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View From The Bar
Fall 2012

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Working TOGETHER *Going the Distance for you*

A Message from the Chairman

As we begin the final quarter of 2012, there are many exciting developments that occurred this year at Mandelbaum Salsburg that I wanted to share.

The development of our Intellectual Property Department, with Jon Fallon as the lead and Mike Kochka to assist him, has received a tremendous response. Many of our clients have already transferred their IP work from other law firms to us.

Our Environmental Law Department, anchored by Gordon Duus and Owen Hughes, is thriving even in a difficult real estate market. They are busy helping clients involved in business and real estate transactions manage their environmental risk.

Our Labor and Employment Department has grown with the addition of Alix Rubin, Mike Kalmus, Paul Weiner and Josh Weiner.

We have enjoyed growth in our Asset-Based Lending ("ABL") work, with the addition of numerous new lenders active in that arena, thanks to the efforts of Richard Simon, who returned to Mandelbaum Salsburg after serving as General Counsel to an ABL company.

All other departments have been very busy. The last quarter will be very active, with estate and gift planning by our clients to meet the challenge of the apparent end of the "Bush Tax Cuts," as well as demand on the part of clients to sell real estate and their businesses to take advantage of the lower capital gains rate.

We are proud of our new website, as well as the seminars we are hosting to provide legal guidance to our clients and friends.

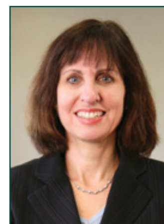
We once again thank our legal clients and friends for their support and referrals.

Very truly yours,

Barry R. Mandelbaum

Why Every Employer Needs a Social Media Policy

By Alix R. Rubin



Now that Facebook is a publicly traded company, there can be no doubt that social media has supplanted the water cooler and the break room as the "place" where employees go to chit-chat, gossip, gripe and simply connect with their colleagues, friends and prospects while at work and after hours.

Social media can help employees perform their jobs better, or it can become a huge distraction that interferes with work performance. Likewise, for employers, while social media can be a way to attract and retain customers, it also can become a minefield if not carefully monitored.

As a testament to social media's impact on the workplace, the National Labor Relations Board ("NLRB") has issued three reports since August 2011 that address the legality

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A Business's Obligations Under The Identity Theft Protection Act

By Richard I. Simon

Federal and state governments have enacted laws imposing obligations on private business to take reasonable steps to protect unauthorized disclosure of personally identifiable information collected and maintained by them. This includes implementation of written information security programs geared to reasonably prevent unauthorized disclosure and/or when a security breach occurs, to notify the exposed individuals. This is in response to ever-increasing incidents of unauthorized access to millions of computerized records containing personal information of individuals, including customers, employees and others.

At the present time 46 states and certain U.S. possessions have adopted some form of data breach notification law. There also are presently numerous federal laws that focus on specific industries, such as health and finance, and require notification of a security breach of personal information.

In 2005 New Jersey enacted The Identity Theft Prevention Act. *N.J.S.A 56: 163 ("ITPA")*. ITPA remedially addresses three separate data security concerns with businesses that compile and maintain personal records; namely (1) notification of a security breach of records containing personal information, (2) destruction of both paper and computerized personal information records, and (3) restrictions on public agency and private entity use of an individual's Social Security numbers.

Under ITPA, any business conducting business in New Jersey that compiles or maintains records that include personal information must disclose any breach of security of the personal information records to all New Jersey customers whose personal information was, or is reasonably believed to have been, accessed by an unauthorized person. Businesses that compile or maintain computerized personal information for another business are required to notify the other business that must, in turn, notify the affected New Jersey customers.

Under ITPA, a business shall in the most expedient time possible and without unreasonable delay disclose a breach of security of covered records to the state police and then to any customer who is a New Jersey resident. However, if the business establishes and documents that misuse of the personal information is not reasonably possible, notification is not required. The written documentation of the determination must be retained for five years.

The ITPA provides for the form and transmission of the required notice, which is dependent upon the costs of notification and the number of customers entitled to receive notice, and can include written notification, e-mail notification, conspicuous posting on the business's webpage and, in certain circumstances, through notification to major statewide media.

"At the present time 46 states and certain U.S. possessions have adopted some form of data breach notification law."

Company Violations Open Substantial Exposure

Such reporting requirements are central to the ITPA, and a business that violates the security breach notification obligations is exposed to substantial costs, fines and penalties, as well as private actions by affected customers.

Notwithstanding the above, a business can take steps to minimize the likelihood of a data security breach. First, the business may undertake a survey to evaluate and pinpoint unsecure retention of data. The survey includes both assessment of existing administrative procedures and what changes should be made to reasonably prevent unauthorized access to records containing personal information. The survey should also asses existing technology, such as firewalls, use of remote devices (e.g., laptops and employee-owned equipment) and updates to reasonably secure the relevant records from unauthorized access. Although encryption of personal information does not equal compliance and should not be presumed to do so, unauthorized access to personal information secured by encryption that does, in fact, render the personal information unreadable or unusable should not constitute a security breach under ITPA.

ITPA, N.J.S.A. 56-8-162 also requires that a business that compiles or maintains customers' personal records, or otherwise has such records in its custody and control, must arrange for destruction of records that are no longer to be retained, by shredding, erasing or otherwise modifying the records so that they are unreadable, undecipherable or nonreconstructable through generally available means or technology. This provision addresses

hard copy records, as well as electronic data, and the hard drives and servers that the data is stored on. Therefore, whether or not a business actually uses personal information records in the course of its business, if it has custody and control of such records, it must destroy the records as directed by the statute.

For example, if a business that prepares mass personalized mailings for other businesses is provided mailing lists containing personal information, the business is required to destroy the records once the project is completed.

In an effort to limit the use of Social Security numbers as a means of identifying an individual, ITPA restricts the use of an individual's Social Security number in business transactions. The statute prohibits a private entity or public agency from posting or displaying an individual's Social Security number, or any four or more consecutive numbers of the entire number. The provision also prohibits use of the Social Security number on mailed materials unless required by state or federal law, printing the number on a card required for an individual to access products or services provided by a business, intentionally communicating or making the number available to the general public, requiring an individual to transmit the number over the Internet, or requiring the number to access an Internet Website, unless a password, PIN or other authentication device is also required. However, a business is entitled to continue to use Social Security numbers for internal verifications of an individual.

We recommend that businesses re-evaluate their existing uses of Social Security numbers and determine if the use complies with the provisions of ITPA, and, if it does not, to modify the use accordingly.

This article may raise more questions by you than have been answered. If you have specific questions or concerns contact Jon Fallon, Chairman of Mandelbaum Salsburg's Intellectual Property practice, or me.

Richard Simon is Counsel to Mandelbaum Salsburg and a member of its Privacy Group. He can be reached at rsimon@msgld.com.

Due to the positive response and the strong interest in our recent seminar "Hacked to Death: Protect Client Data and Your Reputation," we have decided to hold one or more follow-up breakfast meetings in order to delve deeper into the issues and to discuss how your business can initiate the process of data security evaluation, implementation and employee education without interrupting your business or excessively wasting your greatest asset – human resources. Whether or not you attended the initial October 3 Breakfast with Mandelbaum Salsburg meeting, your attendance and participation in future meetings is invited and welcome. If you are interested or have questions, please send an e-mail to alevine@msgld.com, and you will be advised of the time, location and specific data security topics for the next meeting.

Planning for 2013 Surtaxes

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By William S. Barrett

When the Supreme Court confirmed the legality of the 2010 Health Care Bill in June 2012, it set in motion a string of new taxes and deduction limits set to start in 2013. Two of those new taxes are the .9% surtax on earned income and the 3.8% surtax on unearned income.

The .9% surtax works this way:

- First, determine all of your earned income subject to Medicare tax and, if married, your spouse's earned income. Earned income has five main components: W-2 Medicare wages, sole proprietor income, farm income, K-1 income from LLCs and partnerships, and guaranteed payments from LLCs and partnerships.
- Add up all of these amounts and compare the total to the allowed base amount of $200,000 for individuals and $250,000 for married couples filing jointly.
- If your total earned income is less than the base amount, there is no surtax. If it is more, the excess earned income is subject to this surtax.

The 3.8% surtax, which I call the anti-investment tax, uses the same base amounts as outlined above, but is not similar in any other way. This tax is only assessed on taxable investment income, such as interest, dividends, capital gains, annuities, royalties and rents.

How can you plan for these taxes? Think three things: S corporations, HRAs and divorce.

Reducing the .9% Earned Income Surtax

Since the .9% earned income surtax is on earned income only, your goal is to reduce earned income subject to Medicare or reduce earned income and replace it with other income, both tax-free and taxable, but not subject to the Medicare tax. Consider the following tactics:

1. If you are a business owner, we suggest you strongly consider converting to an S corporation immediately. Income distributed by the S corporation is not considered earned income (or investment income, for that matter), while most income from sole proprietorships, farms, LLCs and guaranteed payments is subject to the surcharge. By combining lowered wages with distributions of remaining profits as dividends, many small business owners can avoid the surtax completely.

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Employer "To Do" List to Protect Against Employee Lawsuits

By Dennis J. Alessi

Unemployment has been at a high level for over four years, and the level of underemployment is even higher. This has resulted in a dramatic rise in discrimination, harassment, wrongful termination and other lawsuits by employees.

Under New Jersey statutes there is no limit to the amount of punitive damages that a jury can award an employee. In addition, not only does your company have to pay its own attorneys, but if the employee wins, it also pays his/her attorney for bringing the lawsuit.

Just one employment-related lawsuit can have a devastating impact on a company, particularly a smaller one. In addition to the financial burdens, there is the time and attention the company's owners and key managers must devote to the defense, which distracts them from their all-important tasks of operating the business.

Most troubling of all, in some situations the company's owners can have personal liability. This means that an owner's assets can be attached to satisfy any jury award to the former employee.

Action Steps to Protect Against Lawsuits

We urge our clients to take three actions to protect against such employee lawsuits. These are:

1. Every employee, even managers and executives, must be required to execute an arbitration agreement in which they waive their right to bring employment-related lawsuits in court with a jury. Instead, these suits are heard by private arbitrators who, in general, are more neutral; more often tend to find in favor of the employer; and tend to award significantly smaller amounts of money than juries, when they do find for the employee.
2. Purchase Employment Practices Liability Insurance ("EPLI"), which provides important coverage against employee complaints, even though it has some limitations. Such policies do not cover punitive damages, which is sometimes the largest amount of the damage award. Some policies also do not cover lost wages and benefits. This means that the defense attorney assigned by the insurance carrier is not obligated under the policy to defend the company against these damage claims. These coverage limitations result in our third recommendation...
3. When purchasing EPLI, you should opt for a policy provision that retains your company's right to select its own defense counsel. You can even have a provision included in the policy that expressly names Mandelbaum Salsburg as the designated defense counsel. (Most insurance carriers routinely permit such a designation if you ask for it.) Usually, there is no additional premium. But even if there is a minor increase, the cost is far outweighed by the advantages.

"Under New Jersey statutes there is no limit to the amount of punitive damages that a jury can award an employee. In addition, not only does your company have to pay its own attorneys, but if the employee wins, it also pays his/her attorney for bringing the lawsuit."

The advantages are:

1. our law firm, which knows your company, its owners and key managers, and which understands how it operates, will be defending you against all the employee's damage claims (both covered and not covered by the policy);
2. your company will have far more control over how the case is litigated;
3. it eliminates any concerns over possible divided loyalty by an unknown law firm that is beholden to the insurance carrier that assigned it to defend your company; and
4. the carrier will be paying a substantial portion of your legal fees.

Contact Dennis Alessi, Chairman of our Employment Law Department, at dalessi@msgld.com. He will provide the necessary arbitration documents, guide you through the process of implementing them and answer any questions you have about purchasing EPLI with Mandelbaum Salsburg as designated defense counsel.

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Why Every Employer Needs a Social Media Policy

of employers' social media policies. The NLRB is the federal agency that enforces the National Labor Relations Act ("NLRA"), including employees' right to engage in "concerted activities for the purpose of collective bargaining or other mutual aid or protection," that is, ostensibly, organizing unions. Despite the fact that the NLRB's primary function is to regulate the unionized workplace, the agency has recently targeted non-unionized employers, as well, with regard to social media and other workplace policies.

What Is a Social Media Policy?

A workplace social media policy is designed to regulate employees' use of social media at work and also after hours, the latter only when such use could negatively impact the employer, its customers or its employees. This differs from an electronic communications or computer usage policy, which applies to social media use via the employer's equipment only. A social media policy addresses employee use of social media via any means at any time.

Why Do You Need a Social Media Policy?

A federal jury in Newark awarded damages to two restaurant servers whose employer had eavesdropped on their MySpace forum and then fired them. The comments posted in the discussion group used crude terms to criticize managers and customers and made references to violence and illegal drug use. Why did the jury find in the employees' favor? Primarily because a coworker had given a manager her password to the online group under duress. An effective social media policy might have avoided this outcome.

Employers need social media policies to:

- maintain productivity levels;
- protect such intellectual property as trade secrets and other confidential information;
- enforce nondiscrimination and anti-harassment policies;
- protect the company's image; and
- limit the potential for illegal activity.

What Should Your Policy Include?

An effective social media policy should:

- explain that the company will monitor employees' social media use related to the workplace;
- restrict social media use during working hours, unless for business purposes;
- if social media is used for business purposes, designate an official social media spokesperson and monitor his or her online activity;
- prohibit the disclosure of trade secrets and other confidential financial and proprietary information online;
- restrict posting of personal views as representative of the company;
- explain that the company's nondiscrimination and anti-harassment policies apply to workplace-related social media posts;
- prohibit comments about coworkers, supervisors or customers that violate the company's nondiscrimination and anti-harassment policies or are otherwise illegal;
- explain each restriction clearly and in a way that employees could not reasonably interpret the policy as limiting communications about the terms and conditions of their employment; and
- allow for discipline of employees for comments made on social media that violate this or any other company policy.

In certain regulated industries, additional elements may need to be included. For example, a medical or dental practice should include a restriction on posting any patient information. Likewise, a bank or other financial institution should include a restriction on posting any inside information.

> "A workplace social media policy is designed to regulate employees' use of social media at work and also after hours, the latter only when such use could negatively impact the employer, its customers or its employees."

What Should Your Policy Exclude?

To be enforceable, a social media policy should not require prior authorization for all postings or prohibit:

- vague behavior regarding the employer or a coworker, such as making "disparaging" comments or "inappropriate" remarks, without explaining what that means;
- all communications with the media;
- "friending" of coworkers;
- discussions about wages or working conditions among employees, including complaints about supervisors; or
- the use or display of the company's image or logo in conjunction with a labor dispute.

Keep in mind that the courts have not yet tested the NLRB's position. Given this ever-changing landscape, you should have an attorney review your social media policy regularly to ensure that it is enforceable should you ever need to use it.

If you have questions about your social media policy, contact Alix Rubin, counsel in the Labor and Employment Practice Group, at 973-243-7936, or arubin@msgld.com.

The Leahy-Smith America Invents Act (the New Patent Act):
What a First-to-File Standard Means for Business Owners

By Jon Fallon

After years of waiting, on September 16, 2011, the Leahy-Smith America Invents Act ("AIA") was signed into law, aimed at reforming nearly 60-year-old patent laws in the United States. In addition to implementing measures to expedite a number of administrative procedures at the United States Patent and Trademark Office ("USPTO"), the AIA has substantially changed one of the most fundamental principles of the U.S. patent system – replacing the first-to-invent standard with a first-to-file standard, and in doing so, aligning the U.S. with most of the rest of the world.

For over 175 years, under the first-to-invent standard, the U.S. granted patents to the first inventor to invent a new invention, regardless of whether or not he/she was the first to file a patent application covering such invention. That is, the patent laws permitted and encouraged inventors to invent and improve their inventions before filing a patent application. A subsequent inventor of the same invention, who filed a patent application before the first inventor and/or brought such invention to market before the first inventor, would not receive patent protection on such invention.

Patents Granted Based on Order of Application

Under the new rules, the U.S. grants patents based on the order in which the applications were received at the USPTO. For example, if a first inventor perfects an invention over the course of several years before filing a patent application, and on the day before the patent application is filed, a subsequent inventor files a patent application for the same invention which was only conceived the previous day, the subsequent inventor would be entitled priority to obtain patent protection.

The message here by Congress is clear: file patent applications early and often. This substantive change requires businesses to no longer refrain from protecting an invention due to lack of commercial perfection, waiting for funding or putting projects on the "back burner." Those who decide to wait now run the risk of losing such invention to a subsequent inventor who does not wait – requiring that a serious and potentially vital decision be made very early on in the invention process.

Absolute Novelty Requirement

As a subset to the first-to-file standard, Congress has also now implemented an "absolute novelty" requirement with regard to what constitutes prior art (i.e., information in the public domain prior to the date of filing the patent application).

Under the old rules, an invention in the public domain before an inventor filed a patent application may only be detrimental to the ability to obtain patent protection if it existed more than one year prior to the date of filing and the inventor cannot show date of invention prior to such public disclosure of the invention. As such, an opportunity existed for an inventor to refrain from filing a patent application until after someone else brought the invention to market.

"This substantive change requires businesses to no longer refrain from protecting an invention due to lack of commercial perfection, waiting for funding or putting projects on the 'back burner.'"

Under the absolute novelty requirement, any disclosure of an invention by a third party prior to filing a patent application precludes patentability. While disclosure by the inventor is still granted a one-year grace period before patentability is precluded, any third party disclosure – even on the day before a patent application is filed – will now prevent any patent protection from being granted for such invention.

The absolute novelty requirement was implemented, in part, to prevent purported "inventors" from taking an invention of a third party and filing a patent application thereon. While such an act would inherently render any patent invalid, proving whether an inventor actually conceived an invention is extremely difficult. As such, from a defensive perspective, this absolute novelty standard provides a path via which inventors can ensure no third party attempts to misappropriate an invention and preclude the inventor from practicing the same.

The first-to-file standard and absolute novelty requirement can be extremely beneficial for small to mid-sized businesses engaged in a competitive market if proper patent strategies are put into place. If properly guided, a business may be able to determine when a patent application should be filed immediately, when an invention should be disclosed publicly to market as soon as possible, or when an invention should be disclosed publicly and a patent application filed shortly thereafter, to ensure the business can protect its innovation, prevent its competitors from unfairly competing, and not break the bank at the same time.

As the AIA provides a voluminous number of other changes to the old laws, business owners should consult with a registered U.S. Patent attorney to ensure they are taking advantage of all the benefits and avoiding all of the pitfalls under the AIA designed to protect small to mid-sized businesses.

Jon Fallon chairs Mandelbaum Salsburg's Intellectual Property practice. He can be reached at jfallon@msgld.com.

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Planning for 2013 Surtaxes

2. Both business owners and W-2 employees should work towards setting up employer health reimbursement arrangements (HRAs). This can lower earned income: the corporate employer gets a deduction as a fringe benefit and the employee receives a tax-free reimbursement for his or her medical costs. This avoids the earned income surcharge, but by reducing AGI it might also reduce the anti-investment tax; it even offsets Congress's increase in the medical expense deduction threshold.

3. Utilize all other fringe benefit programs available to high income taxpayers, such as education reimbursement programs, child care programs, employer-provided auto use, etc. These fringes can be used in conjunction with a W-2 reduction or in lieu of a bonus to provide surtax-free income.

4. Employers of all sizes should establish accountable expense plans to reimburse employee business expenses directly. This tool allows employers to reduce wages for employees who incur a lot of business-related expenses by reimbursing the employee directly. The reimbursement is deducted on the business return directly and is not taxable to the employee. Employers receive cost savings from reduced payroll taxes and worker's compensation costs, and employees save income, payroll, surtax and alternative income taxes.

5. Business owners who own their own buildings, which they rent to their business, should maximize the amount of rent paid by the business on the rental property. Since rental income is taxable but not subject to Medicare, this technique will also reduce the Medicare surtax. Set the rent at a maximum fair market value with a written, commercial triple net lease.

6. Consider divorce. Seriously. When single persons split earned income, earned income can be $150,000 higher than for a married couple. Of course, tax, financial and other issues need to be considered on this one.

> "The 3.8% surtax is only assessed on taxable investment income, such as interest, dividends, capital gains, annuities, royalties and rents."

7. Some advisors are incorrectly telling folks to defer income into 401(k) and Simple accounts to reduce this tax. This will not reduce the .9% earned income tax because it does not reduce the amount of income subject to the Medicare tax, although this planning idea does work for the anti-investment tax.

It is important that you understand these tax changes – and their implications for you – as you approach your tax planning for this year and next.

William Barrett is chairman of the Corporate Practice Group at Mandelbaum Salsburg. He can be reached at wbarrett@msgld.com.

Mandelbaum Salsburg News

Dennis Alessi spoke on "Employment Law 101 for Medical Businesses (A Primer on How to Avoid Employee Lawsuits" for the New Jersey Chapter of the National Association of Professional Geriatric Care Managers.

Bill Barrett will be a speaker in a panel discussion: *Your First Practice: Starting New vs. Purchasing a Practice,* at the Greater New York Dental Meeting, the nation's largest healthcare and dental event, in November. He will be speaking with Ronald Nemeroff, DDS, President of RMN Consultants, and Chad Widensky, Vice President, of Bank of America Practice Solutions. Also, as a member of The Dental Resource Alliance, Bill will be presenting a full-day seminar for dental practitioners on October 24 at Seasons Catering in Washington Township, NJ.

Cheryl Burstein is Vice Chair of the New Jersey Supreme Court District Ethics Committee for Essex District V-C. She is also a member of the Millburn Township Zoning Board of Adjustment.

Arla Cahill was invited to participate on the New Jersey Institute of Continuing Legal Education (ICLE) panel, "Assessing Damages in Commercial Litigation Cases," on November 29.

Jon Fallon was named one of the *New Jersey Law Journal's* "New Leaders of the Bar" for 2012.

Robin Lewis has been selected as the Chair of the "Primerus Business Law Institute" for North America, for a one-year term commencing in November. She will assume this post at the Primerus Global Conference in Scottsdale, AZ. Primerus is an international association of independent boutique law firms. Mandelbaum Salsburg is one of 190+ member law firms in 35 countries.

Charles Lorber and **Deborah Concepcion** successfully resolved two personal injury matters. One, involving a young woman who was severely injured by a driver with limited insurance, settled for $690,000. The second involved a young child who was severely burned by a cup of coffee at an auto dealership. The suit was brought against the manufacturer of the coffee machine, the distributor and the auto dealership, and was settled for $382,500, with the three defendants contributing.

Barry Mandelbaum was honored at the Cerebral Palsy of North Jersey's "Steps to Independence Celebration" on October 17.

Richard Miller of Mandelbaum Salsburg's Elder Law Group will be part of a panel of attorneys that are presenting "Guardianships of Incapacitated Persons: The Basics and More" at the NJICLE North ICLEfest on December 18.

Peter Tanella was a featured speaker at the seminar, "Creating the Practice of Your Dreams," presented by Bank of America Practice Solutions.

Mandelbaum Salsburg has welcomed three new attorneys: **Paul Weiner** and **Joshua Weiner**, who have joined the employment practice as counsel, and **Michael Kochka**, who has joined the intellectual property practice as an associate.

Mandelbaum Salsburg in the Community

In and out of the office, the people of Mandelbaum Salsburg dedicate their considerable talents and time to a wide array of community service and charitable organizations. Many attorneys and staff members are involved in their communities, and the firm, as a whole, has also chosen to undertake various efforts.

For the past year, Mandelbaum Salsburg's in-house efforts have been guided by a committee comprised of attorneys and staff members. As a result, there has been significant growth in the number of events in which the firm has been involved and the amount of money raised in support of charities important to the firm. So far in 2012, lawyers and staffers at the firm participated in "Denim Days" to benefit the American Heart Association and the March of Dimes; ran and walked in a 5K event benefitting The Valerie Fund, an organization that provides counseling, treatment and support for children with cancer and blood disorders; and swung golf clubs to benefit the Ernie Els Gold Autism Association. In addition, Mandelbaum Salsburg employees regularly form a team to participate in the "Annual Mayor's Run/Walk to Break the Silence of Ovarian Cancer."

Now that it is autumn, the Mandelbaum Salsburg Charity Committee is gearing up to match its successful 2011 holiday collection drives, which resulted in the donation last year of hundreds of coats, toys and food items to needy families in the northern New Jersey area.

In addition to supporting outside organizations, Mandelbaum Salsburg takes care of its own. Since 2001, the firm has sponsored the "Irving Mandelbaum Scholarship Fund," named in honor of the firm's founding member. Each year, the firm's partners contribute to the fund, which provides scholarships to the children of employees for college and other post-high school education.

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