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Making Your Harvest More Bountiful – Capturing Business Opportunities in Today’s Economy

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While many businesses have been adversely impacted by the turmoil in the economy, it is not enough to reduce overhead and await sunny days. Organizations should actively engage in reviewing their internal practices and procedures to avoid unexpected expenses, which may damage the organization’s financial position, and take advantage of the new opportunities arising out of the “down” market.

Unfortunately, a by-product of a poor economy is an increase in the number of lawsuits. Desperate or unscrupulous customers or suppliers often look to the “deep pockets” of a successful organization as a means of correcting its own poor decisions or replacing lost revenues.

Keep the Pests Out of Your Garden – Review Your External Contracts

Let’s face it, litigation is expensive, unpredictable and disruptive to all businesses. Although there is a time and place to initiate or defend a lawsuit, litigation should be avoided.

The first step to protecting yourself from external claims is to review your organization’s internal practices and procedures. An organization’s failure to implement its own practices and procedures can turn a strong (or winning) case into a mediocre, or worse, a weak (or losing) case.

In reviewing your organization's internal practices and procedures, the organization should be asking many questions. For example, does your organization have written guidelines for your employees describing what is and what is not acceptable new business? How much latitude do you give your sales staff to negotiate the terms of a contract? What training have you provided your sales staff in negotiating contracts? Is a procedure in place to review your contracts before they are signed?

While it is true that every successful organization offers its customers a unique product or service, when was the last time your organization reviewed the terms of its contracts and invoices to be certain that they have been drafted in contemplation of the unique products and services you sell to your customers? Do your employees understand the basic terms of your invoices and contracts? It may be the case that your customers, particularly those that may not have your best interests at heart, have a better understanding of the key terms of your invoices and contracts. The failure to align the terms of your external contracts with your internal policies and procedures may result in claims and expenses that may otherwise be avoided.

Pick Bad Apples Now, Not Later – Review Your Internal Contracts

A review of your organization's internal practices and procedures is also integral to protecting the organization from internal claims, such as claims by your employees and other shareholders. Unlike external claims, internal claims are more likely to threaten the efficiencies of your day-to-day operations and employee morale.

One of the most difficult decisions a manager will make is to lay off good employees. This decision becomes more difficult in a slow economy where good jobs are hard to find. If it is the case that your organization is forced to lay off employees, keep in mind that a poor economy is ripe for employment discrimination lawsuits. Prior to laying off employees you should be certain that you have fully reviewed your internal policies, including your employee handbook, your policies regarding overtime and vacation pay, and the current

state of the employment laws. In the event of a dispute, it is not uncommon for a former employee to contact a state or local regulatory agency to investigate its claims against the organization. An audit by a state or local regulatory agency, such as the Illinois Department of Labor, can prove to be a very disruptive and expensive undertaking.

Now may be the time for your organization to determine who its key employees are and whether any additional steps should be taken to retain them. Depending upon the situation, it may be necessary to modify incentive packages for certain key employees. In the give and take of negotiations, it may be appropriate to link your promise to provide a key employee with a more beneficial compensation arrangement with the key employee's promise to execute an employment agreement, which is designed to restrict the key employee from leaving your organization to join a competitor or soliciting your customers and employees.

Make Lemons into Lemonade – Succession Planning in a Depressed Market

While no one embraces a decrease in the value of their portfolio, the recent downturn in the economy provides opportunities for business owners who are interested in continuing or developing a succession plan.

If you have already initiated a succession plan, keep it up! You may wish to review your progress to make certain you are on track to achieve your goals and adjust your planning as needed.

If, however, you have not yet initiated your succession planning, now is a good time to get started. Low valuations should yield greater opportunities to transfer a larger portion of their business to family members. Prior to commencing succession planning, owners should be certain that all of the organization's governing documents, including shareholder, partnership or operating agreements, compensation agreements and employment agreements, have been properly coordinated to achieve the owner's goals. The failure to coordinate the governing documents may lead to unexpected results and potential conflicts. For example, one family member may ultimately own the parcel of real estate

where the operating business is located, but another family member may be the majority owner of the stock in the operating business.

To “super charge” your business succession planning, you should consider utilizing strategies that are designed to provide your family with a layer of creditor protection in the event of divorce, bankruptcy, business claims or malpractice claims. These strategies may include the use of a trust or other legal structures to retain ownership of the business for the benefit of the family member for his or her lifetime.

Generally, only public corporations are designed to continue in perpetuity. The single largest shareholder of a public corporation typically owns a small percentage of the corporation’s outstanding stock. Unlike family owned and closely held businesses, the death or disability of a public corporation’s single largest shareholder will have virtually no effect on the ongoing operations of the corporation.

Although family owned and closely held businesses may be designed to continue for multiple generations, these organizations are subject to many risks that may impact the transfer of the business to successive generations, such as the departure of a key employee or the inability or unwillingness of the next generation to join the organization.

Depending upon the owner’s level of activity, the family owned or closely held business will be transferred during the owner’s lifetime or at death. Owners who are actively involved in business succession planning are more likely to achieve their desired results with greater family harmony and reduced estate tax exposure. Conversely, owners who are only passively involved in succession planning are more likely to cause family turmoil and an increase in their estate tax liability, resulting in fewer assets distributed among the passive owner’s family.

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Business owners are often the first to identify new business opportunities in a changing economy. Steering clear of avoidable disputes helps keep your talents focused on running your business. While no one can accurately predict the date

of the economic turnaround, we do know that it will occur sooner or later. By implementing the recommendations outlined in this article, your organization will be in a stronger position when the turnaround occurs.

Please do not hesitate to direct any of your questions and comments regarding this article to Jonathan W. Michael or Jeffrey D. Warren.

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