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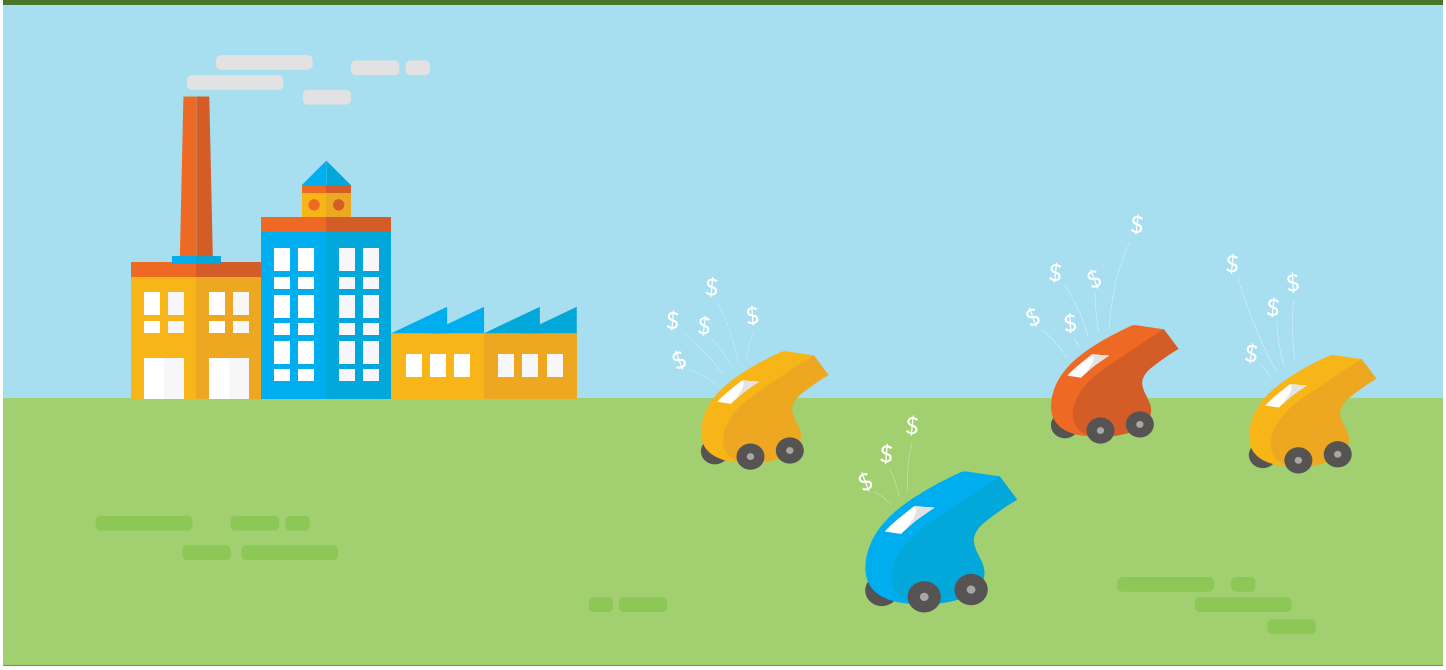

Whistleblower Incentives and Protections In The New "FAST" Act Pose Increased Risks for Suppliers

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Whether suppliers can anticipate increased risk in the form of an automotive whistleblower act is no longer a question. *It is now here.* President Obama recently signed into law the Fixing America's Surface Transportation Act (the FAST Act), the first comprehensive transportation bill in years. Included in the FAST Act, among other stand-alone bills spurred by a pattern of reporting delays and failures by vehicle manufacturers and several major vehicle recalls, is a slightly modified Motor Vehicle Safety Whistleblower Act (MVSWA). This Act will incentivize employees and automotive industry insiders to come forward with information regarding potential vehicle safety defects by offering the possibility of recovering sizeable whistleblower rewards.

WHAT KIND OF INFORMATION DOES THE MVSWA SEEK?

The scope of the MVSWA is limited only to information that relates to any motor vehicle defect, noncompliance, violation or alleged violation of any notification

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or reporting obligation that "is likely to cause unreasonable risk of death or serious physical injury." Some, however, have advocated for more comprehensive automotive whistleblower protections that apply more broadly to all vehicle defects or violations affecting public safety, public health or constitute fraud, particularly in light of Volkswagen's (VW) egregious, but non-safety critical emissions violations.

WHO IS ELIGIBLE FOR AN AWARD?

Under the MVSWA, only an employee or contractor of a vehicle manufacturer, parts supplier or dealership who voluntarily shares original information with the Secretary of Transportation (the Secretary) is considered a "whistleblower" eligible for an award. To the dismay of some, third parties with relevant information, like those who discovered VW's emissions violations, are not considered "whistleblowers" under the MVSWA and, thus, cannot obtain an award.

Additionally, the MVSWA disqualifies certain "whistleblowers" from receiving an award, including those who contribute to the wrongdoing, those who submit information that is based on information previously submitted by another whistleblower, as well as those who fail to provide the information in the form required. Also ineligible for an award are whistleblowers who fail to first report, or attempt to report, the information internally where the applicable vehicle manufacturer, parts supplier or dealership has an internal reporting mechanism intended to protect employees from retaliation, unless the whistleblower "reasonably believed" that the information was already known by the vehicle manufacturer, parts supplier or dealership or that sharing the information would have resulted in retaliation from the company.

WHAT CAN A WHISTLEBLOWER RECEIVE AS AN AWARD?

If the information provided by a whistleblower leads to a settlement or judgment of an administrative or judicial action by the Attorney General or Secretary in excess of $1 million, the Secretary is authorized to issue an award to the whistleblower. Whether to issue such an award, to whom and in what amount, however, remain entirely within the discretion of the Secretary. In determining an award, the Secretary is to consider the importance of the information provided to the resolution of the action, the level of assistance provided by the whistleblower in the action, if applicable, whether the whistleblower attempted to report

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the information internally and other relevant factors.

If the Secretary does issue a whistleblower award, the whistleblower(s) stands to gain a significant amount, as the MVSWA requires that the award be, in the aggregate, no less than 10 percent and no more than 30 percent of the total monetary sanctions collected. The MVSWA also provides whistleblowers with the right to appeal any determination made by the Secretary.

WHAT DOES THE MVSWA MEAN FOR SUPPLIERS?

Although the reach of these new whistleblower provisions is not as broad as some have argued for in light of the VW emissions violations, there is no doubt that the MVSWA, together with several other vehicle safety-related provisions of the FAST Act, amounts to substantially increased risk for automotive suppliers. As industry insiders now have significant financial incentives and protections for sharing relevant information, suppliers can be sure that government action will become even more aggressive and frequent than in the past. As such, it is more critical than ever for suppliers to ensure that their internal protocols and business culture fosters swift communication and investigation of potential issues.

Call us for more information on how to safely navigate the current automotive climate and to learn more about our successes in handling whistleblower cases in similar contexts.

2014 RECALLS

VEHICLE SAFETY & COMPLIANCE

803 Recalls

32.9 Million Vehicles

EQUIPMENT

81 Recalls

2.2 Million Vehicles

CAR SEATS

5 Recalls

7.6 Million Car Seats

TIRES

13 Recalls

368,720 Tires

Source:
Safety in Numbers, NHTSA, May 2015, http://www.nhtsa.gov/nhtsa/Safety1nNum3ers/may2015_2/S1N_May15_Recalls_Issue1.html

Autonomous Vehicles—Safety vs. Privacy

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Most experts agree that the introduction of autonomous vehicles will be the biggest change to the auto industry since the invention of the car itself. Every industry associated with automobiles, directly or indirectly, will be impacted as autonomous vehicles become the norm. It's not a matter of if this will happen, but when it will happen, with the final phases of autonomous technology implementation expected by approximately 2040.

Every industry from airlines to hotels and roadside restaurants, will feel the effect as people utilize their vehicles in completely new ways. Recent history teaches us that it doesn't take long for business models to be completely disrupted by rapid advances in technology. For example, Blockbuster went bankrupt in 2010 after rejecting a partnership with Netflix just ten years earlier.

REDUCED ACCIDENTS

With accidents expected to drop by up to 80% after autonomous vehicles make up a majority of the vehicles on the road, some insurance companies are already adapting their business models. Allstate Insurance Company (Allstate), for one, is positioning itself for the future as premiums are expected to substantially drop. Last year, Allstate obtained two patents entitled "Traffic Based Driving Systems."[1] The patents cover driving analysis servers, systems and methods that use sensors, telematics devices and cameras to identify "potentially high-risk or unsafe driving behavior." This information will be used to calculate or adjust a "driver score," which will be used to determine coverage, premiums, deductibles and award safe driver discounts, etc.

DATA TRACKING & USE

Technology of this sort will be useful in conjunction with autonomous vehicles, as they utilize a number of different devices and data to navigate the roadways. Real-time and historical data will be especially useful for modeling driving profiles. One can imagine classifications of autonomous vehicles tied to their own inherent technological abilities, as well as the driving traits of their owners. For example, preferred routes may be dedicated to "safe" autonomous vehicles/drivers, while less preferred routes are given to other autonomous vehicles/drivers based, for example, on prior high-risk or unsafe driving behavior.

Devices associated with tracking driving behavior are not new. A number of plug-in devices exist already that award safe driving behavior, such as devices from Allstate, Progressive, Nationwide and State Farm. However, these devices are typically limited to just a handful of driving metrics, including miles driven, speed, hard braking, fast acceleration and nighttime driving. "Safe" drivers are offered a discount when utilizing such devices, which supposedly offset other less reliable information insurance companies often rely on, including

Every industry associated with automobiles, directly or indirectly, will be impacted as autonomous vehicles become the norm.

the driver's age, gender, geographic location and credit history.

PRIVACY CONCERNS

As described in Allstate's recent patents, a vehicle may include one or more cameras capable of recording what is occurring both inside and outside of the vehicle. Other devices may be used to monitor noise levels inside the vehicle, a driver's heart rate and even the presence of alcohol. Understandably, Allstate's endeavors have raised a number of privacy concerns, with a quick Internet search producing dozens of articles referring to Allstate's "Spy Car," "Big Brother" and George Orwell's *1984*.

Just a few of the questions that have been raised in connection with Allstate's patents include:

- Can private data like PIN numbers, passwords or social security numbers be captured by cameras?
- Will private telephone or passenger-to-passenger conversations be captured by microphones?
- How will collected information be stored, transmitted and ultimately protected from nefarious parties?

Thankfully, merely obtaining a patent does not mean that a company will implement the associated technology. However, it is safe to assume that at least some form of this technology, claimed or otherwise, will make its way into autonomous vehicles of the future.

Allstate and other businesses developing and implementing data collection systems of this sort should be mindful of privacy concerns, both from a consumer and a legal standpoint. By way of example, General Motors (GM) experienced a backlash with OnStar in 2011. Attempting to rely on updated terms and conditions for OnStar, GM planned on collecting information from non-customers unless they opted out. A public outcry including senator comments—alleging possible violation of federal law—quickly led to GM killing the plan. Various smart TV manufacturers have had similar public relations hiccups when attempting to track and collect information on their customers.

Based on the rapid pace of technology and importance of data security, we can expect data protection regulations to be tailored towards autonomous technology. Likewise, insurance companies can expect to see data protection standards being implemented. Before taking advantage of new technologies, companies should consult with legal counsel to ensure that they are complying with relevant data protection and privacy laws. In addition, companies should strive toward greater transparency with their customers with clear, informed consent being a primary goal. As for vehicles of the near future, even if a driver gives consent, it remains to be seen how consent will be obtained from passengers and others.

1 U.S Patent Nos. 9,081,650 and 9,104,535

Recent Case Demonstrates the Importance of Protecting Trade Secrets

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When you were a kid, did you ever tell your little brother a secret that he promised not to tell, and the moment you told him he told anyone who'd listen? And do you remember how the neighborhood bully took advantage of that secret? And do you also remember that you couldn't get back at your little brother for breaking his promise? Of course you do. My, how times have not changed. Let's assume that you own a business, your employees are your little brother and you have a secret. Maybe it's a client list or a formula or maybe it's a process. Regardless, you sure don't want the neighborhood bully to know about it.

Fortunately, you have more options now than when you were in grade school. But, you have to take advantage of those options to make them work for you. A recent decision from the Utah Supreme Court underscores the importance of taking all reasonable steps to protect your confidential information, including your trade secrets. And by reasonable steps, we mean contracts.

In *InnoSys v. Mercer, 2015 UT 80* (August 28, 2015), an engineer (Mercer) allegedly took confidential information, including a confidential business plan, to use as evidence in an unemployment hearing. The information was forwarded to a personal Gmail account and saved onto a flash drive. Mercer claimed she deleted all of the emails and flash drive information the next day.

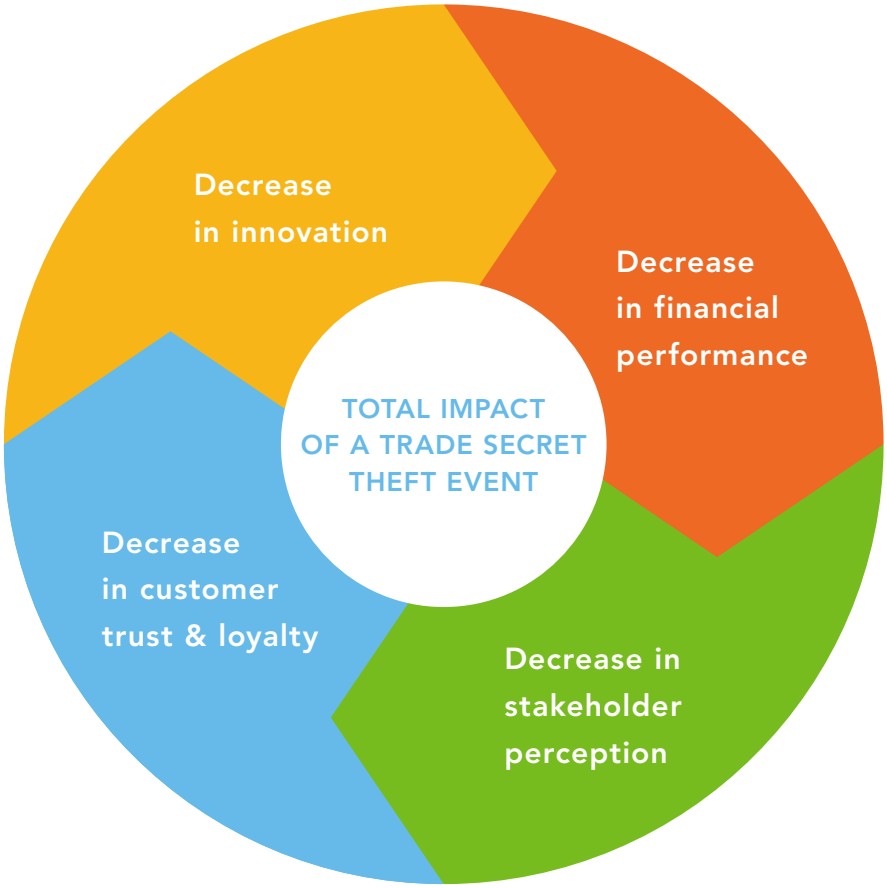
InnoSys sued Mercer, bringing claims of breach of her non-disclosure agreement, breach of fiduciary duty and misappropriation of trade secrets. After some discovery, Mercer filed for summary judgment—and won—arguing that InnoSys had no evidence of actual or threatened harm since she destroyed the confidential information. But, surely Mercer spoiled the evidence by deleting the files, right? "Wrong," said the trial court; she did not know nor should have known that there was an anticipated litigation. As if InnoSys wasn't having a rough day in court already, the Court then awarded Mercer attorney fees.

Fortunately for InnoSys, the Utah Supreme Court reversed the trial court holding. InnoSys "at least arguably" established a prima facie case of misappropriation by proving the existence of a protectable trade secret (because the information had independent economic value from not being generally known) and demonstrated misappropriation. The Utah Uniform Trade Secret Act, and several other similar state acts, provides no defense to unauthorized disclosure. Therefore, by establishing the prima facie case, InnoSys had a rebuttable presumption of irreparable harm that Mercer never attempted to rebut.

> The case stresses the importance of having a separate non-disclosure agreement. Don't rely on your employee handbook.

The Court applied the same principles to damages for breach of the non-disclosure and fiduciary duty claims. Additionally, the Court reversed the sanctions award.

There are some important takeaways from this case. First, it shows the increasing level of scrutiny lower courts have for misappropriation of trade secret claims. Because of this raised level of scrutiny, employers should review and consider all available tools to protect their trade secrets and confidential information, including confidentiality clauses, non-disclosure agreements, non-solicitation agreements and non-compete agreements. In other words, don't leave all of your eggs in one basket. Statutory trade secret protection is great, but it only protects trade secrets as they are defined by the statute. You might have confidential information that isn't considered a trade secret under the law that you still want to protect. How do you protect that information? You protect it with an enforceable agreement.



Second, the case stresses the importance of having a separate non-disclosure agreement. Don't rely on your employee handbook. Your employee handbook probably states clearly that the handbook is not an employment contract; if it doesn't, it should. You don't want your handbook to be considered a contract. But, that also means that you won't be able to enforce certain provisions of the handbook, as if they were a contract. And chief among them are any confidentiality provisions you might have in that handbook. You will want to make sure your handbook contains these provisions; they are valuable when employees take information. Unfortunately, once the employee quits or is terminated, they lose their value. You need an enforceable agreement that survives the employee's termination or resignation. Remember your little brother and don't let that happen again.

Oh, and one more thing. This case demonstrates the importance of computer forensics. In many cases, employers struggle to show misappropriation after an employee leaves because they either don't know where or how to look for evidence of the misappropriation, or the company has a policy of wiping and repurposing computers for departed employees. Oftentimes, the best evidence exists on company-owned devices. Review your policies for departed employees, and if an employee leaves that had regular access to confidential information and/or trade secrets, consider running forensic analysis before reformatting or repurposing their devices.

Here Come the Extenders (Not Another Apocalyptic Teen Movie)—Just Another Tax Act

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These days, the general view of Congress has been that they can't get anything done. But when tax breaks are in the balance, Congress understands that their constituents at home will be very angry if they let them slip. This time, Congress actually outdid itself by not only extending the commonly called "extenders," but making some permanent and extending others for more than another tax year by passage of the Protecting Americans from Tax Hikes Act of 2015 (the PATH Act).

The extenders consist of a variety of over 50 individual and business tax deductions, tax credits and other tax-saving laws which have been on the books for years but burdened with built-in sunsets, most of which expired in 2014.

To start, the research credit was made permanent by the PATH Act, which provides certainty to businesses that want to invest in research and development. The credit amount is 20% of a taxpayer's current year's qualified spending that exceeds a base amount related to gross receipts in certain earlier years, not to exceed 10% of the total spending in the current year on qualified research. Additionally, beginning in 2016, eligible small businesses may claim the credit against alternative minimum tax liability, and the credit can be used by even smaller businesses against the employer's portion of FICA.

The PATH Act extended and made permanent the reduced 5-year waiting period available for newly-converted S corporations. Previously, S corporations had to wait 10 years before selling assets to avoid paying the entity level built-in gains tax. This was meant to prevent C corporations from making an "S" election to avoid double tax payments at the corporate level on all of its assets—which resulted in double tax payments on the proceeds of sold assets in an effective federal and state tax rate of more than 50%. This change may facilitate the sale of more S corporations.

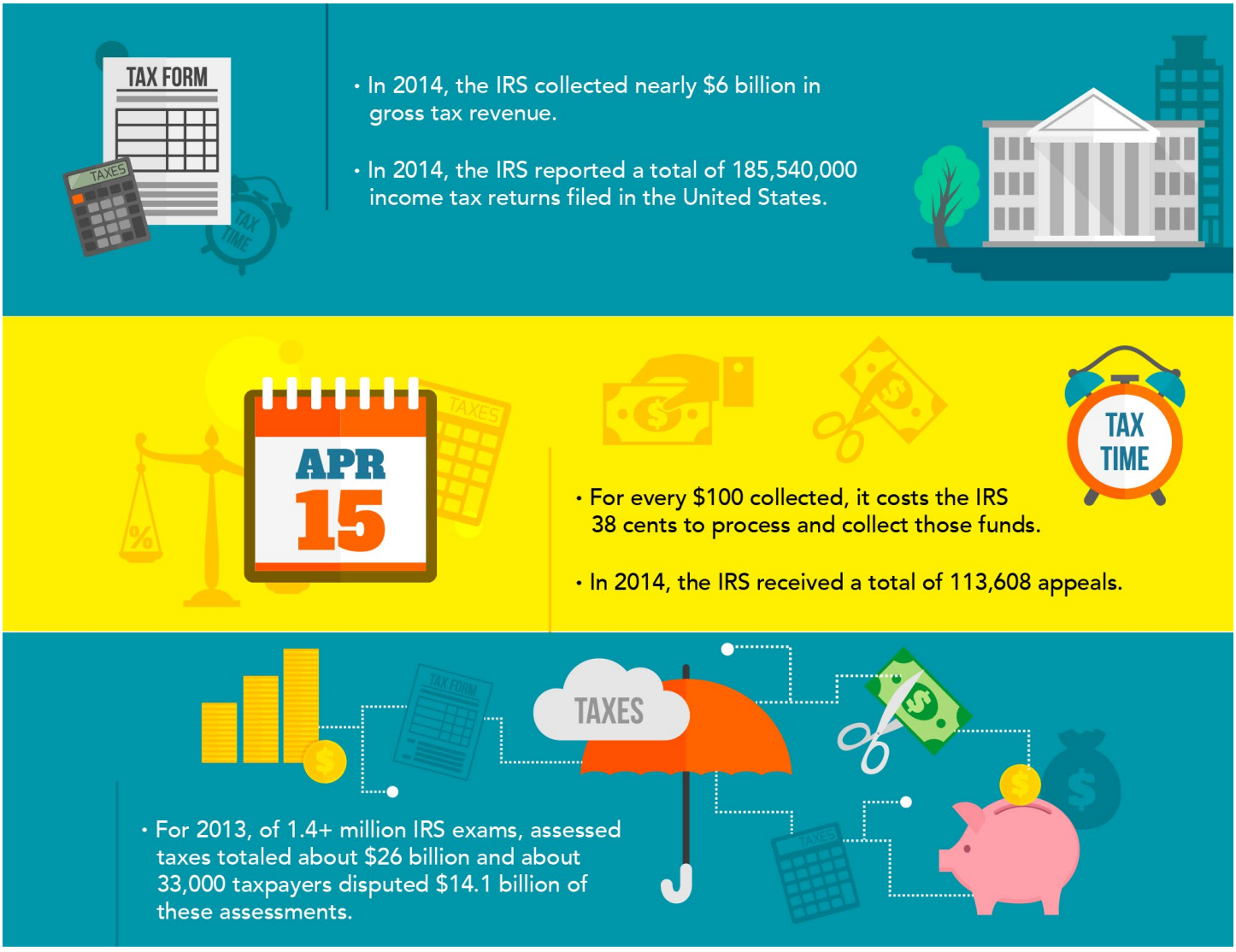
The popular 50% bonus depreciation has been extended with a gradual sunset. The bonus depreciation percentage is 50% for 2015-2017, and phases down to 40% in 2018 and 30% in 2019 before the sunset.

The provision only applies to qualified property, including tangible depreciable property with a recovery period of 20 years or less, water utility property, computer software and qualified leasehold improvement property, and excludes used equipment. Starting in 2016, qualified leasehold improvement property is expanded to "qualified improvement property" and will include any improvement to an interior portion of a commercial building, if the improvement is placed in service after the date the building was first placed in service with certain limitations.

Small businesses will be able to enjoy the tax benefits of capital improvement elective expensing at $500,000 with the $2,000,000 acquisition phase out rules, with both amounts now linked to inflation starting in 2016. Furthermore, the PATH Act made permanent the allowance of expensing most computer software and qualified real property.

The PATH Act was not the only Act impacting taxes. The recently enacted 2016 Consolidated Appropriations Act (CAA) also modified some important tax provisions. The "Cadillac tax," a 40% tax on the plans valued at more than $10,200 for individual coverage and $27,500 for a family, was scheduled to start in 2018 but has been delayed until 2020. The CAA will also allow companies to deduct the Cadillac tax for income tax purposes lowering the effective tax rate. The other Affordable Care Act implementation delay is the one-year postponement of the health insurance provider fee.

Last but not least, credits are extended through 2016 for alternative fuel vehicle refueling property, two-wheeled plug-in electric vehicles and qualified fuel cell motor vehicles. These are just some of the recent tax provisions. Visit WNJ.com to read our blog and articles for more details regarding this and other provisions.



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Employing Retirees? Take Steps to Avoid Problems with Corporate Retirement Plans

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As the workforce ages and retires, employers often seek to fill in gaps by hiring their own retirees as independent contractors or temporary or part-time employees. This practice threatens the tax qualification of employers' retirement plans, both 401(k) plans and traditional pension plans.

Distributions from 401(k) and 403(b) plans are permitted only under narrow circumstances: death, disability, hardship, attaining age $59^{1/2}$ or severance from employment. Distributions from pension plans are even more constrained: all in-service distributions are banned until the participant reaches at least age 62.

The plan document may restrict distributions even further, for example, by not allowing any in-service payouts. Distributions made before the law and the plan allow disqualify the plan.

For example, if a participant "retires" at age 57, takes a 401(k) distribution and returns to work for the same employer part-time, the retiree may be seen as not separated.

The plan has then made an impermissible in-service distribution—a plan-qualification violation.

The employee may have a true severance if re-hired as an independent contractor rather than as an employee; the question is whether the re-hire truly is an independent contractor. The ongoing skepticism the IRS and courts have of "independent contractor" status doubly applies to former employees. Since the standard for "independent contractor" is whether the employer has a right to direct or control the individual, if the retiree is doing the same type of work, in the same place, with the same tools, what is the difference that suddenly creates an independent contractor status?

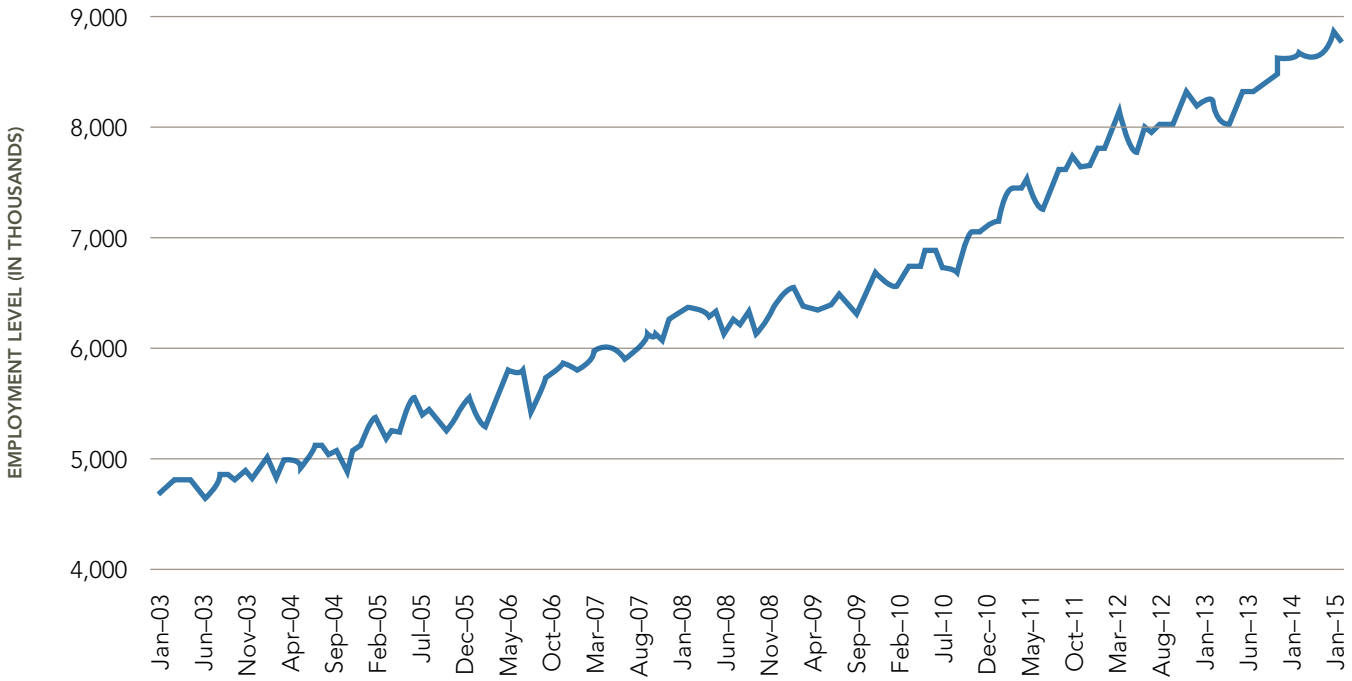
We recommend the following steps before hiring a retiree:

1. Check your plan document. If your 401(k) plan permits in-service distributions at age $59^{1/2}$, or your pension plan permits in-service payouts to begin at age 62 or later (rare), and the employee took the retirement payout after the applicable age, then the plan is safe.

Two-thirds of organizations are unprepared for the aging workforce in terms of examining policies and practices to address the demographic change.

STILL NEEDING TO MAKE MONEY IN THE TWILIGHT YEARS (2003–2015)

Employment Level of U.S. People 65 Years and Older



Source: U.S. Bureau of Labor Statistics. January 1, 2003, to January 1, 2015.

2. Prohibit any understandings with retirees before retirement that they will be re-hired in any capacity.

3. Require a minimum period of time before a retiree can be re-hired. Although no set time is safe-harbor, six months may be sufficient. Some employers use 90 days. This is not a substitute for step #2.

4. If you re-hire the retiree as an independent contractor, make the position sufficiently different to support independent contractor status. Contract with the retiree to set goals, but turn control over to the retiree as to how the goals are to be accomplished. Let the retiree hire others; have him provide his own equipment and supplies and set his own hours. Allow him to work for other employers doing the same work. The less the work looks like the retiree's prior employment, the better.

5. If the retiree is safely re-hired, review the future effect of re-employment under the retirement plans. The retiree may be eligible for additional contributions or accruals. A pension may have to suspend monthly payments during re-employment and give notice to the participant of the suspension.

The attorneys in the Warner Norcross & Judd Employee Benefits/Executive Compensation Practice Group can help you properly handle the hiring of retirees.

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The Automotive Industry Group at Warner Norcross & Judd is comprised of more than 50 attorneys who provide timely, cutting-edge services to automotive suppliers of all sizes.

Unlike almost all other law firms, we do not represent the OEMs—so we are always focused on what's best for auto suppliers.

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