

# CWS NEWS

**CHESTER WILLCOX & SAXBE**  
ATTORNEYS & COUNSELORS AT LAW

*“As the new President promised, “change” abounds in 2009. Witnessing it all, I am reminded that this law firm has seen many changes since it’s founding in 1884.”*

— Jack Chester

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## Don’t Discount Potential Estate Tax Changes—Act Now



by Todd A. Weber

For years the IRS has battled with taxpayers over transfers of family entities and businesses to younger generations, and has challenged the discounts applicable to those transfers. Though the Service has been able to claim small victories from time to time in this arena, the rules and valuation methods associated with these gifts have remained fairly constant, benefiting those wise enough to plan accordingly. However, the times of transferring “more for less” may soon be at an end.

A new bill introduced in the U.S. House of Representatives (HR 436), addresses many of the uncertainties that clients and planners have had for years since significant estate tax legislation was passed in 2001. If passed, the bill would eliminate the one year estate tax repeal in 2010, and would retain the estate tax exemption at \$3.5 million, the maximum estate and gift tax rate at its present rate of 45%, and the step-up in basis rules. The bill would also add a 5% surtax for estates over \$10 million.

Of greater concern are the proposed rules for entity-based valuation discounts. The new legislation would disallow valuation discounts for transfers of interests in entities such as limited partnerships, LLCs, and corporations containing “nonbusiness assets.” In general, transfers of interests in entities containing nonbusiness assets would be valued as if the person had transferred a proportionate share of the actual assets themselves. If the entity holds both business and nonbusiness assets, only the business assets would be considered in the valuation of the entity under traditional methods with applicable discounts, and the nonbusiness assets would be separately valued without discounts. Furthermore, the legislation would deny minority interest or lack of control discounts in the case of any nontradeable entity controlled by the transferor or his spouse and/or their lineal ancestors or descendants, which is often the case with this type of planning. The forgoing rules would apply to transfers for both gift and estate tax purposes and would likely be effective on the date of enactment.

While prior efforts to pass similar legislation have been unsuccessful, the current combination of low interest rates, economic conditions, and depressed asset values presents an excellent opportunity to transfer wealth to the next generation at little or no gift tax cost. Those who have put off making such transfers in the past, or those who are in a position to do so now, should seriously explore and consider the planning options available to them at this time, before HR 436, or similar legislation, is enacted.

For more information contact Todd A. Weber at [tweber@cwslaw.com](mailto:tweber@cwslaw.com) or 614-334-6147



Chester Willcox & Saxbe, LLP provides this newsletter to its clients and friends to raise awareness of legal issues that may be of interest to them. The contents of this newsletter are not intended to be and should not be considered legal advice or a legal opinion on any matter, and no action with regard to any particular legal situation should be taken based upon it. The information contained herein is subject to change without notice.



by Jack Chester

## Jack's Comments

As the new President promised, “change” abounds in 2009. Witnessing it all, I am reminded that this law firm has seen many changes since its founding in 1884. When my grandfather, John J. Chester (the first), opened his law office near the northeast corner of Broad and High streets, I am sure he had little inkling the firm would exist 125 years later or grow to include 36 attorneys

plus two lobbyists concentrating on 21 different practice areas — some of which could not have been imagined in the late 1880s.

In recent months, Chester Willcox & Saxbe LLP has welcomed the arrival of five attorneys to the firm who bring with them three entirely new practice areas for the firm: entertainment law, health care law and long-term care law. **Leon “Lee” D. Bass** has joined the firm as Of Counsel bringing a law practice that includes the areas of music and entertainment law, Internet and computer law, and entrepreneurial law. He’s successfully represented recording artists such as Quiet Riot, Ted Nugent, Night Ranger, and Slaughter in a multi-million dollar breach of concert promotion agreement and has successfully defended multiple law suits for trademark and copyright infringement for business and recording label clients.

The law office of **Geoffrey E. Webster** joins Chester Willcox & Saxbe in April, bringing new practice areas of health care law and long-term care law to the firm. Geoff Webster joins CWS as partner and his associates **Eric B. Hershberger**, **J. Randall Richards**, and **Christina Hultsch** join as associates. During a period when this country’s largest demographic moves toward retirement, the addition of a health care practice, particularly one that focuses on the elder population served by nursing homes and retirement communities, is a timely and exciting expansion for CWS. Strong synergies exist between the Webster group’s practice areas and CWS’ established practice areas such as labor and employment law, corporate/entity formation, business transactions, real estate law, construction law, and litigation. Further, our wholly owned affiliate, CWS Governmental Relations, Ltd. is well positioned to assist with the executive and legislative needs of Mr. Webster’s clients, as they already advise other clients on matters in the health care field.

In late 2008, the firm elected a new Managing Partner, J. Anthony Kington. A widely respected attorney practicing business and corporate law, Kington succeeds John W. Bentine. In his new position, Kington will focus on maintaining the high level of client service that has distinguished the firm since its founding. He will oversee a growing firm that has the distinction of having the highest percentage of “Best Lawyers in America” of any major central Ohio law firm, as recognized by a national peer-review publication.

Through bull and bear markets, the Depression and far too many recessions, and amidst astounding technological advances, the law firm has consistently changed with the times. The year 2009 is, again, one of those times.

CWS

## CWS Partner, Frank A. Ray named “Columbus Best Lawyers Bet-the-Company Litigator of the Year” for 2009



Frank A. Ray

Best Lawyers, the oldest and most respected peer-review publication in the legal profession, has named Frank A. Ray as the “Columbus Best Lawyers Bet-the-Company Litigator of the Year” for 2009.

After more than a quarter of a century in publication, *Best Lawyers* is designating “Lawyers of the Year” in high-profile legal specialties in large legal communities.

These specialties are Banking Law, Bet-the-Company Litigation, Corporate Law, Family Law, Personal Injury Litigation, and Real Estate Law and only a single lawyer in each specialty in each community is being honored as the “Lawyer of the Year.”

*Best Lawyers* compiles its lists of outstanding attorneys by conducting exhaustive peer-review surveys in which thousands of leading lawyers confidentially evaluate their professional peers. The current, 15th edition of *The Best Lawyers in America* (2009), is based on more than 2.5 million detailed evaluations of lawyers by other lawyers.

The lawyers being honored as “Lawyers of the Year” have received particularly high ratings in our surveys by earning a high level of respect among their peers for their abilities, professionalism, and integrity.

Steven Naifeh, Managing Editor of *Best Lawyers*, says, “We continue to believe—as we have believed for more than 25 years—that recognition by one’s peers is the most meaningful form of praise in the legal profession. We would like to congratulate Frank A. Ray on being selected as the ‘Columbus Best Lawyers Bet-the-Company Litigator of the Year’ for 2009.”

## Firm Adds Health Care Law Practice Focused on Long Term Care



Geoffrey E. Webster

Eric B. Hershberger

J. Randall Richards

Christina Hultsch

We are pleased to announce that the firm has added a well established, highly regarded health care law practice through the addition of **Geoffrey E. Webster and Associates**. Over the past thirty years, Mr. Webster has built a successful law practice that focuses on meeting the needs of those engaged in the delivery of a variety of health care services including long-term care, health care mergers and acquisitions, health care facility licensing, regulation related litigation and administration. Mr. Webster is counsel to the Ohio Academy of Nursing Homes and a member of the American Health Lawyers Association.

Joining Webster in the move to CWS are associates **Eric B. Hershberger**, **J. Randall Richards**, and **Christina Hultsch**. Hershberger has 17 years of statewide civil and administrative litigation experience representing self-insured corporations, health care facilities, public-entity pools, municipalities, governmental officials and insurance interests. His areas of practice include business litigation, employment discrimination and discharge, personal injury/wrongful death, premises liability, pharmacy/dietary supplement claims, product liability, defamation, civil rights violations, insurance defense, construction and health law.

Richards has been with the Webster firm since 1994, focusing his practice on sale and acquisition, leasing, construction and financing of health care facilities as well as Medicare and Medicaid reimbursement, joint ventures, licensure and certification, business formation, operation and contracts, compliance guidance and fraud and abuse.

Hultsch focuses her practice on Workers' Compensation and health care litigation. A native of Germany, Hultsch was a research assistant at the Institute for Civil Procedure and Business Law of the University of Dresden, prior to joining Webster. She holds a Ph.D. in comparative bankruptcy law and an undergraduate degree from the University of Dresden.

"The addition of a health care practice is a natural for the firm. While the Webster group provides an entirely new practice area for the firm, there are strong synergies with a wide variety of existing practices such as corporate/entity formation, business transactions (including financing), real estate, construction, litigation, and labor and employment. In addition, our wholly owned affiliate, CWS Governmental Relations, Ltd. is well positioned to assist with executive and legislative needs of Mr. Webster's clients, as they already advise other clients on matters in the health care field," stated Managing Partner, J. Anthony Kington.

## Ten CWS Partners Named to 2009 Ohio Super Lawyers List

The following CWS partners were named to *Law & Politics* magazine's prestigious **Super Lawyers** list which is bestowed upon only five percent of the total lawyers in the state.

John W. Bentine  
Donald C. Brey  
John J. Chester  
Stephen C. Fitch  
J. Anthony Kington  
Eugene B. Lewis  
Craig B. Paynter  
Frank A. Ray  
Charles R. Saxbe  
Elizabeth M. Stanton

## Rising Stars

The following CWS attorneys have been named to *Law & Politics* magazine's **2009 Ohio Rising Stars** list. Only 2.5 percent of the best up-and-coming attorneys in Ohio are named to the Rising Stars list of the best attorneys 40 years old or younger, or who have been practicing for 10 years or less.

James D. Abrams  
David J. Butler  
Jessica A. Mager  
Lark T. Mallory  
Sarah D. Morrison  
Janica Pierce Tucker  
Deborah A. Scott



by Lark T. Mallory

# American Recovery and

On February 17, 2009, the American Recovery and Reinvestment Act of 2009 (the “Recovery Act”) was signed into law. Below is a summary of some of the provisions that could impact you and your business.

## How the tax changes affect you:

### Liberal expensing limits continued for another year.

The Recovery Act extended the rules in effect for 2008. Thus, for tax years beginning in 2009, the maximum amount that a business may expense is \$250,000, and the expensing election begins to phase out when a business buys more than \$800,000 of expensing-eligible assets. Without the Recovery Act, the dollar limits would have dropped this year to \$133,000 and \$530,000 respectively.

### Bonus first year depreciation extended for another year, too.

The Recovery Act extends for another year the ability for businesses to take an extra “bonus” depreciation deduction for the first year new assets are placed in service. The bonus first-year depreciation deduction generally equals 50 percent of the cost of qualified property acquired and placed in service during 2009. Certain types of property with a long life, and certain types of aircraft, may be placed in service before January 1, 2011, and still qualify for the 50 percent bonus first year depreciation allowance.

### Deferred tax on debt forgiveness income when debt is repurchased.

A business generally will wind up with debt discharge income if it repurchases its debt for less than the outstanding amount of the debt. Note that a business is considered to repurchase its debt if it restructures such debt. For debt that’s repurchased in 2009 or 2010, the Recovery Act permits the tax that’s owed on such debt discharge income to be paid over five years, beginning with 2014.

### Small businesses may elect longer NOL carryback period.

Generally, net operating losses (NOLs) may be carried back two years and forward 20 years (different rules apply for certain specialized types of losses). For NOLs arising in a tax year beginning or ending in 2008, the Recovery Act permits small businesses to elect to increase the NOL carryback period from two years to three, four, or five years. A small business for this purpose is a trade or business (including one conducted in or through a corporation, partnership, or sole proprietorship) whose average annual gross receipts are \$15 million or less for the three-tax-year period (or shorter period of existence) ending with the tax year before the year in which the loss arose. The longer NOL carryback period gives small businesses that experienced losses the ability to get refunds of income taxes paid in earlier years. The refunds can be used to fund capital investment or other expenses.

### S corporation built-in gain holding period shortened temporarily.

An S corporation generally is not subject to tax; instead, it passes through its income or loss items to its shareholders, who pay tax on their pro-rata shares of the S corporation’s income. However, if a business that was formed as a C corporation elects to become an S corporation, the S corporation is taxed at the highest corporate rate (currently 35 percent) on all gains that were “built-in” at the time of the election if the gains are recognized during a special holding period. Pursuant to the Recovery Act, for tax years beginning in 2009 and 2010, the special holding period is shortened to seven years.

The above summary is a highlight of some of the new key tax provisions.

# Reinvestment Act of 2009

## Bigger exclusion for sale of qualified small business stock.

Before the Recovery Act, individuals could exclude 50 percent of their gain on the sale of qualified small business stock (QSBS) held for at least five years (60 percent for certain empowerment zone businesses). To qualify, a QSBS must meet a number of conditions (for example, its gross assets can't exceed \$50 million and it must meet active business requirements). Under the Recovery Act, the percentage exclusion for QSBS sold by an individual increases to 75 percent for stock acquired after February 17, 2009 and before January 1, 2011.

## Reduced estimated taxes in 2009 for individuals with small businesses.

To the extent that tax isn't collected through withholding, taxpayers generally must make quarterly estimated payments of the "required annual payment." The required annual payment is the lesser of: (1) 90 percent of the tax shown on the return or (2) 100% of the tax shown on the preceding year's return (110 percent if adjusted gross income (AGI) for the preceding year exceeded \$150,000). The Recovery Act provides that for a tax year beginning in 2009, the required annual payment for individuals with small businesses is the lesser of (1) 90 percent of the tax shown on the return for the tax year, or (2) 90 percent of the tax shown for the preceding tax year. An individual qualifies for this relaxed estimated tax payment rule only if: AGI on preceding year's return is less than \$500,000 (\$250,000 if married filing separately); and at least 50 percent of the gross income shown on the previous year's return was from a small trade or business (one that employed no more than 500 people, on average, during the calendar year ending in or with the preceding tax year).

## More workers eligible for work opportunity tax credit (WOTC).

Employers that hire workers from one or more targeted groups can claim a tax credit that varies with the type of person hired. For individuals beginning work for the employer after December 31, 2008, the Recovery Act creates a new targeted group for the WOTC, consisting of unemployed veterans and disconnected youth who begin work for the employer in 2009 or 2010.

## AMT relief.

Generally, to find out if you owe alternative minimum tax (AMT), you start with regular taxable income, modify it with various adjustments and preferences (such as addbacks for property and income tax deductions and dependency exemptions), and then subtract an exemption amount (which phases out at higher levels of income). The result is multiplied by an AMT tax rate of 26 percent or 28 percent to arrive at the tentative minimum tax. You pay the AMT only if the tentative minimum tax exceeds your regular tax bill. Although it was originally enacted to make sure that wealthy individuals did not escape paying taxes, the AMT has wound up ensnaring many middle-income taxpayers. Exemption amounts were scheduled to drop and fewer tax credits were to be available to offset AMT for 2009. The Recovery Act provides AMT relief for 2009 by (1) increasing the exemption amounts above last year's levels and (2) allowing nonrefundable credits to offset AMT as well as regular tax.

## Leon D. Bass Joins CWS as Of Counsel

Leon “Lee” D. Bass has joined the firm as Of Counsel. Bass’ practice is concentrated in the areas of corporate and business law, entertainment and music law, contracts, intellectual property including copyright and trademark, Internet and computer law, real estate and civil litigation.

Since 1998, Bass has conducted a law practice that successfully obtained dismissal in defense of multi-million dollar breach of a concert promotion agreement for the U.S. national tour for recording artists Quiet Riot, Ted Nugent, Night Ranger and Slaughter. He also has successfully defended multiple law suits for trademark and copyright infringement for business and recording label clients.

Founder of a personal management company for recording artists, Lee Bass Entertainment, Bass also founded the Greater Columbus Music Awards and co-founded *Music in the Round*, a non-profit annual charity concert benefiting Choices, Rosemont Center and Transit Arts. He has been a member of the Recording Academy and serves on the Board of Advisors for the Hocking College Music Program. He is president of Capital Square Rotary and serves on the entertainment committee of the Community Festival (Com Fest).



## When to Consider Trademark Protection and Registration

by Leon D. Bass

Trademark protection and enforcement is one of the most often neglected areas by small business owners and management. Unfortunately, failure to take some simple steps can have devastating consequences to a business of any size. I have seen too many situations where a company received the infamous “cease and desist” letter regarding their company name or mark. These businesses are then faced with a “catch 22” decision: either 1) change their name or product mark after investing substantial funds over time building goodwill in a mark; or 2) litigate the issues of trademark rights at a substantial cost and with no guarantee of successful results.

The costs of changing a business name can be enormous and difficult to quantify. For example, imagine that a fast food chain with 500 restaurants was forced to change its name. If the average cost to change the signs on each restaurant was 10,000 dollars, this would amount to total cost of five million dollars. In addition to signage, costs would be incurred for all of the other items that would need to be replaced, such as uniforms, to-go bags, menus, letterhead, and business cards. In addition, the damage in terms of lost goodwill that had been generated over time may not be clearly quantifiable. In some cases, a change of name may even effectively mean the end of a business.

To avoid these and other issues, the owner of a company providing goods or services using a name and/or logo should first consult a trademark attorney to get a search and opinion. The search will determine whether another business is already using a trademark that is identical or similar to the one the business owner wants to use. Searching minimizes investments in marks that cannot be used, while preventing the inadvertent infringement of marks held by others. A mark should not be adopted or used if the search indicates it is likely to

become confused with a mark adopted by another company or person. The consequences of failing to conduct a reasonably thorough trademark search may be severe depending on how widely the business owner intends to use the trademark and how much it would cost to change it if a conflict later develops. If the desired trademark has already been federally registered, the business owner will be precluded from using the trademark in any context where customers might become confused as to the source of the products or services. Also, a court might determine that the entrepreneur knew about the trademark registration—this might cast the user as a “willful infringer.” Willful infringers can be held liable for large damages and payment of the registered owner’s attorney fees; they can also be forced to stop using the trademark altogether.

If the search and opinion are favorable, the informed business owner should apply for state and federal trademark registration. Federal trademark registration is a crucial element in a business’ intellectual property protection strategy. For example, a registered owner is presumed to have exclusive nationwide rights to use any mark that is confusingly similar to their mark. This allows the user to enforce its right against other businesses that are trying to pass off similar goods and services as that of the registered user’s. In addition, after a period of five years from the date of registration a registrant has the right to declare the mark “incontestable”, further protecting the user against attacks from unknown users.

In general, a search and registration can be relatively inexpensive especially when compared to the cost of potential infringement litigation and/or future name change. Given the complexity of issues surrounding trademarks and their relative importance to a business, the advice and guidance of an experienced trademark attorney is recommended.

For more information about trademark protection, contact

Lee Bass at [leon@LeonBass.com](mailto:leon@LeonBass.com) or 614-431-2277.



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# Employment Law Alert

## New Law Regarding cobra Continuation Coverage Under the American Recovery and Reinvestment Act of 2009

We'd like to make you aware of the recent changes to the Consolidated Omnibus Budget Reconciliation Act of 1985, commonly called COBRA, as a result of the American Recovery and Reinvestment Act of 2009 ("ARRA"), signed into law by President Obama on February 17, 2009. If your Company's group health plan is subject to COBRA, the ARRA may affect you.

As you may have heard, the new ARRA provides for premium reductions and additional election opportunities for health benefits under COBRA. Eligible individuals will pay only 35% of the COBRA premiums and the remaining 65% will be reimbursed to the coverage provider through a tax credit. The premium reduction applies to periods of health coverage beginning on or after February 17, 2009, and last for up to nine months. For an overview of COBRA and the recent changes, visit our website at [www.cwslaw.com](http://www.cwslaw.com).

There are also new COBRA notice requirements (and a new poster) that apply if any individual under your plan had a COBRA qualifying event on or after September 1, 2008. There are also additional COBRA election opportunities for certain individuals with qualifying events from September 1, 2008 through February 16, 2009.

### What your company must do now The Department of Justice requires your company to take the following actions:

**Inform** your company's employees of the changes to the law by circulating a notice regarding the new COBRA Continuation Coverage Assistance under the ARRA to all employees (we advise having each employee read the notice and sign a receipt acknowledging the same). The Department of Labor has prepared a model flyer that can be used for distribution with employees, which can be found at <http://www.dol.gov/ebsa/pdf/cobrastimulusflyer2.pdf>.

**NOTICE:** The DOL requires that plan administrators provide notice about the premium reduction to individuals who have a COBRA qualifying event during the period from September 1, 2008 through December 31, 2009. Plan administrators may provide notices separately or along with notices they provide following a COBRA qualifying event. This notice must go to all individuals, whether they have COBRA coverage or not, who had a qualifying event from September 1, 2008 through December 31, 2009.

**Inform** your company's current and former employees who are individuals eligible for the special COBRA election period described above of the new COBRA Continuation Coverage Assistance under the ARRA. The DOL requires that they also must receive a notice informing them of this opportunity. This notice must be provided within 60 days following February 17, 2009.

**Post** the most recent COBRA poster, that was just issued by the Department of Labor on February 26, 2009, reflecting the changes made to the law. A model, new poster for use by employers can be found at <http://www.dol.gov/ebsa/pdf/joblossposter2.pdf>; and

**Familiarize** the individual at your company administering the group health plan and COBRA as the DOL expects companies to comply with the new law

**Questions?** Contact **Elizabeth M. Stanton**, Chair, Labor & Employment Law Practice Group at (614) 334-6189 [estanton@cwslaw.com](mailto:estanton@cwslaw.com).

CWS

## CWS in the COMMUNITY

*Charities recently supported by the firm:*

**American Heart Association**

**American Red Cross**

**Big Brothers/Big Sisters**

**Transit Arts Group**  
— **Music in the Round**

**The Women's Fund of Central Ohio**

## Emens/Wolper Form Own Firm

Former CWS partners, J. Richard Emens and Beatrice E. Wolper are going to be opening their own law office, Emens and Wolper Law Firm Co., LPA, continuing to serve the needs of their business and corporate clients. The husband and wife attorney team have been partners at the firm since April 1997 and were instrumental in founding the Conway Family Business Center, where Emens continues to serve as Executive Director.

They expect to open their office, which will be located at Easton, in early April. According to Managing Partner, J. Anthony Kington, "We have enjoyed having Dick and Bea as partners in our firm and will miss them on a day-to-day basis; however, we look forward to continuing to work together in co-counsel engagements where our mutual expertise has advantage to clients of both firms."

# CWS in the NEWS

**Eugene B. Lewis** participated in the Chester Institute on Professionalism annual program.

**James V. Maniace** taught "Commercial Civil Rights" to the Commercial/Industrial Section of the Columbus Board of Realtors on March 2nd. On April 23rd, he will serve as a panelist on "Negotiable Lease Issues: Landlord vs. Tenant" also for the Commercial/Industrial Section of the Columbus Board of Realtors.

**Lark T. Mallory** has been appointed by Columbus Mayor Michael Coleman and the Franklin County Commissioners to the Board of Trustees for The Affordable Housing Trust for Columbus and Franklin County.

**Janica A. Pierce Tucker** has been appointed by the Ohio Supreme Court to the Board of Commissioners for Grievances and Disciplines.

**Geoffrey E. Webster** recently presented at the *American Health Lawyers Association Annual Long Term Care and The Law* seminar on the topic of "Preparing for a Civil Monetary Penalty Appeal."



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