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Is a Closed Tax Audit Really Closed?

By Robert B. Teuber

A federal tax audit ends when the IRS issues a report asserting an additional tax liability. If a taxpayer disagrees with those findings, it may appeal the auditor's assertions to obtain a further review through the Appeals Division and the Tax Court. After these challenges, any remaining liability is sent to the IRS Collections Division. Similarly, if a taxpayer chooses not to appeal the audit report, the asserted liability will end up in the Collections Division. In such a case, the liability is legally valid and be collected by the IRS even if the debt is based on faulty information. However, just because the IRS has satisfied all of its procedural requirements to establish and collect a liability, it does not mean that the underlying audit is closed forever.

The IRS may reopen a closed audit through a procedure known as Audit Reconsideration. An Audit Reconsideration may be available if tax was assessed as a result of an audit and the taxpayer has additional information that was not considered during the initial audit. This is also the process that is used by the IRS to correct a liability if the IRS had previously filed a "substitute return" on behalf of a taxpayer who failed to file on their own.

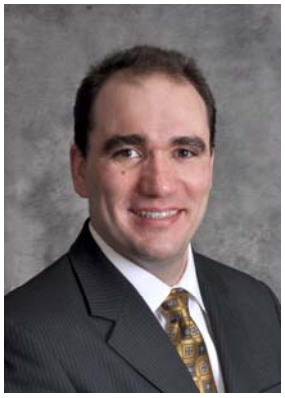
To request an Audit Reconsideration, the taxpayer must have filed a return, all or part of the liability must remain unpaid, disputed items must be identified and the taxpayer must provide additional information that had not previously been considered during the audit. All relevant information should be submitted at the time the request is made as the IRS may or may not ask follow up questions. If the IRS believes that a taxpayer did not submit sufficient additional information, it may deny any change to the asserted tax liability.

"It is important to note that the Audit Reconsideration process is not simply a 'second kick at the cat.'"

Audit Reconsideration may not be available in all circumstances. Regardless of whether new information exists, if the tax debt has become final through a court proceeding, by agreement of the taxpayer, by offer in compromise or in other circumstances, the liability will not be disturbed by an Audit Reconsideration. Further, if the liability has been paid in full, the taxpayer's recourse will be through a claim for refund rather than Audit Reconsideration.

If a taxpayer is currently facing collection action by the IRS, the IRS may (but is not required to) place a hold on additional collection activity. When pursuing Audit Reconsideration, a taxpayer should certainly request a collection hold; however, any existing installment agreements should continue to be honored.

It is important to note that the Audit Reconsideration process is not simply a "second kick at the cat." A taxpayer does not get to reargue its earlier position without any new information. The process is generally for circumstances in which the conclusions reached in the audit were incorrect in light of additional information that the IRS did not have the first time around. Any taxpayer considering Audit Reconsideration should review IRS Publication 3598, What you Should Know About the Audit Reconsideration Process, and the relevant provisions of the Internal Revenue Manual to decide whether the process is appropriate. WBB



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INSIDE

Workplace Harassment Investigations 2

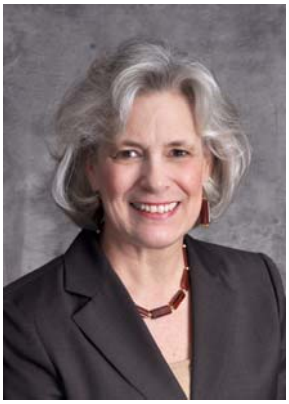
Mediation vs. Effective Mediation 3

Are you Selling Your Business? Maybe an Earnout Could Help 4

At the Firm...

Workplace Harassment Investigations

By Anna M. Pepelnjak



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On receiving a complaint of workplace harassment, the employer's first duty is to conduct an investigation. Investigations are required because an employer can be held liable for negligence if it does not "promptly and adequately respond to [the] harassment." Sutherland v. Wal-Mart Stores, Inc., 632 F.3d 990, 994 (7th Cir. 2011). In addition to avoiding legal liability, an employer communicates "zero tolerance" for harassment by conducting an investigation. Moreover, a well-done investigation may prevent future episodes of harassment.

What are the elements of a good investigation? First, select an experienced, unbiased investigator. Whether that investigator is internal or external, the investigator's professionalism is the key. The investigator must be both skilled and unbiased.

Employers and investigators should prepare in advance of commencing a workplace investigation. For example, an outside investigator must establish some degree of familiarity with the workplace. The employer and the investigator must define the scope of the investigation. Next, the parties should identify the witnesses who need to be interviewed and gather the relevant documents (including employment policies, personnel files, complaint documentation, internal correspondence, video/audio evidence and electronically stored information). Finally, the employer should impose any necessary temporary, intermediate remedial measures, such as physically separating the complaining employee from the accused.

The fact-finding part of the investigation can be intensive. The investigator ought to study all relevant documents, conduct thorough initial witness interviews (preferably using prepared questions and adding follow-up questions) and obtain signed affidavits from the witnesses. Each witness needs to be advised of the protection against retaliation for participating in the investigation. A good closing question to ask the complainant is what is his/her preferred resolution of the matter. Then, the investigator should analyze preliminary findings and conduct any necessary supplemental interviews.

Workplace investigations should remain confidential. To that end, the investigator should advise each witness that the employer will do its best to maintain confidentiality and share information only on a "need to know" basis, but that the investigative process requires disclosure of the complaint and other information to the accused and to witnesses. A note of caution is required here: A blanket rule prohibiting employees from discussing ongoing investigations of employee misconduct may violate Section 8(a)(1) of the National Labor Relations Act. Under the NLRA, rather than a "one size fits all" rule, confidentiality must be determined on a case by case basis.

> *"...an employer communicates 'zero tolerance' for harassment by conducting an investigation. Moreover, a well-done investigation may prevent future episodes of harassment."*

When the investigator arrives at his or her factual findings, s/he should prepare Investigation Report. If the evidence is clear, describe each conclusion separately. If some or all of the evidence is contradictory, assess the witness's motives/credibility. If the evidence is inconclusive, the investigator should recommend re-investigation.

Finally, it is the employer's job to impose appropriate remedial measures. Remedial measures should be designed to stop the harassment, correct its effects on the employee, and ensure that the harassment does not recur. Employers have to make sure that the remedial measures are consistent with previous actions, so as to avoid creating grounds for a charge of discrimination or retaliation. In deciding on the remedial measures, the employer should account for their effect on the workforce as a whole. If an outside investigator is used, a provision in the Fair Credit Reporting Act requires that, in cases in which an adverse employment action results from the investigation, employers must disclose to the affected employee "a summary containing the nature and substance of the communication upon which the adverse action is based". 15 USC §1681; Fair and Accurate Credit Transactions Act of 2003 (FACT Act) (Public Law 108 -159).

Last, the employer and the investigator must thoroughly document the entire process and retain these materials for seven years post-investigation. WBB

Mediation vs. Effective Mediation

By Sandy Swartzberg

In all lawsuits, a Judge has the authority to order mediation and, in most lawsuits, they do. Additionally, many disagreements call for mediation or arbitration.

A lot of times, parties will wait until the dispute has been ongoing for an extensive amount of time before they mediate. This usually results in more expense, bitterness and danger towards the business.

A mistake that many lawyers and other parties involved in disputes make is to view mediation as not very serious and not required. The first thing to know about mediation is that it is a very serious process with many possible outcomes. It is not simply about whether you settle your case or not. You need to understand your situation well enough to have a successful outcome. You need to make sure you understand what it is you want and need.

Once, I participated in a case where my client made a certain product and the business that bought the product did not think the product functioned according to its specifications. There was an extensive discussion, two days of mediation and a settlement was reached. As part of that settlement, a complete release was signed, which included the words that "the company had no further obligations of any kind to purchaser."

The purchaser now took the product as-is and forgot the product had a ten year guarantee and that he had just voided the warranty. Later when warranty questions came up, we informed them that they had voided the warranty.

Know your situation well, as if you are going to trial or having an eight hour oral exam on the case. If there are weaknesses, you need to know what they are and what response, if any, to shore up these weaknesses. If there are numbers involved, make sure you have the numbers at your fingertips.

Remember, a successful settlement depends upon how you view your case as mediation continues; how the other side views your case; and how the mediator perceives the strength and weaknesses of the case. One of your strengths or weaknesses would be how long you can afford to fund the controversy. How imperative is it that you settle?

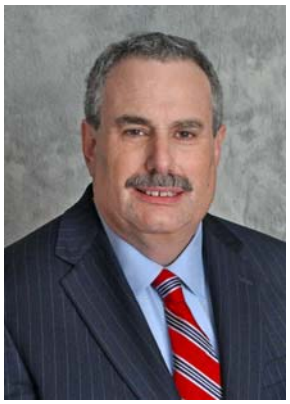
One frequent mistake is not asking yourself the hard questions. Therefore, if the hard questions come out, you will either be surprised, unable to answer or have to suspend mediation until you find the answer. In any negotiation, you need to know your strengths and weaknesses better than any other parties involved in the transaction.

After you have evaluated your case, you also need to find out what you do not know about the other side's position. Mediation can be a wonderful, informal discovery device. Even if litigation is going to continue or follow, you will either gain valuable information or save time and money by knowing where and what to look for.

Next, before you select a mediator, you need to know the type of mediator you need. Some mediators do not give their opinion and call themselves facilitative mediators. While this form of mediation sounds great, in my experience, I think having a mediator who will make a recommendation makes settlement more likely.

While a mediator is not an arbitrator, in that they do not decide the case, their evaluation of your case can make a difference in how the case is settled or if it is settled. If the mediator believes you have a strong case and conveyed that to the other side, your chances of getting a good settlement are excellent. Further, an experienced mediator sometimes will give you an unbiased evaluation of your case. However, remember the mediator has no hidden agenda. His agenda is simply to settle the case, and not to determine what - in the mind of the parties - is fair and just.

If you want to use a mediator who is going to make a recommendation, then it is important that you know what biases the mediator may have. Therefore, it is best to use a mediator you are familiar with and who you can read. If you do not know the mediator, you can contact them or use various tools, including social media, to gather information about the mediator. You need to know the level of sophistication of your mediator.



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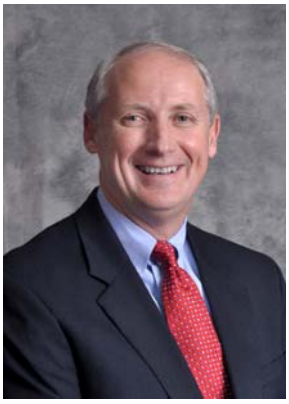
I have been involved in mediations in which the level of complexity of the case required a mediator who had patience and a background in the field. You don't want to spend most of the mediation educating the mediator.

In general, the more you prepare for mediation, the more likely it is that the case will settle on terms that you can live with. WBB

Are You Selling Your Business? Maybe An Earnout Could Help

By David J. Roettgers



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When trying to determine the selling price for your business, it is not always easy to come to an agreement with a Buyer. The Seller, on one hand, highlights all the opportunities for growth in the business. On the other hand, a Buyer looks at the history and minimizes any future growth in trying to determine a fair value. How do you close this gap?

An earnout can become a very valuable tool when the Seller isn't sure of the value of a business because of future uncertainty. Specifically, an earnout can be used in situations where a business is being turned around, if an industry is at a low point, when a company has developed a new product or when a company has entered into a new market area and the amount of success or failure has not yet been determined. An earnout can be a perfect method to bring the Seller and Buyer together.

An earnout is basically an adjustment to the sale price of a business based upon certain financial or nonfinancial performance. Financial performance could adjust the purchase price based upon the Buyer achieving some type of gross revenue, gross margin, or net income. Nonfinancial criteria can also be used. For example, if the future of the company is tied to obtaining certain governmental approvals or purchase orders with a customer, value can be adjusted accordingly.

Although the earnout seems to be a simple answer to "closing the gap", there are numerous issues that must be considered. If you are a Seller, an important question is who is making the day to day decisions as it relates to achieving the best value for the earnout. Is the company devoting enough resources to the promotion and sale of the product? Is the product priced correctly? These and other questions make it sometimes difficult for a Seller to accept an earnout.

On the other hand, a Buyer does not want to pay the Seller for opportunities that the Buyer brings to the new business. Furthermore, a Buyer wants to be able to make long term business decisions without dealing with the Seller. If the Seller is requiring the Buyer to allow the Seller to participate and control the future of the business, an earnout may not work for the Buyer.

Overall, an earnout can be a very beneficial tool to be used in negotiating value. Nonetheless, do not underestimate the complexity of using an earnout. If you believe the earnout is the only way to address the issues identified above, start the discussion early in the process. Delaying the discussion can lead to great expense and potential disappointment. WBB

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Comments? We'd like to hear from you. Please send an email to the editor: Megan Wiseman at reporter@wbb-law.com.

AT THE FIRM...

Weiss Berzowski Brady LLP is pleased to announce that five of our attorneys were recently selected by their peers for inclusion in The Best Lawyers in America® 2013 (Copyright 2012 by Woodward/White, Inc., Aiken, S.C.). Listed are **Nancy M. Bonniwell, Scott, B. Fleming, Philip J. Miller, Randy S. Nelson,** and **John A. Sikora.** This year marks Randy S. Nelson's fifteenth year of inclusion – a remarkable achievement of which the firm is very proud. With this printing, John A. Sikora has reached his tenth consecutive listing.

Please see the dates for our 2013 Conferences in the right hand column. For more information or to register, go to our website. Or contact Megan Wiseman, 414-270-2559 (mkw@wbb-law.com)

2013 Schedule of Events

REAL ESTATE & BUSINESS CONFERENCE
April 17, 2013

ESTATE PLANNING CONFERENCE
June 5, 2013

31st ANNUAL TAX & BUSINESS SEMINAR
September 18, 2013

EMPLOYMENT LAW CONFERENCE
October 16, 2013

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