE account by anyone other than the beneficiary are treated as completed gifts and are **not** excluded from gift tax by reason of being a gift for medical expenses under IRC § 2503(e).
  - The contributions are treated as present interest gifts and therefore will qualify for the annual exclusion.
  - The aggregate contributions in any one year from all contributors cannot exceed the annual exclusion amount under IRC § 2503(b).
  - All contributions must be in cash. IRC § 529A(b)(2); (c)(2).

- A person may be a beneficiary of an ABLE account if that person—
  - Is eligible for government benefits due to blindness or disability as defined under the Social Security Act, or
  - A disability certification with respect to such beneficiary is filed with the IRS each year showing that such beneficiary has a “medically determinable physical or mental impairment, which results in marked and severe functional limitations."
- To be eligible to open an ABLE account, the blindness or disability must have occurred **before** the beneficiary reached 26 years of age.

- Upon the death of an ABLE account beneficiary, in general, the funds remaining in the ABLE account (up to net amount of medical assistance paid for such beneficiary under the state's Medicaid program) must be paid to the state in which the account is established if such state files a claim for such payment.
- State legislatures are rapidly adopting ABLE programs.
- Alabama has enacted the law in June as part of Alabama Code § 16-33C-1 *et. seq.*

LANIER FORD

B. Tax Changes Included in Highway Funding Bill (H.R. 3236)

- On July 31, 2015, President Obama signed legislation giving a 3-month extension for highway funding (the thirty-fourth short-term extension since 2009).
- As often happens, tax changes meant to offset some of the cost of the legislation are included in a bill that has nothing to do with tax.

LANIER FORD

1. Mortgage Interest Reporting Requirements Changed for 2016

- Three additional reporting requirements are added to the 2016 **Form 1098, Mortgage Interest Statement:**
  - The amount of outstanding principal on the mortgage at the beginning of such calendar year;
  - The date of the origination of the mortgage; and
  - The address (or other description in the case of property without an address) of the property that secures the mortgage (IRC § 6050H(b)(2) as amended).
- **Effective date**. This provision is effective for Form 1098, Mortgage Interest Statement, and is required to be made, and statements required to be furnished, **after** December 31, 2016 (2016 tax return information).

LANIER FORD

- **Tax planning point**. Adding the loan balance to Form 1098 will provide the IRS with information allowing it to easily target returns where the mortgage balance exceeds the $1,000,000 acquisition debt limit.

- **Tax practitioner note**. Adding the date that the loan originated to Form 1098 will alert preparers as well as the IRS to homeowners who have refinanced their acquisition loan and perhaps exceeded the $100,000 home equity borrowing limit.

2. Tax Return Due Dates Change for 2016

- **Returns of partnerships and S corporations**. Returns of partnerships under IRC § 6031 and returns of S corporations under § 6012 and § 6037 made on the basis of the calendar year are due on March 15 following the close of the calendar year.
  - Returns made on a fiscal year basis are due on the fifteenth day of the **third month** following the close of the fiscal year.
  - **This provision is effective for taxable years beginning after December 31, 2015.**
- **Tax practitioner note**. This change is welcome news for individual return preparers who hate K-1s that arrive on April 14. However, partnership return preparers will have less time to get a timely return out by March 15.

LANIER FORD

- **Returns of C corporations**. Returns of C corporations are due on or before the fifteenth day of the **fourth month** following the close of the fiscal year (April 15 for calendar year C corporations).
  - **This provision is effective for taxable years beginning after December 31, 2015. In the case of any C corporation with a taxable fiscal year ending on June 30, the change to the due date applies to returns for taxable years beginning after December 31, 2025.**

- **Tax practitioner note**. Your C corporation client with a June 30 fiscal year-end will continue to have a September 15 due date until 2026. Other fiscal year-ends will be due on the fifteenth day of the fourth month for taxable years beginnings after December 31, 2015.
  - **Example**. The tax return of ABC, a C corporation with a fiscal year-end of May 31, 2016, is due September 16, 2016 (the fifteenth day of the fourth month). The tax return of XYZ, a C corporation with a fiscal year-end of June 30, 2016, is also due on September 15, 2016 (the fifteenth day of the third month).

3. Due Dates of Extended Tax Returns Change for 2016

- **Partnerships and S corporations.**
  - The maximum extension for the returns of partnerships and S corporations will be a 6-month period ending on September 15 for calendar year taxpayers.
  - **This provision is effective for returns for taxable years beginning after December 31, 2015.**

LANIER FORD

- **C corporations**.
  - In the case of any return for a taxable years of a C corporation that ends on December 31 and begins before January 1, 2026, the maximum extension will be a 5-month period.
  - **This provision is effective for returns for taxable years beginning after December 31, 2016.**
  - In the case of any return for a taxable year of a C corporation that ends on June 30 and begins after January 1, 2026, the extension period will be 7 months.
- **Tax practitioner note**. Thus, for a calendar year C corporation, the extended due date of Form 1120 continues to be September 15.

LANIER FORD

- **Trusts**.
  - The maximum extension for the returns of trusts filing Form 1041 will be a 5½ month period ending on September 30 for calendar year taxpayers.
  - **This provision is effective for returns for taxable years beginning after December 31, 2015.**
- **Tax practitioner note**.
  - Do not let this change be a surprise and result in a late trust return.
  - For 2015 trust tax returns, a calendar year trust's extension expires October 15.
  - For 2016 calendar year trusts, the extension will expire September 30, 2017.

LANIER FORD

- **Form 5500**.
  - The maximum extension for the returns of employee benefit plans filing Form 5500 will be an automatic 3½-month period ending on November 15 for calendar year plans.
  - **This provision is effective for returns for taxable years beginning after December 31, 2015.**
- **FinCEN 114**.
  - The due date for FinCEN Report 114 (relating to Report of Foreign Bank and Financial Accounts [FBAR]) will be April 15, with a maximum extension for a 6-month period ending on October 15.
  - **This provision is effective for returns for taxable years beginning after December 31, 2015.**
  - FBAR reports for 2016 will be due April 15, 2017, and may be extended to October 15, 2017.

- **Penalty waiver**.
  - The new law provides that for any taxpayer required to file the FinCEN114 for the first time, any penalty for failure to timely request or file an extension may be waived by the IRS.
- **Tax practitioner note**.
  - Is this not a reasonable change?
  - FBAR reporting due dates will match the individual returns!
  - And an extension of time to file the FBAR will be allowed for the first time, with due dates again matching the individual due date of October 15.

LANIER FORD

4. Employer Mandate Exemption Added for Health Coverage under TRICARE or the Veterans Administration

- **The legislation amends IRC § 4980H(c)(2), adding**: **Solely for purposes of determining whether an employer is an applicable large employer (the 50-employee test)** for any month, an individual will **not** be taken into account as an employee for the month if the individual has medical coverage for the month under TRICARE or the Department of Veterans Affairs (VA).
- **This provision is effective for months beginning after December 31, 2013.**

LANIER FORD

5. Eligibility for Health Savings Account (HSA) Not Affected by Receipt of Medical Care for Service-Connected Disability

- An individual will **not** fail to be treated as an eligible individual for any period merely because the individual receives hospital care or medical services under any law administered by the VA for a service-connected disability (IRC § 223(c)(1) as amended).
- **This provision is effective for months beginning after December 31, 2015.**

LANIER FORD

C. Recent Supreme Court Decisions

- *King v. Burwell* (June 24, 2015).
- *Obergefell v. Hodges* (June 26, 2015).

Supreme Court upholds subsidies for health care purchased on federal exchange

- The U. S. Supreme Court, in *King v. Burwell* (June 24, 2015, 576. U.S.) determined that premium tax credits (also known as health insurance subsidies) under the Affordable Care Act (ACA), are **not** limited to taxpayers who live in states that have established their own health insurance exchange, but are also available to taxpayers living in states that rely on a federal exchange.
- The Supreme Court concluded that allowing the subsidies for insurance purchased on **any** exchange was consistent with the purposes of the ACA.

LANIER FORD

Supreme Court declares nationwide right to same-sex marriage

- The U. S. Supreme Court, in *Obergefell v. Hodges* (June 26, 2015, 576 U.S.), struck down four state-wide bans on same-sex marriage, holding that the Fourteenth Amendment requires all states to license a marriage between two people of the same sex.
- Since same-sex couples may now exercise the fundamental right to marry in all states, the Court ruled that there is no lawful basis for a state to refuse to recognize a lawful same-sex marriage performed in another state.
- Tax ramifications of this decision include:
  a. Simplified tax filing for same-sex married couples that previously had to file as married for federal purposes and single for state purposes.
  b. For unmarried same-sex couples, facing the same marriage penalty and marriage benefit factors that other couples face when deciding whether to marry.

D. New trade laws include wide variety of tax provisions

- On June 29, 2015, President Obama signed into law two major trade bills:
  a. Trade Preference Extension (TPE) Act of 2015.
  b. Trade Priorities and Accountability (TPA) Act of 2015.
- These new laws contain a variety of tax provisions.

LANIER FORD

HCTC

- The refundable health coverage tax credit (HCTC) makes health insurance more affordable for certain trade-affected workers, Pension Benefit Guaranty Corporation (PBGC) payees, and their families, by paying part of their health insurance premiums.
- The HCTC had expired at the end of 2013.
- The TPE Act provides that the HCTC applies before January 1, 2020.
- **Thus, the credit is generally retroactively extended 6 years, from 2014 through 2019.**
- The TPE Act also makes certain changes to the HCTC, including how the health coverage tax credit interacts with the ACA's premium tax credit.

LANIER FORD

Pre-age-59 ½ withdrawals

- Pre-age-59 ½ withdrawals from retirement plans generally are subject to a 10% penalty tax unless one of several exceptions applies.
- Under one of these exceptions, distributions from a government pension-type plan are not subject to the penalty tax if made upon separation from service after age 50 to state or local police, firefighters, or emergency medical services personnel.
- **Effective for distributions made after December 31, 2015,** the TPA Act broadens the category of eligible governmental workers who can qualify for the penalty tax exception to include specified federal law enforcement officers, customs and border protection officers, federal firefighters, and air traffic controllers who reach age 50 and separate from service.
- Additionally, the TPA Act expands the types of plans from which distributions eligible for the exception can be made.

LANIER FORD

E. Next year's inflation adjustments for health savings accounts (HSAs)

- Eligible individuals may, subject to statutory limits, make deductible contributions to an HSA.
  - Employers, as well as other persons (e.g., family members), also may contribute on behalf of an eligible individual.
  - A person is an "eligible individual" if he is covered under a high deductible health plan (HDHP) and is not covered under any other health plan that is not an HDHP, unless the other coverage is permitted insurance (e.g., for worker's compensation, a specified disease or illness, or providing a fixed payment for hospitalization).

LANIER FORD

- The IRS provided the annual inflation-adjusted contributions, deductible, and out-of-pocket expense limits for 2016 for HSAs.
  - For calendar year 2016, the limitation on deductions is $3,350 (no change from 2015) for an individual with self-only coverage. It's $6,750 (up from $6,650 for 2015) for an individual with family coverage under an HDHP.
  - Each of these amounts is increased by $1,000 if the eligible individual is age 55 or older.

- For calendar year 2016, an HDHP is a health plan with an annual deductible that is not less than $1,300 (no change from 2015) for self-only coverage, or $2,600 (no change from 2015) for family coverage, and with respect to which the annual out-of-pocket expenses (deductibles, co-payments, and other amounts, but not premiums) do not exceed $6,550 (up from $6,450 for 2015) for self-only coverage, or $13,100 for family coverage (up from $12,900 for 2015).

LANIER FORD

II. Qualified Retirement Plan Developments

A. Regulations Will Prohibit Replacement of Lifetime Income with Lump Sums Under Defined Benefit Plans

- After approving several private letter rulings allowing for pension de-risking by offering lump-sum cashouts to retirees, the IRS is now prepared to alter that landscape.

LANIER FORD

- Specifically, Notice 2015-49, 2015-30 IRB informs taxpayers that the IRS will amend the required minimum distribution regulations under IRC § 401(1)(9) to address the use of lump-sum payments to replace annuity payments being paid under a defined benefit plan.
  - As amended, the regulations will generally **prohibit** defined benefit plans from replacing any joint and survivor, single life, or other annuity currently being paid with a lump-sum payment or other accelerated form of distribution.
  - This change is generally expected to be applicable as of July 9, 2015, subject to certain exceptions.

LANIER FORD

- Specifically, the Notice states that the regulations under IRC § 401(a)(9) reflect an intent, among other things, to prohibit, in most cases, changes to the annuity payment period for ongoing annuity payments from a defined benefit plan, including changes accelerating (or providing an option to accelerate) ongoing annuity payments.
  - The Treasury Department and the IRS have concluded that a broad exception for increased benefits in Treas. Reg. § 1.401(a)(9)-6, Q&A-14(a)(4), that would permit lump-sum payments to replace rights to ongoing annuity payments would undermine that intent.

LANIER FORD

- Accordingly, the Treasury and the IRS intend to propose amendments to Treas. Reg. § 1.401(a)(9)-6, Q&A-14(a)(4), to provide that the types of permitted benefit increases described in that paragraph **include only those that increase** the ongoing annuity payments, and do **not** include those that accelerate the annuity payments.
- Thus, participants in pay status will **not** be allowed to elect to cash out ongoing payments in favor of electing a lump-sum payment.

LANIER FORD

B. IRS Announces Changes to the Determination Letter Program

- The IRS has announced the elimination of the regular cyclical staggered determination letter program for individually designed plans, thus eliminating most of the determination letter program. (Ann 2015-10, 2015-19 IRB, 7/21/2015)
- **This change will be effective January 1, 2017.**
- However, sponsors of Cycle A plans will continue to be permitted to submit determination letter applications during the period during February 1, 2016, and ending January 31, 2017.

LANIER FORD

- As changed, the determination letter program will essentially be limited to (1) initial plan establishment, without regard to when the plan was adopted, and (2) qualification on plan termination.
  - In addition, **effective July 21, 2015,** the IRS will no longer accept determination letter applications that are submitted **off-cycle,** except for determination letter applications for new plans and for terminating plans.
  - The announcement states that a sponsor will also be permitted to submit a determination letter application in certain other limited circumstances that will be determined by Treasury and the IRS.

LANIER FORD

- Under Rev. Proc. 2007-44, a plan's remedial amendment period is generally extended to the close of the plan's applicable remedial amendment cycle.
  - **Since the cycles are being eliminated, the extended remedial amendment period under Rev. Proc. 2007-44 will not be available after December 31, 2016.**
  - In recognition of the significance of this change, the IRS states in Ann. 2015-19, 2015-19 IRB that it intends to extend the remedial amendment period for individually designed plans to a date that is expected to end no earlier than December 31, 2017.
  - Presumably, this will be limited only to any open remedial amendment periods for individually designed plans.

C. DOL Provides Timing Flexibility for Annual Participant-Level Fee Disclosure

- DOL final regulations require plan administrators to disclose certain plan and investment- related information, including fee and expense information, to participants and beneficiaries in participant-directed individual account plans.
  - Certain information must be provided on or before the date on which a participant can first direct his or her investments and "at least annually thereafter."
  - **Current regulations define the at least annually require-ment as meaning "at least once in any 12-month period, without regard to whether the plan operates on a calendar or fiscal year basis."**

LANIER FORD

- In Field Assistance Bulletin 1013-02 (July 22, 2013), the DOL clarified that the regulation **requires annual disclosures to be made no more than one year exactly (e.g., 365 days)** after the prior annual disclosures.
  - However, that Field Assistance Bulletin also provided a one-time re-set opportunity pursuant to which the DOL, as an enforcement matter, would treat a plan administrator as satisfying the "at least annually thereafter" if the disclosure was provided no later than 18 months after the prior disclosures.
  - This was done in response to concerns raised by plans and practitioners that the timing was out of alignment with other disclosures and was done to allow plans to better coordinate the timing of this disclosure with other disclosures required to be provided.

LANIER FORD

- **In response, the DOL has amended the regulations by replacing the definition of the phrase "at least annually thereafter."**
  - That definition, previously defined to mean at least once in any 12-month period**, is instead defined to mean once in any "14-month period."**
  - Thus, the definition, as amended by this rulemaking, states that the term "at least annually thereafter" means at least once in any 14-month period, without regard to whether the plan operates on a calendar year or fiscal year basis.
- **The change is effective June 15, 2015.**
  - However, in order that plans can take advance of the relief immediately, the DOL has also issued a temporary enforcement policy under which plan administrators may rely on the new definition prior to the effective date of the amendment.

D. Failure to Satisfy DOL Electronic Disclosure Regulations Meant Failure to Deliver SPD

- The facts of *Thomas v. CIGNS Group Insurance,* (Case No. 09-CV-5029, E.D. N.Y. 2015) involved a participant in an ERISA covered life insurance plan who died after having terminated employment due to a disability.
- Although the policy had a waiver of premiums provision for disability, the participant had not applied within the specified time period and, thus, died after the policy has lapsed.
- The employee's dependent argued that the participant did not apply for the waiver because she was unaware of the provision.

LANIER FORD

- LINA, the administrator, determined that the decedent was appropriately informed of her waiver of premium rights.
- However, the court found that determination to be arbitrary and capricious because it was both unsupported by substantial evidence and erroneous as a matter of law.
- The company had posted the SPD on its intranet.
- The court found that the posting, however, failed to satisfy ERISA's disclosure requirements.
- Before turning to the requirements of the DOL's electronic disclosure regulations, the Court first notes that the basic SPD disclosure requirements necessitate that the SPD be "furnished" and not simply made available.

- With respect to the electronic disclosure regulations, the Court notes that the exception from obtaining affirmative consent for electronic delivery is available only to those participants who had "the ability to effectively access at their worksite documents furnished in electronic form at any location where the participant is reasonably expected to perform his or her duties as an employee and with respect to whom access to the employer's or plan spon-sor's electronic information under Labor Reg. § 2520.104b-1(c)(2)(i), but in all events, she could not have when she actually needed the information; i.e., after retirement due to his disability.

LANIER FORD

- Further, even if this requirement had been satisfied, the DOL regulations require that notice be provided to employees at the time subsequent versions of the SPD are posted. This requirement similarly was not satisfied.
- In light of these failures, the Court concluded that LINA's determination that the decedent was properly informed of her waiver of premium rights under the employer's plan was arbitrary and capricious as it was both unsupported by substantial evidence and erroneous as a matter of law.

E. IRS Issues Updates to EPCRS

- The IRS's traditional approach to issuing changes to its Employee Plans Compliance Resolutions System (EPCRS) has been to issue updated superseding guidance.
- Rather than waiting to issue new such superseding guidance, the IRS has instead issued **two updates that effectively amend the current guidance issued as Rev. Proc. 2013-12.**
- Specifically, the IRS has issued Rev. Proc. 2015-27, 2015-16 IRM, 03/27/2015, and Rev. Proc. 2015-28, 2015-16 IRB, 04/02/2015.
- Rev. Proc. 2015-27 provided both procedural as well as substantive changes.

LANIER FORD

1. Correcting Overpayment in Defined Benefit Plans

- When there is an overpayment from a defined benefit plan, the general guidance of Rev. Proc. 2013-12 requires the employer to take reasonable steps to have the overpayment returned to the plan.
- However, some employers were loath to try and recoup the overpayment, particularly where excess payments had been made over a considerable period of time and repayment would necessitate recouping payments from pension payments made over perhaps decades.

LANIER FORD

- In response to these concerns, Rev. Proc. 2015-27 proposes two alternative methods of correction.
  - For example, depending on the nature of the overpayment failure (such as an overpayment failure resulting from a benefit calculation error), an appropriate correction method may include having the employer or another person contribute the amount of the overpayment (with appropriate interest) to the plan in lieu of seeking recoupment from plan participants and beneficiaries.
  - Presumably, the other person might be, for example, the service provider involved in the error.

LANIER FORD

- Another example of an appropriate correction method includes the plan sponsor adopting a retroactive amendment to conform the plan document to the plan’s operations in accordance with section 4.05 of Rev. Proc. 2013-12.
  - Section 4.05 is the section that generally limits the use of correction by retroactive amendment to VCP and Audit CAP, subject to the three limited failures in which the guidance specifically allows correction by reformation in self correction.
  - Presumably, this reference is intended to confirm that correction of an overpayment by retroactive amendment may only be considered where there is IRS involvement; i.e., in VCP or Audit CAP.

LANIER FORD

2. Correction of Certain 415 Failures

- Rev. Proc. 2013-12 provides that in a plan that provides for both elective deferrals and non-elective contributions that are not matching contributions, the plan won't fail to have practices and procedures sufficient to be able to self correct simply because it corrects IRC Sec. 415 violations within 2½ months after the end of the limitation year.
- Rev. Proc. 2015-27 modifies this provision to extend the allowable correction period as long as the plan corrects excess annual additions through the return of elective deferrals to affected employees within 9½ months after the end of the plan's limitation year.

LANIER FORD

3. Fees

- Rev. Proc. 2015-27 also includes some changes to EPCRS's fee structures.

4. Automatic Contribution Arrangements

- Rev. Proc. 2015-28 amends Rev. Proc. 2013-12 to, **for the first time,** add a safe-harbor correction method for failures arising from automatic contribution arrangements in IRC Sec. 401(k) or IRC Sec. 403(b) arrangements, including those with escalation clauses.
- The correction method **may also be used** where the employee makes an affirmative election in lieu of the application of the automatic contribution amount.
- If the failure to implement an automatic contribution feature for an affected eligible employee, or the failure to implement an affirmative election of an eligible employee who is otherwise subject to an automatic contribution feature does not extend beyond the end of the 9½-month period after the end of the plan year of the failure, no QNEC for the missed elective deferrals is required, provided certain conditions are satisfied.

LANIER FORD

5. Calculating Earnings

- Rev. Proc. 2015-28 also provides a special alternative safe harbor option for calculating earnings.
  - Specifically, if the affected employee has not made an investment option election, the plan may generally use the plan's default investment option to calculate earnings.
  - However, any cumulative losses reflected in the earnings calculation may not result in a reduction in the required corrective contributions relating to any matching contributions.

LANIER FORD

F. State Anti-Garnishment Law Not Preempted, Thus Protecting SIMPLE From Turnover Order

- The case of *VFS Financing, Inc. v. Elias-Savio-Fox, LLC, et. a.,* (Case No. 12 Civ. 2853, S.D. N.Y. 2014) arose out of a loan to a limited liability company used to purchase a private airplane.
- When the loan went bad, the lender filed suit.
- The day before trial, VFS settled with all defendants, and the parties entered into a consent judgment entitling VFS to in excess of $2.4 million plus interest, cost, and attorneys' fees.
- The judgment made each of the three individual members of the LLC jointly and severally liable.

LANIER FORD

- When VFS attempted to collect on the judgment from the LLC, it was only able to recover approximately $200,000.
- VFS filed a turnover motion with respect to one of the member's (Fox's) accounts at Merrill Lynch, one of which was a SIMPLE.
- Fox argued that state anti-garnishment laws protected the SIMPLE from creditors.
- VFS countered that it could reach the SIMPLE because ERISA preempts state laws sheltering SIMPLEs and IRAs.

LANIER FORD

- However, while such plans are included within the coverage realm of Part 1 of Title 1 of ERISA, they are **not** protected by ERISA's anti-alienation provision.
  - This is because Part 1 of ERISA, which includes the anti-alienation provision, specifically excludes IRAs from coverage. (citing ERISA § 201(6))
  - However, the Court goes on, ERISA does not itself conclusively address whether a SIMPLE is exempt from the accountholder's creditors.
  - Thus, the Court concludes that the issue becomes one of resolving whether ERISA's silence on the issue preempts in protection provided by the state.

LANIER FORD

- The court notes that SIMPLEs and IRAs are excluded from the anti-alienation clause, not by a specific exception to that provision, but by virtue of the wholesale exclusion of these accounts from all of Part 2 of Title I.
- In the Court's judgment, this exclusion—unlike the specific exemptions for pre-ERISA transactions and domestic relations creditors—does not bespeak an affirmative congressional policy to systematically prefer judgment creditors over retirees with respect to these accounts.
- Put differently, although Congress did not itself act to shield these accounts from judgment creditors, it also did not act to block states from doing so.
- It was silent on the subject.

LANIER FORD

G. IRS Opens Pre-Approved Plans to ESOPs and Cash Balance Plans

- The IRS has issued Rev. Proc. 2015-36, 2015-25 IRB, 06/08/2015 setting forth the procedures for issuing opinion and advisory letters to pre-approved master and prototype and volume submitter plans.
- Among the more significant changes is a provision allowing pre-approved plans to include an ESOP or a hybrid defined benefit plan.
- Rev. Proc. 2015-36 also provides that the third six-year remedial amendment cycle for pre-approved defined contribution plans begins on February 1, 2017, and ends on January 31, 2023.
  - The IRS will begin accepting opinion and advisory letter applications for pre-approved defined contribution plans for the third six-year remedial amendment cycles on February 1, 2017.

H. Late-Filed 5500EZ Penalty-Relief Program Made Permanent

- The IRS had previously established a 1-year pilot program providing penalty relief for the failure to timely file Form 5500EZ applicable to "one-participant" plans.
  - No penalty or other payment was required to be paid under the pilot program.
- Rev. Proc. 2015-32, 2015-24 IRB, 05/29/2015 establishes a permanent relief program similar to the temporary program with some modifica-tions.
- The permanent program generally follows the parameters of the pilot program, with some modifications.
  - Among the most significant changes is a payment requirement.
  - Specifically, whereas no fee was required under the pilot program, **the permanent program will require a payment for each submission of $500 for each delinquent return for each plan, up to a maximum of $1,500 per plan.**

LANIER FORD

- As was the case with the pilot program, generally, the permanent program requires that the applicant submit the delinquent return on the Form 5500EZ that applied for the plan year for which the return was delinquent.
- The pilot program also provided that multiple returns for multiple plans could be included in a single submission.
  - However, because the permanent program requires a payment based on the number of delinquent returns for each plan, **the permanent program requires that delinquent returns for each plan must be submitted separately.**
  - Thus, multiple delinquent returns for a single plan should be submitted in a single package, but delinquent returns for different plans must be submitted in different packages.

LANIER FORD

III. Probate Law And Estate Tax Developments

A. Overstated Basis Extends Statute of Limitations to 6 Years

- IRC § 6501(e)(1)(B) is amended to add, "An understatement of gross income by reason of an overstatement of unrecovered cost or other basis is an omission of gross income."
  - Thus, if there is a substantial omission of gross income (in excess of 25%) reported on the return, the 6-year statute of limitations applies.
  - **This provision is effective for tax returns filed after July 31, 2015, and for returns filed previously that are still open under IRC § 6501.**
- **Tax practitioner note**.
  - In 2012, the U. S. Supreme Court in *U.S. v. Home Concrete & Supply, LLC,* held that overstating tax basis was **not** the same as omitting income.
  - **The act "overrules" the Supreme Court by expanding the meaning of omission of income to include overstated basis (and thus underreported income).**

LANIER FORD

B. Consistent Basis Reporting Required Between Estate and Person Acquiring Property from Decedent

- The basis of property acquired from a decedent generally is the fair market value (FMV) of the property on the decedent's date of death.
- Similarly, property included in the decedent's gross estate for estate tax purposes generally must be valued at its FMV on the date of death.
- Although the same valuation standard applies to both provisions, pre-act law does not explicitly require that the recipient's basis in that property be the same as the value reported for estate tax purposes.

LANIER FORD

- On July 31, 2015, President Obama signed into law the Surface Transportation and Veterans Health Care Choice Improvement Act of 2015 (P.L. 114-41).
  - Section 2004 of that Act enacted IRC § 1014(f) and IRC § 6035 impose a new basis consistency standard – in general, the basis of property received by reason of death under IRC Sec. 1014 must equal the value of that property for estate tax purposes.
  - A new information reporting requirement, covered below, is designed to ensure that the basis consistency standard is met.

LANIER FORD

- More specifically, under the Act, effective for property with respect to which an estate tax return is filed after July 31, 2015, the basis of any property to which IRC Sec. 1014(a) (i.e., the rules for determining basis of property acquired from a decedent) applies, cannot exceed:
  1. In the case of property the final value of which has been determined for purposes of the tax imposed by chapter 11 (i.e., the estate tax) on the estate of the decedent, such value, and
  2. In the case of property not described in (1) above, and with respect to which a statement has been furnished under new IRC § 6035(a) (see below) identifying the value of such property, such value. (IRC § 1014(f)(1), as amended by Act § 2004(a))

LANIER FORD

- The basis consistency rule in IRC § 1014(f)(1) only applies to a property whose inclusion in the decedent's estate increases the liability for the tax imposed by chapter 11 (reduced by credits allowable against such tax) on the estate. (IRC § 1014(f)(2))
- For purposes of IRC § 1014(f)(1), the basis of property has been determined for purposes of the estate tax imposed by chapter 11 if—
  a. The value of such property is shown on a return required under IRC § 6018 and that value is not contested by IRS before the expiration of the time for assessing a tax under the estate tax rules;
  b. In a case not described in (a) above, the value is specified by IRS and that value is not timely contested by the executor of the estate; or
  c. The value is determined by a court or pursuant to a settlement agreement with IRS. (IRC § 1014(f)(3))
- IRS may by regulation provide exceptions to the application of IRC § 1014(f). (IRC § 1014(f)(4)).

LANIER FORD

- **Information reporting.**
  - The executor of the estate is now required to file an information return under IRC § 6018(a) to the IRS and to each person acquiring any interest in property included in the decedent's gross estate for federal estate tax purposes (new IRC § 6035).
  - The statement must identify the value of each interest in such property as reported on the estate return and any other information with respect to the inherited interest as the IRS may prescribe.

- **Time for furnishing statement.**
  - Each statement is required to be furnished at the **earlier** of—
    1. The date that is 30 days **after** the date on which the return under IRC § 6018 was required to be filed (including extensions, if any); or
    2. The date that is 30 days after the date the return is filed.
  - This provision is effective for property with respect to which an estate tax return is filed **after July 31, 2015.**
  - **Tax practitioner note**. An underpayment of tax due to an overstatement of basis would be subject to the 20% accuracy-related penalty.

LANIER FORD

- **Returns, statements not due until February, 2016**.
  - In Notice 2015-57 the IRS announced a delay that, for statements required under IRC § 6035(a)(1) and IRC § 6035(a)(2) to be filed with IRS or furnished to a beneficiary *before* February 29, 2016, the due date under IRC § 6035(a)(3) is delayed to February 29, 2016.
  - This delay is to allow IRS guidance implementing the reporting requirements of IRC § 6035.
  - Executors and other person required to file or furnish a statement under IRC § 6035(a)(1) or IRC § 6035(a)(2) should not do so until the issuance of forms or further guidance by the IRS addressing the requirements of IRC § 6035.

LANIER FORD

Questions?

Elizabeth W. Abel, J.D., LL.M.
Lanier Ford Shaver & Payne P.C.
2101 West Clinton Ave., Suite 102
Huntsville, AL 35805
256-535-1100
EWA@LanierFord.com
www.LanierFord.com
© 2015