PERSPECTIVES

SCHERER SMITH & KENNY LLP
THE STRENGTH OF PARTNERSHIP

140 Geary Street, Seventh Floor ▪ San Francisco, CA 94108-4635
Phone: (415) 433-1099 ▪ Fax: (415) 433-9434 ▪ www.sfcounsel.com

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In This Issue

Scherer Smith & Kenny LLP serves mid-sized and fast-growing entrepreneurial companies. From complex litigation to business, real estate, intellectual property and employment law, our team brings strategic thinking, pragmatism and intense dedication to our clients' success.

New Website

We are pleased to announce our new website! It is the same address with a new updated look. Please take a look! www.sfcounsel.com

Scherer Smith & Kenny has Gone Green!

We are excited to announce that we have gone paperless as of January 1, 2016. Our paperless system consist of maintaining all files in electronic format, with the exception of items that require paper originals or files to be maintained. In addition to being more environmentally sound, our system will allow us to save costs by reducing our paper usage and allow us to better serve our clients by accessing client files regardless of where we are working and quickly sending files when they are needed.

California's Fair Pay Act

Effective January 1, 2016, California employers are required to comply with California's new Fair Pay Act, which was signed into law by Governor Brown on October 6, 2015. According to the California Legislature, the Fair Pay Act was passed to address the perceived gender-based wage gap which reportedly causes women in California to lose over $33 billion in wages annually. Like nearly all laws of its nature passed in California, the Fair Pay Act imposes a number of new requirements for California employers to be aware.

The crux of the Fair Pay Act is an amendment to California Labor Code section 1197.5 that prohibits paying females lower wages than males for "substantially similar work, when viewed as a composite of skill, effort, and responsibility, and performed under similar working conditions." (*See* Cal. Lab. Code § 1197.5(a).) There are exceptions justifying such a pay differential, however, which include seniority-, merit-, and production-based compensation systems as well as any "bona fide factor other than sex, such as education, training, or experience" that may justify the difference in wage rates. (*See id.*) However, the employer bears the burden to demonstrate the application of any of these exceptions in the case of a pay discrepancy. (*See id.*)

The Fair Pay Act also provides additional protections to employees who may attempt to gain information from the employer related to the payment of wages to other employees in an attempt to explore any perceived or suspected pay gap. For example, the Fair Pay Act prohibits retaliation against an employee who attempts to discuss wage

Denis Kenny

Disneyland: the happiest place on earth. No, this is not an advertisement. Rather, this is a story about my family's recent visit to Disneyland and some lessons that apply to our services at Scherer Smith & Kenny.

Scherer Smith & Kenny traditionally closes our office between Christmas and the New Year. This marks a time when we find many of our clients also wind down operations at year end and it is an added perk for our employees.

rates with other employees or inquires about wages paid to other employees. (*See id.* at § 1197.5(j).) The Fair Pay Act's remedies to affected employees include monetary damages, equitable relief (i.e., the ability for a court to order a remedy such as reinstating a wrongly terminated employee), and attorney's fees.

Although the nuances and impact of the Fair Pay Act will ultimately be developed through the California courts, employers should begin immediately implementing its requirements. Fair Pay Act employer implementation should include, at a minimum, a review of pay policies and wage rates applicable to employees of the opposite sex who do substantially similar work. If discrepancies are identified, employers should either ensure that such discrepancies are corrected through adjusted wage rates or, alternatively, that they are able to present a compelling case that one of the exceptions under California Labor Code section 1197.5(a) above may apply. Employers should also ensure that any inquiry or action that could potentially give rise to a retaliation claim such as a an employee's attempting to discuss wage rates with another employee or offering to disclose his or her rate of pay to another employee - is handled with requisite care and is not met with any sort of reprimand or other adverse action that could provide the basis to support a claim for retaliation under California Labor Code section 1197.5(j).

We at Scherer Smith & Kenny remain available to assist you with any employment-related or other legal issues, including helping you comply with the Fair Pay Act or any of the numerous other laws that impact employers and employees in California. Please contact Denis Kenny (dsk@sfcounsel.com), Ryan Stahl (rws@sfcounsel.com), or John Lough (jbl@sfcounsel.com) for more information.

- *Written by Ryan Stahl*

2015 Year-End Legislation Applies 100% Exclusion on QSBS Capital Gain Permanently

As many of our small business clients may be aware, Section 1202 of the Internal Revenue Code ("Section 1202") provides an exclusion from capital gains in the sale of certain "small business stock" by individual taxpayers. Section 1202 functions as an incentive to encourage taxpayers to invest in small businesses.[1]

Historically, this exclusion was capped at 50% of the capital gain on the sale of the QSBS. However, in an effort to provide further benefits to small business investors via Section 1202, Congress has enacted additional legislation over the past few years to make this incentive more substantial.

Specifically, the Small Business Jobs Act ("SBJA"), enacted in 2010, initially amended Section 1202 to allow for a temporary increase in the exclusion from 50% to 100% of all capital gain realized on the sale of certain QSBS. The SBJA originally applied this 100% exclusion to QSBS acquired between September 28, 2010 and December 31, 2010, which was later extended through December 31, 2014.

On December 18, 2015, President Obama signed the Protecting Americans from Tax Hikes Act of 2015 ("PATH"). PATH settled the matter once and for all by permanently and retroactively extending the 100% capital gain exclusion for all QSBS acquired after September 27, 2010. In addition, PATH provides that no portion of the excluded gain will be treated as a preference for purposes of the alternative minimum tax (AMT). Notably, sales on QSBS issued before September 27, 2010 may also qualify for exclusions of up to 75% on the gain, depending on the date the QSBS was issued[2].

Almost certainly, the permanent extension of the 100% exclusion under PATH will provide significant tax benefits to non-corporate small business stockholders, in some cases allowing for a complete exemption from federal income tax on the sale of QSBS.

Naturally, certain restrictions apply in order to benefit from the exclusion, including, among other things, a five year holding period for the QSBS and a cap on the amount of gain that any taxpayer can exclude at the greater of $10 million or ten times the taxpayer's adjusted basis of the QSBS. These are in addition to the QSBS restrictions mentioned above, which require that the issuer be a C corporation and be engaged

Admittedly, I do not fully disconnect as I stay on email and handle matters as needed. But, for the most part, it marks a time when my family and I are able to, ourselves, reconnect and do our part to embrace and enjoy the Holidays.

This year my wife and I surprised our son and daughter with a trip to Disneyland as one of their Christmas presents. They were overjoyed, which is a present in itself for parents.

My wife and I had done a bit of research and understood that the Christmas Holiday week marks the historic peak season at Disneyland. As it turned out, December 30th, the day we chose to visit, marked one of the top five busiest days of 2015. In fact, 2015 marked the "Diamond Jubilee" commemorating the 60th Anniversary of Disneyland. As a result, Disneyland held several special events and promotions throughout the year. Friday, May 22nd was reportedly the busiest day of 2015. That day, the park opened at 6am and was scheduled to remain open for 24 hours (the park typically opens at 8am and closes at Midnight). Talk about a marathon! Being at Disneyland for 24 hours, frankly, sounds like a recipe for creating the unhappiest place on earth regardless of how many others attended. Well, apparently true Disneyland aficionados found this promotion too good to pass up. In fact, the park had to turn away thousands of visitors when it reached capacity at 2:30 pm by which time an estimated 65,000 to above, which require that the issuer be a C corporation and be engaged in a qualified trade or business, which excludes certain professional service companies such as hospitality, financial companies, etc.

It is imperative when evaluating whether this exclusion is available, that you consult with your attorney and tax advisor to be sure that you qualify for this significant tax benefit. If you have questions or would like to discuss the impact of PATH and Section 1202 on you or your small business, please feel free to contact Brandon Smith (bds@sfcounsel.com) or Heather Sapp (hgs@sfcounsel.com) at Scherer Smith & Kenny, LLP.

- *Written by Heather Sapp*

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[1] "Small Business Stock" ("QSBS") means stock originally acquired by the individual taxpayer from a domestic C corporation after August 10, 1993 where: (a) the gross assets of the company do no exceed $50 million at the time of issuance, and (b) at least 80% of the assets are in a "qualified" trade or business.

[2] For QSBS acquired before February 18, 2009, the exclusion is 50% and for QSBS acquired between February 18, 2009 and September 27, 2010, the exclusion amount is limited to 75%.

75,000 visitors had entered its doors. "Disneyland's official capacity is not publicly disclosed but it is reportedly tied to a formula based on several variables including the number of rides open and how many "cast members" (staff) are working. This formula results in a daily maximum capacity ranging anywhere from 65,000 to 80,000 visitors. I suspect one reason for the "dynamic" official capacity figures may be that publishing the size of the daily crowds might dissuade all but the hardiest Disneyland groupies from venturing into such madness. I know that holds true for me.

To provide a bit of perspective, Redding, the Northern California town in which I was raised during the 80's, has been and remains the most populated California city north of Sacramento. When I graduated from high school in 1987, Redding had a total population of about 60,000--5,000 less than the low end of Disneyland's maximum capacity! Redding's city limits span a distance of about 60 square miles as compared to Disneyland's .25 square miles. I now better understand why my parents never took my three brothers and me to Disneyland (yes, this is true; my first visit to Disneyland was during Spring Break in 1989 as part of my extracurricular "studies" at Cal).

These facts and statistics may paint the picture of this author being a person who abhors crowds. If that were true, then my recent visit to Disneyland would be something akin to a Nightmare on Elm Street (remember, I grew up in the 80's). Actually, my Disneyland visit was a tremendous experience.

Aside from each other's company, one of the primary reasons my family and I thoroughly enjoyed our Disneyland experience on such a busy day was Disneyland's mastery of the art of crowd management. First and foremost, the cast members are truly top-notch. The cheerful disposition of all is reminiscent of Ricardo Montalban's (aka Mr. Roarke) directive to Tattoo and other staff when greeting "da plane" of guests arriving on Fantasy Island: "Smiles, everyone, smiles!" Author's Note: Fantasy Island aired from 1977 to 1984 in the 10pm time slot following the Love Boat. I was a bit too young to watch the "adult-themed" Fantasy Island until re-runs aired in the late 80's.

That TV digression aside, in addition to Disneyland's friendly and effective staff, the physical layout of the park caters toward efficiency and pedestrian traffic control and flow. The usage of turnstiles, railings and other natural barricades coupled with the close proximity of abundant food and beverage carts to the most popular rides, assist in making line-waiting a social experience and discourages to the point of extreme rarity, incidents of line-cutting so prominent in other amusement parks. In fact, over the course of our nearly 12 hour stay at the park (that is not a typo), I saw only one line-cutting incident that happened on one of the oldest (but, timeless) rides, the

Areas of Practice

[Business; Real Estate; Intellectual Property and Employment Law; Litigation and Dispute Resolution; Nonprofit; Estates and Trusts](#)

Matterhorn.

Other more recent technological advancements which make the experience at Disneyland "happy" even on the most crowded days, include the "FASTPASS" and the Disneyland "ride tracker" features. For those of you interested, here is the link to the Disneyland App which we used on our day at the park. This App provides a mobile device-friendly way to buy your tickets, see wait times, browse maps, check FASTPASS return times, and locate Disney Characters appearing throughout the parks.

A final ingredient in Disneyland's recipe for crowd management includes: arriving at the park before the main crowds. This means: get there early, certainly well before 10am. Disneyland opened at 8am on December 30th and we arrived at 7:45. By using a combination of our prompt start and strategic FASTPASS usage, we were able to go on all of our favorite rides by Noon. That left the afternoon and evening for further exploration, eating and return rides. Incidentally, the new and improved, Star Wars-themed "Hyper" Space Mountain- -they even changed the name- -was the most popular ride and is well worth a visit! Peter Pan, my wife's favorite ride, took a whopping 120 minutes. I do not recommend this.

Tips for Disneyland enjoyment aside, here is how the Disneyland experience translates into day-to-day business success. There is truly no substitute for customer service.

Disneyland provides top-notch customer service. This is precisely what we aim to do at Scherer Smith & Kenny. Of course, we cannot promise you an amusement park experience given the constraints of our legal services industry. But we can and will continue to give you the undivided attention and dedicated service which you deserve. Please do let us know if there are ways in which we might improve our customer service. Thank you, very much, for continuing to trust in our firm. All the best to you in 2016!

- Written by Denis Kenny