

Compilation of recent, interesting legal news, views and perspectives from the desk of Rob Wolf.

\*v. *To ponder, consider or deliberate at length.*

(American Heritage Dictionary, Fourth Office Edition, 2000, Houghton Mifflin)

## Welcome

My professional focus is business formation and organization, operations and financial management, restructurings, "turnarounds," business mergers and acquisitions, liquidations and litigation; uniquely viewed from a legal and management perspective. On these pages, you'll read monthly commentary and news on law-related business topics that should prove useful, informative, and/or simply interesting. More material is available at [NHBizLaw.com](http://NHBizLaw.com) or [MassBizLaw.com](http://MassBizLaw.com).



## WORKPLACE SAFETY VIOLATIONS COST EMPLOYER

A jury recently returned a \$3.7 million verdict against the employer of a man who was seriously injured when he fell down an open elevator shaft. The fall caused the worker to break several ribs, his shoulder, and his elbow. His injuries were so serious that he could not move, and he had to be rescued from the elevator shaft by a crane. The worker (who, ironically, was responsible for safety at the construction site) fell because the rails intended to keep people from falling down the shaft had been partially disassembled.

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## LIKE-KIND EXCHANGES

Normally, capital gains are recognized and taxable upon the sale of property, however, the Tax Code provides an exception to this rule for certain exchanges of property. If all requirements are met, gain from the exchange is not taxed, and a loss cannot be deducted. Gains or losses will not be recognized until the person who received property in the exchange sells or otherwise disposes of it. The most common type of nontaxable exchange is the exchange of property for the same kind of property, or like-kind exchanges.

### Requirements

To qualify as a like-kind exchange, the property traded and the property received must be both (1) qualifying property and (2) like property. Qualifying property must be held either for investment or for productive use in a trade or business. Typical examples include machinery, buildings, land, trucks, and rental houses. Like property refers to the nature or character of the property. Characteristics relating to the grade or quality of the property are immaterial. All real estate is like-kind to all other real estate, whether or not one or both of the properties are improved.

Similarly, an exchange of personal property for similar personal property is an exchange of like property. Because a straight swap of property is often impractical, the Tax Code allows deferred like-kind exchanges. If the transaction is structured properly, a person can sell one property, have the proceeds held for a period of time, and then use the proceeds to buy new property. The seller must identify the replacement property within 45 days of selling the relinquished property. Also, acquisition of the replacement property must take place within 180 days of the sale of the relinquished property, or the due date of the taxpayer's return for that year, whichever is earlier.

### Qualified Intermediary

It is common to use a qualified intermediary in making a deferred exchange of like property. A qualified intermediary is a person who enters into a written exchange agreement to acquire one party's property and transfer it to a second party, and also to acquire replacement property from the second party and transfer it to the first party.

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## **Workplace Safety Violations Cost**

### **Employer**

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The evidence showed that one side of the rails had been unscrewed from the supports and, when the worker leaned on the rails, they gave way and he fell.

At trial, the employer blamed the worker, saying that the worker had given permission for the rails to be loosened to allow another company to do some work. The employer also claimed that the rails were obviously not attached and that it was the worker's fault for not noticing. However, these claims were undermined by another worker, who testified that the rails still looked as if they were properly attached.

The jury ruled against the employer and awarded the worker over \$3 million for his injuries and loss of earnings, and awarded his wife almost \$700,000 because of the injuries suffered by her husband. Workplace safety is important, and verdicts such as these play an important role in ensuring that employers have the proper incentive to protect their workers.

## **ASTHMATIC WINS DISABILITY SUIT**

A recent case demonstrates that the definition of a "disability" can be broader than you might think. The case involved a woman who worked in a prison as a drug counselor. The woman suffered from asthma so severe that an asthma attack made her turn blue for lack of oxygen and could send her to the hospital.

The prison began to use air fresheners that triggered the employee's asthma attacks, but, once the prison realized that the air fresheners were causing the asthma attacks, they were removed. However, the prison then installed automatic air fresheners and refused to remove them despite the employee's protests. The prison then compounded its error when it refused to allow her to come to work unless she provided a signed assurance from her doctor that the air fresheners would not affect her and, when such assurance was not forthcoming, she was fired.

At trial, the jury found that the woman's asthma was so severe that it constituted a disability, and it went on to find that the prison failed to make a reasonable accommodation for the woman by

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## **EMPLOYERS: DON'T LET TIPS TRIP YOU**

Employers in service industries are well advised to pay close attention to their practices and policies affecting customers' tips for their employees. There are a variety of ways in which missteps can run afoul of federal or state laws, including the federal Fair Labor Standards Act (FLSA).

Employees might contend, for example, that the employer is effectively reducing their tip income by imposing various fees or other charges on customers. Or, contrary to a requirement in the FLSA, employees who are paid less than the minimum wage might not be getting enough in tip income to make up the difference between their hourly rate and the minimum wage. Recent cases in the news involved yet another alleged violation, sometimes taking place on a very large scale, where employees are made to share tip income with fellow employees who supervise them.

In one of the tip-sharing cases, a state court ruled in favor of a class of plaintiffs consisting of baristas,

or coffee counter servers, whose tips were required to be shared with their shift supervisors, in violation of state law. Change left for tips apparently adds up, as the judgment for the tens of thousands of servers, for about an eight-year period, topped \$100 million, including interest.

The case was not cut-and-dried; as the supervisors were themselves hourly workers who had customer service duties in addition to the responsibility of scheduling workers and giving directions to the baristas. It was not a case of highly paid bosses dipping into the tip jars filled by customers they never saw in person.

When a shift supervisor hands a customer his latte and muffin, and the customer responds with a tip, the customer may assume that the money, or at least part of it, goes to the supervisor. Instead, under the ruling, the supervisors must now keep their hands off the tips, and the employers must ensure such an outcome.

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# Employers: Don't Let Tips Trip You

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In the wake of this case, similar lawsuits have been filed against the same employer, a national chain, and against other employers in other states. Companies in the restaurant, hotel, gaming, transportation, and delivery businesses face the largest risks for mishandling the treatment of tips. There is another pending case in which casino dealers have complained that an employer's new policy illegally requires them to share tips with floor supervisors.

The legal issues surrounding the treatment of tips are murky enough in any one state, but further complicating the matter is the fact that there are variations among the states and between the statutes for a state and for the federal government. This makes it especially risky for national employers to assume that a one-size-fits-all policy on tips will be sufficient for all of their locations.

"Back-room" personnel, shift supervisors, hostesses, greeters, drink servers, and other similar positions could be treated differently depending on what state you are in. Employers should regularly assess their job descriptions and tip-sharing policies against applicable state and federal laws. This kind of audit is useful not only for detecting or avoiding possible violations, but for laying the groundwork for a potential "good-faith" defense under the FLSA if litigation ensues.

## Legal Background

The California case which resulted in a judgment of over \$100 million against the employer is *Chou v. Starbucks Corp.*, No. GIC836925 (Cal. Super. Ct. Mar. 19, 2008). The similar case involving the alleged sharing of tip money with supervisory employees at a casino is *Baldonado v. Wynn*, No. 06-A-528138-C (Clark County, Nev., Dist. Ct. 2008).

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## *In the News . . .*

### **Government "Bailout" Includes Renewable Energy Production Tax Credit Extension**

Buried in the recent "bailout" legislation is a significant tax credit scheme directed at renewable energy development; featuring a one-year extension for wind energy, and a 9-year extension of tax credits through December 31, 2017 for solar energy development.

See [http://www.rules.house.gov/110/text/110\\_hr4221\\_text.pdf](http://www.rules.house.gov/110/text/110_hr4221_text.pdf)

### **It's Still a Sellers' Market for Business Owners Who Want to Cash Out**

BizBuySell, the Internet's largest marketplace for buying or selling a small business, claims the trends for-sale and sold businesses in the U.S. are on the rise in spite of a volatile economy.

See <http://www.prweb.com/pdfdownload/1410264/pr.pdf>

### **Businesses Vacate at Fastest Pace in Years, Pressuring Landlords and Their Lenders**

Businesses are dumping office space at the fastest pace since the months after the Sept. 11 attacks, increasing the financial stress on commercial-real-estate owners and their lenders, many of them already ailing financial institutions. See <http://futurerealestate.blogspot.com/2008/10/office-space-is-emptying-out.html>

## Next Month

⇒ **Get it in Writing Part 2: why every contract should have collection costs and attorney fees provisions**

⇒ **Home Improvement Scams**

⇒ **Landowner "Taking" Settlement**

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**If you have questions or suggestions for upcoming topics, make sure to write: [RWolf@Shaines.com](mailto:RWolf@Shaines.com).**

# Like-Kind Exchanges

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The agreement must explicitly limit the first party's rights to obtain in any way the benefits of money or other property held by the intermediary. A qualified intermediary cannot be either an agent or a relative of the "exchanger."

There are special rules for like-kind exchanges between related persons. In this context, "related persons" include not only spouses, siblings, parents, and children, but also a corporation in which an individual has more than 50% ownership, and a partnership in which an individual owns over 50% of the capital or profits. For a like-kind exchange between related persons, the ability to postpone tax liability for the gain from the exchange is lost if either person disposes of the property within two years after the exchange.

An exchange of like-kind property is only partially nontaxable if the taxpayer also receives money or unlike property in an exchange that produces a capital gain. In that case, the gain is taxable, but only to the extent of the money received and the fair market value of the unlike property.

## Factors to Consider

In general, three basic factors may be considered in deciding whether a like-kind exchange will make sense. The exchanger should (1) receive property with a price equal to or greater than that of the relinquished property; (2) have as much, or more, debt in the acquired property as in the property given up; and (3) take no cash out of the transaction. While these are good general guidelines, they are not a substitute for sound advice from an attorney familiar with all of the requirements for a valid like-kind exchange.

## Legal Background

A like-kind exchange as a means of putting off recognition of capital gains is authorized in the Internal Revenue Code at 26 U.S.C. § 1031. The primary rules are § 1031(a) & (b) Visit [NHBizLaw.com](http://NHBizLaw.com) or [MassBizLaw.com](http://MassBizLaw.com) for more details.

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*Actual resolution of legal issues depends upon many factors, including variations of facts and state laws. This newsletter is not intended to provide legal advice on specific subjects, but rather to provide insight into legal developments and issues. The reader should always consult with legal counsel before taking action on matters covered by this newsletter.*