



Legal Considerations for Business

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Introduction

There is no simple calculus which factors in all relevant elements of the inherent uniqueness of the business personality. Nor is there a litmus test to be apply which identifies the company's need for professional legal services. The universe of legal considerations applies equally to all forms of business association, all sizes of companies, and applies all of the time. A small company may not realize the potential legal significance of what may otherwise be considered a minor and non-causal business decision. On the other hand, the management of larger companies is usually more experienced with issues having legal implications, the larger company frequently has more at stake, and consequently can more easily justify the application of professional legal resources. This Thumbnail is a companion to a presentation entitled Managing Company Growth and is intended as a brief overlay of common situations having legal exposure, where timely application of professional legal services can significantly improve the legal outcome and improve the overall legal posture of the company.

Form of Business Entity

When a business is created, it has form. Each form of business association from the Sole Proprietorship where you are the company, to Partnership where ownership is shared amongst a group, through the more sophisticated limited liability creations of the Limited Partnership, Corporation (Open/Closed) and the newer Limited Liability Company (LLC) and Limited Liability Partnership (LLP), each has significantly different ownership, control and tax characteristics. Proper selection of the business association can provide the business entity a compatible structure through which to operate. When a company grows or evolves, so can its form of business association. Legal professionals experienced in business structures can recommend, create and implement the appropriate business association for a specific situation.

Common Pitfalls

The poor track record of new business failure is attributed to numerous factors. The failure to plan or to document decisions can lead to a disintegration in business structure and contribute to

missed or masked opportunities. Seemingly casual decisions made early in the business's life, if left unchanged, can come back to haunt with a vengeance. Unlimited or non-expiring personal guarantees made by the business participant can lay dormant for years while retaining its legal teeth and continue to make the participant personally liable on debts or undertakings years after the original guarantee was long forgotten. The related situation of executing supply contracts and leases or acquiring services in a personal capacity can result in similar deferred personal liability. Frequently, after a period of business success, the company has established a favorable credit history sufficient to negate the continuing requirement for the personal guarantee. Unfortunately, memory fades and occasionally the participant is not longer associated with the company when legal enforcement action on the guarantee presents itself. A triad of commonly misunderstood concepts of the distinction and legal significance of 1) ownership, 2) management control, and 3) compensations have been responsible for the creation of countless unworkable business situations. The use of professional legal services early in the business formation cycle can protect against creating a future untenable situations.

Sometimes a new company will launch financial investment only to learn that bona fide claims of copyright and trademark infringement complicate and heavily prejudice the future. A new company, through unbounded trust or naivete, may fail to protect its valuable commercial information and trade secrets which permits this valuable information to be broadly available or accessible to employees or others who do not have a legitimate need to know. Even the smallest company has information which is valuable to its competition. Common examples are pricing methodologies, client lists, competitive philosophies, technical techniques, inventions, and other intellectual property. Safeguarding the company's commercial valuable information is crucial, especially when the information is stored in electronic form or is proliferated through a computer terminal or over a computer network. Although unauthorized access to computer criminal statutes may provide some a deterrent, forms of employee tampering or unauthorized encryption to company data may not give rise to criminal prosecution. It is far better to devise and implement reasonable physical and electronic protections for a company's valuable commercial information. Sometimes a company has produced a commercially viable invention or product, only to learn to its surprise that their employment agreement failed to assign employee inventions to company. The company does not have the intellectual property it had thought. Imprecisely drafted agreements can also be responsible for similar disappointments. If the control of intellectual property is a necessary element for company success, appropriate agreements should be prepared and implemented.

Business Areas

Company's business areas vary widely and may require numerous licenses. In addition to the usual business licenses, sometimes product licenses and distribution agreements must be negotiated before business can proceed. Considerable research may be necessary before the full breadth of the undertaking becomes apparent. Early considerations of short or long-term marketing objectives, geography and the nature of the business offering, whether product, service or both are necessary to develop a comprehensive business plan. Fundamental of the business strategy provides the necessary glue to bind loosely fitting business elements. Sometimes licencing an existing product or products is desirable. Negotiating a franchise agreement is a viable approach to quickly establishing a credible business presence. In all these areas, competent legal assistance can identify

areas of concern and ensure the client understands all of the attendant risks.

Operational Structure

At the heart of any company are key functions and personnel which must be perpetuated. Operational structure not only includes key functions and personnel but provides the mechanisms for information distribution and exercise of control. Human resource management is necessary and must conform to the Fair Labor Standards Act (FLSA), the American Disability Act (ADA) and other statutes which proscribe employment and facility mandates. More than one company has learned that salaried personnel are not categorically exempt from overtime pay. As a business grows administration complicates with issues involving hiring processes, employment discrimination (real, perceived or wholly imagined), on-the-job injuries, accommodation of injured or disabled employees and even the unfortunate but necessary discipline and termination processes emerge and gain significance. All have legal implications. Financial policies and procedures as well as billing and collection processes become institutionalized. Asset protection and risk management become part of the operational structure. Unfortunately, more than one quick and easy solution to a business problem or exploitation of a business opportunity has subjected the unwary to potential violation of statute.

Continuity

Continuity planning is critical. Business continuity involves long-term facility's arrangements through leases or purchase where expansion or contraction will not be cost prohibitive. Similarly, longevity for product and services licenses must be cost effectively maintained. A business plan is a vehicle which may help identify areas for needed continuity planning. Management continuity is attained through specially structured employment agreements with key personnel. Controlled access to the company's trade secrets through confidentiality and non-disclosure agreements protect the business's commercially valuable information from compromise, loss or dissipation. A properly drafted covenant-not-to-compete agreement is a valuable legal instrument to discourage the spawning of competition from within or capitalizing of information learned while in your employ which would be valuable to your competition. Covenants not to compete must be carefully drafted to maximize enforceability.

Succession planning addresses how to fill the inevitable void in key management or technical positions which become vacant as a result of resignation, termination, retirement, disability or death. A company must recognize its dependence of this talent and develop a plan to maintain it. Frequently, employment contracts provide longevity leverage over key and potentially key personnel. Employee training and cross-training are necessary to maintain a level of assurance that necessary talent and skill is maintained and available. Legal vehicles such as profitsharing plans and buy-sell agreements provide organized structure for discouraging shifts of company critical talent or ownership and sometimes can serve as incentives to remain with the company for extended periods. These agreements can provide needed insulation from business disruptions due to death, divorce, disinterest and can even provide sometimes invaluable methodologies for ousting irascible or destructive partners or shareholders. Properly drafted consultant agreements can provide a conduit through which to acquire necessary talent for transactional or short-term, stop-gap purposes.

Joint Relationships

At some point a company may desire or need to develop a relationship with another business entity. Typically this comes about because of a need by both entities to cooperate in achieving a common and mutually desirable goal. A common event is technical teaming to transfer a technology or transition a technology from research to product where both entities contribute needed elements. Sometimes, companies enter into licensing agreements to acquire necessary products or technologies. In addition to the more traditional licensing of intellectual property, Cooperative Research and Development Agreements (CRADAs), Memoranda of Understanding (MOU) and Memoranda of Agreement (MOA) (basically the same as MOU) are legal instruments which control technical cooperative arrangements with federal government agencies, federal laboratories or military services. Each of these unique relationships are grounded in statute and regulation and competent legal professionals can assist in preparing and negotiating these ventures.

Special Situations

Occasionally, a company or its personnel may become the subject of an administrative adverse action which may involve some “privilege” as distinguished from “right” which is granted by the government such as a license, access or security clearance. These proceedings are highly technical and require special talent. There is a broad range of potential outcomes which include issuance, suspension, revocation of the license, access or clearance. Sometimes conflicts of interest arise which require professional attention to minimize future risk.

Government Contracting (directly or indirectly) is a business undertaking which involves very complex and frequently illogical rules. Otherwise, customary and common business practices may be violations of government contracting statutes and regulations. Other common areas of business risk with government contracting involve assessing who is underwriting the technical and cost risk of an undertaking. Placing competent legal professional resources effort up-front can avoid undesirable contracting structure and their negative downstream consequences. Understanding the intricate rules of government contracts is indispensable to prevent untoward results. Prior actions or inattentive management decisions may escalate into defective pricing situations. You must completely understand the company’s obligation for performance and whether the company can perform as contracted.

National Security Contracting

Sometimes a company intends to expand into the national security business sector. This is a complicated and time-consuming endeavor since in order to perform federal security classified work, it cannot do so without appropriately security cleared personnel which are individuals who possess a Personnel Security Clearance (PCL). The company cannot sponsor employees for a security clearance without having a classified contract with federal government agency or subcontract with a cleared contractor to perform security classified work. This dilemma is challenging to address. There is a limited range of approaches to address this situation. The company may choose to hire someone who already possesses the necessary active security clearance, hire a recently discharged military member who possessed a security clearance, a military reservist

who possess a security clearance as part of his reservist activities, recruit security cleared employees from another company, or develop a cooperative relationship with a cleared company who sponsor your company employees to work on their classified contract. Additionally, there may be a unique government program for the necessary sponsorship such as the National Security Agency's Provisional Industrial Security Approval (PISA) Sponsorship Program.

However, obtaining the necessary security clearances is a lengthy process. The employee completes a detailed personal history hardcopy SF-86 form or its electronic version, the required investigation and adjudication. This entire process can take weeks to months. Only after a favorable security adjudication will a security clearance be granted. Some Special Assess Programs (SAP) and Sensitive Compartmented Information accesses may have other additional security processing requirements such as Counter Intelligence and/or a full Life Style polygraphs. In addition to security clearances for the company employees, the company's senior executive must also be security cleared at the same level as the classified contract and the company must be granted a Facility Security Clearance (FCL) and designate a cleared individual to perform the Facilities Security Officer (FSO) function.

Summary

The sound application of competent legal services to businesses, regardless of size, can prevent undesirable legal consequences and does add value. The more diverse, technical or complex the business undertaking, generally the greater the need for professional legal services and the more substantial the benefit. Assisting a company navigate the national security landscape requires knowledgeable and experienced counsel.