

# THE CICOTTE LAW FIRM LLC

ERISA AND EMPLOYEE BENEFITS + CORPORATE

DECEMBER 2008 NEWSLETTER

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## LEGAL CHANGES IN EFFECT JANUARY 1, 2009

Several new laws will become effective in 2009 which may affect you or your business in the coming year. You should be mindful of the new requirements.

News laws in effect beginning Jan. 1, 2009 include:

- New 403(b) rules, with a Dec. 31, 2008 deadline;
- New document requirements for 409A plans, with Dec. 31, 2008 deadline;
- New benefit limits for 2009;
- New ADA amendments

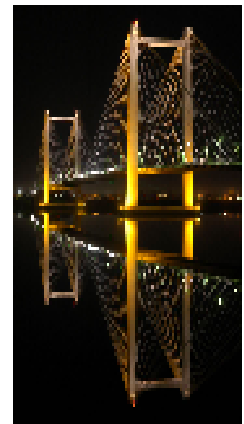
effective in 2009;

- 2009 Wine legislation; and
- New FMLA regulations, including new military leave rules.

The new year is a good time to confirm compliance with the myriad of legal requirements American businesses face.

In addition to discussing new legal changes effective in 2009, we have included a corporate compliance checklist. Reviewing the checklist will give your company a thorough legal check-up and improve its health in the coming year.

Attorneys with The Cicotte Law Firm are available to assist you by addressing any questions you may have concerning these matters.



## ADA AMENDMENTS EFFECTIVE IN 2009 INCREASE EMPLOYER RESPONSIBILITIES

The Americans with Disabilities Act Amendment (“ADA Amendment”) was passed in 2008, and becomes effective Jan. 1, 2009.

The ADA Amendment intensifies employer responsibilities and will likely increase the numbers of employees defined as “disabled.” Definitions of “major life activities” have been expanded, conditions that are episodic or in remission may qualify as a disability, and mitigating measures other than contacts or eyeglasses are not

to be taken into account in determining whether a disability exists.

To comply with the ADA Amendment, employers should:

1. Revise policies and procedures to define “reasonable accommodation” in light of those employees who were not considered “disabled” previously but who will be under the ADA Amendment.
2. Revise all procedures to comply with the ADA

Amendment.

3. Ensure job description include essential job functions.
4. Train supervisors concerning the legal changes manifested in the ADA Amendment.
5. Contemplate giving diversity training to employees to include topics covered by the ADA Amendment.

Detailed regulations are expected in 2009, and employers should prepare to comply.

## 403(b) REGULATIONS EFFECTIVE 2009

403(b) plans should be examined to ensure compliance with new 403(b) regulations effective Jan. 1, 2009.

The most significant change in the new 403(b) regulations is the requirement of a "written plan" maintained by employers. 403(b) plans must be operated and maintained in accordance with the written plan. Plan sponsors were required to adopt a written plan by Dec. 31, 2008, though an extension to Dec. 31, 2009 was issued very recently in Notice 2009-3. The extension does require the written plan be effective Jan. 1, 2009, and during 2009 sponsors must operate the plan in view of the new regulations. Before 2009

ends, sponsors must attempt to retroactively correct failures to conform to terms of the written plan during 2009.

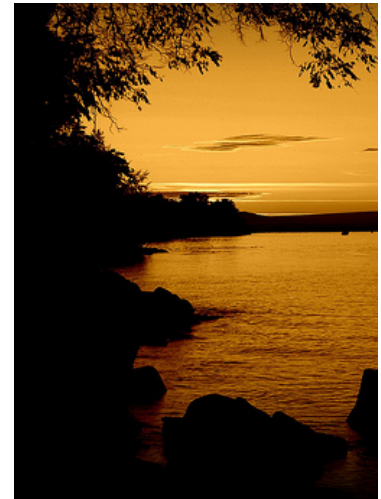
There is some ambiguity about what satisfies the written plan requirement for 403(b) plans. A collection of documents may satisfy the written plan requirement.

Later deadlines are available for collectively bargained plans, church plans that can only be amended with the authority of a church convention, and government plans which require a meeting of a legislative body with the power to amend the plan.

Tax-sheltered 403(b) plans, sponsored by 503(c)(3) organizations, will not neces-

sarily lose their ERISA-exempt status by complying with the new written plan requirement. Guidance can be found in the DOL's Field Assistance Bulletin 2007-02.

Another significant change for 403(b) plans under the new regulations involves transfers between financial products. The old rules permitted 403(b) plan participants to transfer money accrued through an employer's program to another mutual fund. While these transfers are still permitted, an "information sharing agreement" is required in which employers must approve the new investment provider and product transferred to.



## NEW 409A DOCUMENT REQUIREMENTS

All nonqualified deferred compensation plans must comply with Section 409A by placing all material plan terms in writing by Dec. 31, 2008. The term "plan" under 409A is broad, including all documents defining participant's rights to the deferred compensation. A deferral election form is an example of a "plan" document.

Plan sponsors should review all documents, including those which may not initially appear to provide deferred compensation. Arrangements subject to 409A include employment agreements with

severance provisions, multi-year bonus plans, certain stock plans, and change in control agreements. Your review should ensure (1) all documents comply with the final 409A regulations and (2) the terms of all plan documents are consistent.

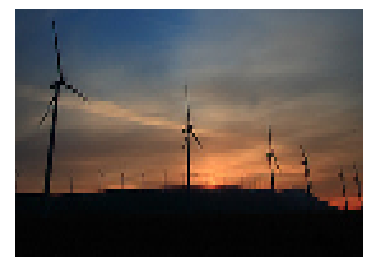
Material terms of nonqualified deferred compensation plans that must be in writing include:

- When/how initial election to defer compensation may be made;
- Amount of deferred compensation to be given;

- Time, form, and schedule of payment distribution;
- Require a 6-month delay for payments arising from "key employee" 's separation of service of publicly traded company;
- Conditions allowing change in payment schedule or form; changes in time or form of payment after Dec. 31, 2008 must comply with "subsequent change" rules.

Note that a "savings clause" will not ensure compliance.

"The most significant change in the new 403(b) regulations is the requirement of a 'written plan' maintained by employers"



**WINERY LEGISLATION AFFECTS TASTING ROOM PROFITABILITY**

The wine industry is growing, competition is increasing, and wineries are seeing the need to capture potential market share wherever they can. The focus of wineries has turned to one of their most profitable areas of business, the tasting room.

Tasting room sales continue to yield a major portion of all winery sales. Forty-three percent of total sales for California, Oregon and Washington wineries are directly from the tasting room (Wine Business Monthly, 5/17/2007). The number from other states is as high as sixty-eight per cent of total sales.

Wineries are realizing the return-on-investment potential in the tasting room and as such are operating more than one tasting room off premises. Increasing the number of off-premise tasting rooms has also enabled the wineries to collect additional customer information, enhance customer communication as well as educate the consumer about club benefits and membership cards.

In order to support this trend the Washington State Liquor Control Board has responded by setting into motion proposed regulations addressing additional tasting rooms. The Washington State Liquor Control Board has released an Issue Paper entitled Legislation for Winery Regulation.

A legislative bill regarding multiple tasting rooms was adopted by the Washington State legislature in 2008. SSB 6770 (2008) permits two new activities, one for domestic wineries and one for bonded-wine warehouses, and creates another enforcement permission for the WSLCB.

In a nutshell the bill provided for three changes to the existing legislation (Chapter 314-24 WAC):

1. Adding language permitting a domestic winery to sell wine of its own production for on-premises consumption at two locations separate from its production or manufacturing sites. (Although the RCW already provided for two locations, see RCW 66.24.170, there are no Administrative rules on the issue.)
2. A bonded-wine warehouse may “handle” bottled wine as long as the contracting winery is responsible for all financial transactions involving direct-to-consumer shipping activities that a bonded-wine warehouse does on its behalf.
3. The WSLCB may hold all licensees involved in the operation of an off-premises, multiple-winery-serving location accountable whenever the WSLCB is unable to

connect a violation to a single licensee. The new WAC section 314-24-161 permits, at the additional retail locations, serving samples and selling for on and off-premises consumption.

The licensee may request an outside designated area. A public hearing on the proposed rule is set for Dec. 3, 2008. Public comments will be heard until Dec. 10, 2008. The intended date of adoption is Dec. 17, 2008 and the rule should be effective approximately January 17, 2009.

The biggest changes in the new rules allow for the selling of glasses of wine at additional tasting rooms, allowing for the selling of a bottle to be consumed on the premises but outside the winery itself, and that the licensed bonded warehouses can now participate in the fulfillment process, e.g. the assembly of gift baskets, etc.

The City of Kennewick has also recently implemented additions to its code to reflect designations for wineries operating within the City of Kennewick. In fact several wineries will soon be leasing space for tasting rooms within the City limits.



**“New rules allow for the selling of glasses of wine at additional tasting rooms”**



## LEGAL COMPLIANCE CHECKLIST, PT. 1

The new year is a good time to ensure that your company is in compliance with a variety of legal requirements. This list, covered in three parts, will help you evaluate your compliance in 2009.

### CORPORATE MINUTE BOOK

- Yes No Are the Articles of Incorporation filed?
- Yes No Are the Bylaws filed?
- Yes No Are amendments/restatements to the Articles of Incorporation and Bylaws filed?
- Yes No Are minutes for all [annual and special] Shareholder meetings filed?
- Yes No Are minutes for all [regular and special] Board and Committee meetings filed?
- Yes No Are all written consents of the Board and Shareholders filed?
- Yes No Are all documents associated with approvals by the Board/Shareholders filed?
- Yes No Are copies of all notices of meetings filed?



### STOCK MATTERS

- Yes No Do the Articles of Incorporation provide for sufficient authorized shares?
- Yes No Is the stock register current?
- Yes No Were all sales of stock made in compliance with applicable securities laws?
- Yes No Is there proper Board authorization for all sales of stock?
- Yes No If necessary, was Shareholder authorization for sales of stock obtained and/or updated?
- Yes No Did the company receive all consideration for the issued stock?
- Yes No Were stock certificates or alternately acceptable documents issued?
- Yes No Did all stock certificates have appropriate legends affixed?

**“Were all sales of stock made in compliance with applicable securities laws?”**

### GOVERNMENT FILINGS

- Yes No Has the company obtained its EIN?
- Yes No Has the company obtained its state employer ID number?
- Yes No Have all required local/state licenses/permits been obtained?
- Yes No Has the company qualified to do business in all states it is required to?
- Yes No Have all annual information statements been filed with the Secretary of State?

### RECORDKEEPING

- Yes No Are all financial records maintained in an orderly manner?
- Yes No Are all active agreements tracked in a database of some sort?
- Yes No Are closed agreements properly closed out and archived?
- Yes No Are all employee records current and up-to-date?
- Yes No Does the company have a records retention program?



# LEGAL COMPLIANCE CHECKLIST, PT. 2



## EMPLOYMENT

- Yes    No    Do interviewers of prospective employees know what can and cannot be asked?
- Yes    No    Are processes in place to track EEO/Affirmative Action information?
- Yes    No    Is each employee required to fill out an application form?
- Yes    No    Is there a copy of each employee's offer letter in their personnel file?
- Yes    No    Does each employee have a resume in their personnel file?
- Yes    No    Has each employee filled out all federal forms [W-2, I-9, etc]?
- Yes    No    Has each employee filled out all benefit related paperwork?
- Yes    No    If applicable, has each employee provided information for security and badge purposes?
- Yes    No    Has each employee been given a copy of the company employee handbook?
- Yes    No    Is there an acknowledgement of receipt of the employee handbook in each file?
- Yes    No    If applicable, has each employee executed a confidentiality/non-compete?
- Yes    No    Are benefits and eligibilities properly administered?
- Yes    No    Are leaves of absences properly administered?

**“Are benefits and eligibilities properly administered?”**

## AGREEMENTS

- Yes    No    Are all agreements analyzed to create a compliance checklist?
- Yes    No    Are subcontractors and vendors monitored to assure timely compliance?
- Yes    No    Are annual reviews of insurance policies, etc conducted?
- Yes    No    Prior to execution, are all agreements reviewed against a certain standard?

## APPLICABLE LAWS (SPECIFIC TO TYPE OF BUSINESS)

- Yes    No    Has the company determined if the following laws apply to its business?
  - Yes    No    environmental
  - Yes    No    worker safety
  - Yes    No    securities
  - Yes    No    consumer protection
  - Yes    No    advertising
  - Yes    No    employment
  - Yes    No    ERISA
  - Yes    No    product liability
  - Yes    No    tax
  - Yes    No    commercial and real property



# LEGAL COMPLIANCE CHECKLIST, PT. 3

## INTELLECTUAL PROPERTY

- Yes    No    Have appropriate trademarks and patents been obtained/ applied for?
- Yes    No    Is a proper copyright notice put on all company copyrightable material?
- Yes    No    Is a trade secret protection program appropriate, and if so, implemented?
- Yes    No    Have employees signed Invention Assignment Agreements, if appropriate?
- Yes    No    Have consultants, subcontractors, etc signed Confidentiality/Non- competes?
- Yes    No    Have consultants, subcontractors, etc signed Invention Assignment Agreements?
- Yes    No    Does the company have a program to monitor for 3<sup>rd</sup> party infringements?
- Yes    No    Does the company have all necessary licenses?
- Yes    No    Is the company complying with all terms of licenses where it is the licensee?



## SPECIFIC TO WORK FOR GOVERNMENT

- Yes    No    Has the company determined compliance with the following?
  - Yes    No    procurement integrity
  - Yes    No    organizational conflicts of interest
  - Yes    No    quality assurance
  - Yes    No    training – specifically timecards and drug-free workplace
  - Yes    No    small business subcontracting plans
  - Yes    No    specifics found in representations and certifications
  - Yes    No    environmental
  - Yes    No    FAR 3.10
  - Yes    No    Davis Bacon, Service Contract Act, Walsh Healey
  - Yes    No    union dues posters

“Does the company have all necessary licenses?”

## ITEMS THAT SHOULD BE CALENDARED (IF APPLICABLE)

- Notification of annual meeting for Board
- Annual meeting of the Board [elect corporate officers]
- Notification of annual meeting for Shareholders
- Annual meeting of the Shareholders [standing agenda item – elect Board]
- Filing of federal AND state tax returns
- Filing of state sales and use tax obligations
- Filing of property tax obligations
- Filing of payroll taxes



## NEW FMLA REGULATIONS EFFECTIVE JAN. 16, 2009

The Department of Labor (“DOL”) issued its final revised regulations for the Family and Medical Leave Act (FMLA) on Nov. 17, 2008. The new rules become effective Jan. 16, 2009, sixty days after publication. As the regulations require a statement of FMLA policy to be included in all employee handbooks, it will be essential that companies revise their employee handbooks to reflect the law’s changes.

Establishing a “serious health condition” has been slightly changed. If proving the condition by visiting a doctor twice, the two doctor visits must take place within 30 days of the first day of incapacity. If proving the condition by one doctor visit and a regimen of continuing treatment, the doctor visit must take place within seven days of the first day of incapacity. For chronic conditions, employees now are required to receive periodic treatment at least twice a year from a healthcare provider.

Notice requirements for employees have been changed. Employers may deny or delay leave should an employee fail to comply with notice requirements for calling in sick or requesting leave; the old regulations allowed employers to discipline employees for failing to comply with call-in procedures, but were not

able to deny or delay leave for lack of compliance with procedure. Should a need for leave be unforeseeable, employee notice requirements have been shortened to the same day or the next business day that the need is learned of, as opposed to the previous regulation’s requirement of two days notice after the need arises.

Employers are given additional abilities in the new regulations. In some circumstances employers may request medical recertifications of employee FMLA conditions every six months. Employers may also contact a health provider directly to clarify a medical certification, with some restrictions. Fitness-for-duty certifications at the close of each intermittent leave period are permitted up to once every thirty days, if there are safety concerns about the ability of an employee to perform their job. The new regulations permit employers to require employees to use accrued paid time off (i.e. vacation, sick days, etc.) during a FMLA leave from work. Employers may also reject perfect attendance bonuses or similar awards to employees who have taken FMLA leave.

An important change to the FMLA regulations was made by implementing the Defense

Authorization Bill, passed in Jan. 2008. The bill expands FMLA coverage to those persons giving assistance to military members and injured veterans. The new military coverage allows eligible employees to take a maximum of twelve weeks of unpaid leave to assist the soldier’s family and/or affairs before, during, or after employment, under qualifying circumstances. Qualifying circumstances include making financial and/or legal arrangements, receiving counseling, recuperation, deployment on short notice, child care and school activities, post deployment activities, and other circumstances as negotiated by employers and employees. The maximum length of unpaid leave can extend to twenty-six weeks, should leave be required by a “next-of-kin” to care for a family member wounded during service.

The new FMLA regulations make significant changes for employers administrating FMLA. Employers should update their current leave procedures, forms, and policies to comply with the new rules. In terms of training, all training materials should be updated to conform with the new rules and employers should give training to personnel concerning the new rules.



**“The regulations require a statement of FMLA policy to be included in all employee handbooks”**



**2009 BENEFIT AND CONTRIBUTION LIMITS**

The 2009 IRS retirement and benefit limits are found in the table below. You may request these limits be sent to you in a card format by contacting The Cicotte Law Firm.

**2009 IRS RETIREMENT AND BENEFIT LIMITS**

<b>Retirement Plan Limits</b>	<b>Under 50</b>	<b>50 and Over</b>
Maximum salary deferral to a 401 (k), 403(b) or 457 plan	16,500	22,000
<b>SIMPLE account maximum deferral</b>	11,500	14,000
Limit on total annual additions to a defined contribution plan	49,000	54,500
Maximum annual benefit in a defined benefit plan	195,000	195,000
<b>IRA Limits</b>	<b>Under 50</b>	<b>50 +</b>
Maximum deductible / Roth	5,000	6,000
<b>HSA Limits</b>	<b>Under 55</b>	<b>55 +</b>
Individual	3,000	4,000
Family	5,950	6,950
<b>Compensation Limits</b>	<b>2009</b>	<b>2008</b>
Compensation that may be considered in a plan	245,000	230,000
Highly compensated employee	110,000	105,000
Key employees:		
Officers earning	160,000	150,000
1% owner earning	150,000	150,000
SEP coverage:		
Employees earning	550	500
<b>Social Security Wage Base</b>	<b>106,800</b>	<b>102,000</b>

**Firm Description**

The Cicotte Law Firm is located in Kennewick, WA, and represents employers in several states in all aspects of benefits law, handling diverse employment, labor, tax and corporate matters.

The Firm's practice covers all areas relating to employee benefits, including designing "defined contribution-style" health plans (HRAs, HSAs, & FSAs), assistance with COBRA, HIPAA, and EGTRRA, advising on fiduciary responsibilities, maintaining legal compliance with non-discrimination requirements, analyzing unusual benefit claims, representing employers in labor relations matters where pension or welfare benefits are involved, advising on the federal tax implications of complex benefits-related issues, and examining the ERISA status of compensatory arrangements.

Other practice areas vital to corporate function available at the Firm include corporate formation, corporate compliance, negotiations, mergers and acquisitions, SEC compliance, and HR liaison activities.

The Firm is also able to assist companies with licensing agreements, non-compete and nondisclosure agreements, intellectual property concerns, and real estate and construction law.

*Disclaimer: This document is for general information only and is not legal advice. Should you have legal questions pertinent to this document, you should contact an attorney.*

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