

Corporate Communiqué

Business Resolutions - Start the New Year Right

By Bernadette L. Puzzuole, Esq.

Just because we've already started 2010 doesn't mean it's too late to make some New Year's Resolutions – for your business. Here are the top 10 New Year's resolutions you should consider for your business in 2010, listed in no particular order.

Know your role in your business. A recent federal court decision in Pennsylvania imposed personal liability on a member of a limited liability company because, in his dealings with a vendor, he failed to say he was acting, and failed to sign the vendor contract, as a representative of the company. When someone decides to operate a business as a corporation, limited liability company or limited partnership, it is typically for two basic reasons: 1) to obtain favorable tax consequences for the income generated by the business; and 2) to avoid personal liability for business obligations. Owners can lose that liability protection, however, by failing to act consistently with their role in the business. This can mean having appropriate titles on business cards, and signing documents appropriately. If you're not sure what you should be doing to avoid personal liability for business obligations, now is the time to get your role clarified.

Calendar your contract deadlines. If your lease or other agreements have an expiration date, or a date by which you must exercise an option to renew, you need to have not only that date, but a date perhaps 60 days prior calendared. This will give you time to consider if you want to extend the agreement or exercise the option, and to negotiate any open terms if you decide to continue the relationship. Having time to consider all ramifications of the decisions will lead to a wiser decision, and give you more bargaining power in negotiations.

Evaluate your contracts. If the meaning is murky, or the results unexpected, perhaps it is now time to have those contracts you (or a friend) drafted, or were downloaded from the internet, drafted professionally. If the contract is one you are provided, rather than one you drafted, now is the time to have it evaluated as well, so you know the effect, and may be able to negotiate alternative language. You'll pay more money to litigate the terms of a disputed contract than you will having it drafted.

Update your corporate records. Pennsylvania law requires that corporations have annual meetings of both the shareholders and the board of directors. The bylaws will specify the terms of office for the board of directors and officers. The failure to satisfy these statutory and bylaw requirements could be one factor a court would consider in deciding whether to hold individual shareholders liable for corporate obligations (or limited partners liable for partnership obligations when the corporate general partner did not satisfy its statutory and bylaw obligations). With limited liability companies, while there is limited organizational requirements, voluntarily creating and complying with an organizational structure and an operating agreement can reinforce that

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Rothman Gordon, P.C.
Attorneys At Law
310 Grant Street

Third Floor, Grant Building
Pittsburgh, PA 15219
(phone) 412.338.1100
(fax) 412.281.7304
www.rothmangordon.com

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the business is an entity, and the members should not be held liable for its obligations. Now is the time to review your corporate minute book or other business records to determine the date of the last officially adopted action. This may be in the form of a written consent or meeting minutes, but there are statutory requirements that must be satisfied to make each enforceable. In any event, if there are no records of an election or other official action for more than a year, now is the time to update those records to establish the paper trail necessary to preserve available protections against personal liability.

Evaluate your succession plan and/or buy-out agreements. In multiple owner entities, the partnership agreement, operating agreement or shareholders agreement may contain a procedure for buying out an owner, valuing an owner's interest, or dealing with the interest held by a deceased or disabled owner. These types of provisions are typically drafted when the entity is new. Over time, however, situations can arise that make the initial choice no longer the best choice. Just as an individual should regularly revisit his or her personal estate planning documents, business owners should regularly revisit the way the business is governed and how ownership can be transferred and valued, to be sure the original agreement still meets the owners' needs. If you are the only shareholder of a corporation, or member of a limited liability company, this issue may be irrelevant. You may nonetheless want to consider succession planning, so that your ownership interest in the business can be passed to a child, other relative, friend, or even employees over time, to ensure you are compensated for your investment in the business, but without significant tax consequences.

Update or create employee handbooks. Does your employee handbook address social networking, e-mail and internet use? Does it specify who owns work your employees create on the job that provides a benefit to your business? Have you evaluated new state and federal laws (e.g., the mini-Cobra law in Pennsylvania) to determine if they need to be referenced in the agreement, or a policy adopted to ensure compliance? If your employee handbook does not address these issues, or if you don't have an employee handbook, you may find yourself in litigation over employment issues that could have been avoided.

Evaluate your insurance coverage. Having the right insurance in the right amount is a tremendous benefit when problems develop in a business. While general liability insurance is typical, your business may benefit from professional liability insurance, product liability insurance, or employment practices liability insurance.

Lost profits insurance (for situations where you cannot operate, for example, because of a fire) is something you may want to consider. Directors and officers insurance coverage also protects your board and officers against liability for decisions made in good faith. Additionally, the amount of coverage originally appropriate may now need to be upgraded to address business growth. Meet with your insurance agent to evaluate your current coverage and whether it needs to be changed.

Tax Planning. While your business tax returns may be professionally prepared, are you taking advantage of all your tax professional can provide? Changes in your business over time may suggest new strategies to reduce taxes. Pension, deferred compensation and fringe benefit policies should all be evaluated. With anticipated changes in the tax laws upcoming, now may be the time to decide if there are ways to increase your business' bottom line by decreasing the tax it pays. A few hours with a tax professional can yield years of tax savings in the future.

Make sure all necessary registrations are in place and current. For example, have you protected your business' proprietary information appropriately? That may require patent, trademark or copyright registration, or confidentiality agreements with your employees and third parties. Have you developed a unique logo that needs to be protected? Are your business licenses up-to-date? If you and your employees require licenses or must be registered with some governmental agency, are those licenses and/or registrations current? Do you have employees subject to immigration restrictions that need to be reviewed regularly? You should annually review existing registrations and licenses, and calendar when each expires or needs to be renewed, as well as determine if anything new should be registered.

Evaluate your employment and contractor relationships. Many businesses engage both employees and independent contractors at the outset to provide services for the business. Over time, as people become more experienced in a job, or the nature of the business changes, the original relationship may have changed, without a change in the work status. The contractor who was hired in 2000 to provide 10 hours of service a week and had other clients, may in 2010 be providing 40 – 50 hours per week in services exclusively for your business, and dropped those other clients. If that's true, he or she may now need to be treated as an employee, and be paid overtime. The liability to a business for mischaracterizing an employee as an independent contractor can be substantial. It may be time to re-evaluate each of your employment and contractor relationships to make sure the original designation is still correct.

Making some or all of the above resolutions for your business won't guarantee a successful year, but it should prevent unnecessary and potentially damaging surprises as you go through the year. "An ounce of prevention is worth a pound of cure" has been good advice since Ben Franklin stated it many years ago, and applying it to your business situation in 2010 should bring positive results.



Bernadette Puzzuole is an attorney in the Real Estate and Corporate Departments. She has represented clients in organizational and corporate issues, as well as real estate transactions. Bernie can be reached at (412) 338-1129 or bpuzzuole@rothmangordon.com.

com.

Understanding the Fair Labor Standards Act (FLSA)

By Cami L. Davis , Esq. and John W. Zatkos, Jr., Esq.

The Fair Labor Standards Act (FLSA) establishes minimum wage, overtime pay, recordkeeping, and youth employment standards affecting full-time and part-time workers in the private sector and in Federal, State, and local governments.

Minimum wage

Covered nonexempt workers are entitled to a minimum wage of not less than \$7.25 per hour effective July 24, 2009. Whether a worker is nonexempt (and therefore subject to the minimum wage provisions or both the minimum wage and overtime pay provisions) or exempt (and therefore not subject to those provisions) can be complicated and will be discussed in the next few issues of *Corporate Communiqué*,

There may be additional minimum wage requirements at the State and local levels. For example, Pittsburgh Councilman Ricky Burgess recently reintroduced a bill that would activate a wage floor for workers on the city payroll, on city contracts, and on city-backed development sites. When the legislation was first introduced in 2001, that floor was \$9.12 an hour. Mr. Burgess has stated the floor would be recalculated by the City Controller.

Overtime Pay

Covered nonexempt workers are entitled to overtime pay at a rate not less than one and one-half times the regular rate of pay for work performed beyond 40 hours in a workweek.

Record Keeping

Employers are required by the FLSA to keep records on wages, hours, and other items, as specified in U.S.

Department of Labor recordkeeping regulations. Record-keeping is usually not odious as most of the information is generally maintained by employers in ordinary business practice. There is no standard form for records and time clocks need not be used.

With respect to nonexempt employees, who are subject to the minimum wage provisions or both the minimum wage and overtime pay provisions, the following records must be kept:

1. Personal information, including employee's name, home address, occupation, sex, and birth date if under 19 years of age;
2. Hour and day when workweek begins;
3. Total hours worked each workday and each workweek;
4. Total daily or weekly straight-time earnings;
5. Regular hourly pay rate for any week when overtime is worked;
6. Total overtime pay for the workweek;
7. Deductions from or additions to wages;
8. Total wages paid each pay period; and
9. Date of payment and pay period covered.

Overtime, minimum wage and records required for exempt employees differ from those for nonexempt workers. Over the next few issues of *Corporate Communiqué*, we will discuss nonexempt vs. exempt employees; violations to watch for concerning nonexempt employees; and violations to watch for concerning exempt employees.



Cami Davis is an associate with Rothman Gordon in the Labor and Employment Law and Employment Litigation Departments. While Cami concentrates her practice on litigation, she works with clients on a variety of issues, including counseling related to employment policies and practices, employment discrimination, employment agreements, wage and hour issues, unemployment compensation and other human resource matters. Cami can be reached at (412) 338-1127 or cldavis@rothmangordon.com.



As an attorney in the Workers' Compensation & Social Security Disability Department of Rothman Gordon, John Zatkos works with workers' compensation clients, although his background also includes experience in civil litigation, Bankruptcy, and Social Security and class action litigation under the Fair Labor Standards Act. John can be reached at (412) 338-1132 or jwzatkos@rothmangordon.com

Defense Appropriations Bill Passed by Congress Includes COBRA Subsidy Extension

By Alan C. Blanco, Esq.

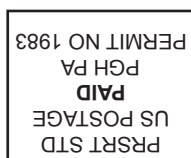
A bill regarding the Department of Defense Appropriations Act, 2010 may seem a strange thing to reference in our newsletter. However, in a last minute move, H.R. 3326 was amended to include an unemployment insurance extension and a six month extension in the maximum COBRA premium subsidy period (from 9 months to 15 months). H.R. 3326 also extends eligibility for the subsidy for two months, to include job losses up to and including February 28, 2010, and includes transition period relief and new notification requirements for health plan administrators. President Obama signed the bill on December 19, 2009. Employers should be careful to use COBRA notices that comply with the new law and reflect the revised current dates. Forms previously used may no longer be compliant.

COBRA, which stands for Consolidated Omnibus Budget Reconciliation Act of 1985, applies to group health coverage by employers with 20 or more employees and generally provides an employee with the opportunity to continue the employee's group health plan coverage for a period of 18 months after a loss of coverage. The Stimulus Package, signed by President Obama on February 17, 2009, included

changes that apply to employees who are eligible for COBRA who were involuntarily terminated from their employment at any time between September 1, 2008 and December 31, 2009. Through the amendment, it is now extended through February 28, 2010. To recap, the government is to subsidize 65% of the cost of the COBRA premiums for individuals who are eligible. Eligible individuals pay only 35% of the full COBRA premiums and the employer will be responsible for paying the remaining 65% of the COBRA premium. The employer will then be reimbursed, generally through credits against certain employment taxes, for the amounts paid on behalf of the eligible individual.



Alan Blanco's practice is exclusively in the field of employment law, representing primarily individuals, including executives and professionals, as well as unions and small and mid-sized businesses with regard to employment matters. Alan can be reached at (412) 338-1125 or acblanco@rothmangordon.com.



Rothman Gordon R.C.
310 Grant Street
Third Floor, Grant Building
Pittsburgh, PA 15219

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