SPECIAL REPORT

LONG-TERM CONSIDERATIONS

Some key legal issues for middle-market companies

While your middle-market business may be thriving, you must act to preserve and protect your accomplishments with an eye on the horizon. Here are six legal matters you should be thinking about and for which you should have a plan in place.

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▶ Protection of proprietary assets: As you find the right talent to join your organization and develop intellectual property and other proprietary assets, your business should take steps to protect its interests, including making sure key employees enter into protective employment agreements.

Employment agreements not only spell out the terms of employment and compensation, but they also provide noncompetition covenants; employee, customer and supplier noninterference covenants; confidentiality and trade-secret protection provisions; and intellectual property ownership rights.

Because noncompete covenants are generally looked upon disfavorably by courts, it's important to use a well-crafted employment agreement to maximize its enforceability and protect your proprietary interests.

▶ Executive retention: It's important to keep talent through sound employee-retention and -incentive initiatives. For example, consider offering a direct or indirect ownership interest in the business through profits interests, equity-appreciation rights, employee stock ownership plans, restricted stock and stock options.

Each method has its own advantages and detriments from legal, tax and cash-flow perspectives. In any such arrangement, it's important to include buy-back and forfeiture provisions to protect against the untimely or unexpected departure of a key employee.

▶ Succession planning: There are many uncertainties related to your business, but here is one certainty – you are not going to live forever (no offense, Ted Williams). A good starting point for addressing succession planning is establishing a buy-sell agreement that provides a road map for the buyout and funding of departing equity holders as a result of death, disability, termination of services or other triggering event. As set forth below, each equity holder also should have an effective estate plan in place that contemplates and works in conjunction with the buy-sell terms.

▶ Minimizing taxes: There is nothing wrong with structuring your business and personal affairs to minimize taxes to the fullest extent of the law. While you should not let the tax tail wag the dog, effective tax planning is critical to any successful business owner. That advice applies across the board, from minimizing taxes through operational structures, compliance positions, investment vehicles and retirement plans, to effectively structuring business sales and acquisitions and minimizing estate taxes.

▶ Estate planning and creditor protection: Estate planning touches on succession planning and minimizing taxes. For instance, who do you want to receive your business when you are gone? Do you want to separate the control (voting interests) from the economics (nonvoting interests) of your business when making your decision? Would you like to protect your business from your and your heirs' future creditors and keep your business from becoming a marital asset?

Strategic decision-making coupled with the proper legal framework can allow your business to grow outside of your and your heirs' taxable estate and has the potential to prevent your business from being cut nearly in half by estate taxes. Estate planning is not just about a will and power of attorney; it's a sophisticated process that incorporates trust ownership of business interests and provides for harmony in the transition of your business to multiple generations.

▶ Administrative and regulatory compliance: There are ever-increasing government rules and regulations that can catch even a well-run business off guard. Failing to comply can cripple your business through fines, taxes, interest and penalties as well as adverse publicity and nonmonetary sanctions. Do not put your head in the sand about Obamacare or any other regulation governing your industry. Face reality and control your own destiny – before someone else does. If necessary, hire a compliance manager to institute compliance measures and polices, and to interface with regulatory authorities. It will cost you money in the short term but will be a worthwhile investment for the long-term survival of your business.

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