

BUSINESS LAW NOTES

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Our law firm has provided exceptional legal services to clients throughout the state and the U.S. for more than 50 years. A full-service firm founded in 1955, we have built a reputation for helping clients solve difficult problems with sound counsel, sophisticated analysis and superior performance. A hallmark of our firm is personalized client service. Recognizing that each of our clients has a unique set of issues, objectives and needs, our firm is committed to individualized attention and works as an integrated team to respond to our clients' needs.

We serve diverse clients, including Fortune 500 companies, government agencies, professional associations, closely held corporations, limited liability companies, partnerships and individuals.

ASSET PURCHASE VS. STOCK PURCHASE: SOME ADVANTAGES AND DISADVANTAGES.

F. Stephen Glass

Early in the process of buying or selling an existing business, both Buyer and Seller must come to an agreement about how the transaction will occur – that is, will the transaction be a purchase of the assets of the business or a purchase of the all of the stock (or membership interests in the case of an LLC) of the business? In an asset purchase, the Buyer purchases the selling business' assets, including facilities, vehicles, equipment and stock or inventory, while in a stock purchase, the Buyer purchases the selling company's stock so that Buyer will own the business rather than just its assets (and liabilities).

Tax aspects are the main reason that C corporation Sellers usually prefer to sell their stock, while Buyers prefer to buy the assets (less the liabilities). In a C corporation asset sale, Seller will be taxed twice (1) the corporation will pay tax on any gains realized when the assets are sold, and (2) then the shareholders will pay capital gains tax when the corporation is liquidated. In contrast, if Seller sells the stock, Seller will pay capital gains tax on the profit from the sale, generally at the 15 percent long-term capital gains rate (through the end of 2010).

However from a Buyer's perspective, an asset purchase will usually be preferable. In an asset purchase, a Buyer's tax basis for depreciation is the purchase price allocated to the transferred assets. In a stock sale, the tax basis of the stock is "stepped up" to the purchase price of the stock being purchased. However, the Buyer receives whatever tax basis the Seller had in the assets. If Buyer had already depreciated some of the assets down to zero, Buyer cannot claim any more depreciation deductions on them. It is easy to see why a Buyer would much prefer the stepped-up basis of an asset sale.

One thing Seller should keep in mind when negotiating with Buyer regarding the form of the transaction — whether the deal will be a stock sale or an asset sale — is that Seller's increased taxes from an asset sale will usually be greater than the savings that Buyer would get from the sale. A stock sale usually results in the lowest total amount of taxes being paid to the IRS, and the most money in the hands of the parties. Seller should be able to take advantage of a stock sale by adjusting the sales price to reflect the future tax burdens. Also, if the parties use a stock sale, the IRS permits Buyer to elect to have the transaction treated as an asset purchase, i.e., Buyer can get a step up in the basis for the assets purchased if Buyer pays tax on the difference between each asset's current basis and its fair market value.

Generally, if Seller is an S corporation, there is just one tax to shareholders on either an asset or stock sale. If Seller is contemplating the sale of the business several years down the road, Seller may want to consider electing to be taxed as an S corporation now. By doing so Seller can usually eliminate the double taxation on any appreciation after the date of the switch.



BUSINESS LAW NOTES

Recent Employment Law Cases

F. Stephen Glass

The U.S. Supreme Court has held that an employer claiming it did not violate the federal **Age Discrimination in Employment Act**, because a decision having an adverse impact on older workers was based on a "reasonable factor other than age" has the burden of actually proving that defense at trial. This ruling will complicate and make more expensive an employer's defense of a disparate impact age discrimination claim. (Meacham v. Knolls Atomic Power Lab., Inc., June 2008)

EEOC sues The Cheesecake Factory for same-sex harassment of men, claiming that it subjected a class of male employees to a sexually hostile work environment at its Chandler, Arizona, store by permitting them to be repeatedly sexually harassed by groups of other male employees. In a suit announced July 10, 2008, the EEOC claims that the Cheesecake Factory failed to address the harassment even after the male employees complained to management.

Louisiana enacts the latest "bring your gun to work" law prohibiting employers from restricting their employees (or other guests and invitees) from bringing guns onto their parking lots. The law, signed on July 2, allows persons who may lawfully possess firearms to transport or store their firearms in a locked, privately-owned motor vehicle, "in any parking lot, parking garage, or other designated parking area." Employers and business entities are allowed by the Louisiana law to adopt policies requiring that firearms be hidden from plain view or kept within a locked case or container within the vehicle. The

measures contain other protections for employers who wish to restrict access to its parking area if they provide for other means of firearm storage or an parking area where vehicle storage of firearms will be permitted. And the law expressly does not apply to company vehicles used by employees in the course of employment, to worksites where firearm posses

sion is currently restricted by law, and other exceptions. Moreover, no monetary penalties attach for violations of the law, and the statute provides for certain other protections from liability.

Does your company have a current policy regarding firearms on the work premises?

10th Circuit Court of Appeals: Multiple racial incidents supported hostile environment claim. An African-American employee presented sufficient evidence of a racially hostile work environment, ruled the Tenth Circuit. The employee claimed the harassment began in 1995 and over the years included racist graffiti on his locker and on restroom walls; racist cartoons posted on company billboards; overhearing another employee refer to an African-American manager as [expletive deleted] and being called "boy" in the presence of at least two other employees. The employee claimed he complained after each incident and although the graffiti was cleaned up or removed, there was no investigation to find the perpetrators or at least no action was taken against the perpetrators. In 2003, after finding a life-size noose "prominently suspended from a large industrial clock," the employee reported the incident and ultimately filed suit. While the employee was not "subjected to racism on a daily basis," there was sufficient evidence to support his hostile environment claim. A reasonable jury could find the complained-of incidents were calculated to demean or intimidate African-American employees. Further, there was a triable issue as to whether the employer condoned or tolerated the creation of the hostile environment, in that it knew or should have known about the alleged harassment and failed to remedy it (Tademy v Union Pac Corp., 10th Cir, April 1, 2008).

8th Circuit Court of Appeals: No reasonable belief that single, sexist comment amounted to harassment. The employee alleged that she was subjected to unlawful conduct when she assisted a coworker in filing a complaint based on a single, sexist comment made to the coworker by a manager. The Eighth Circuit concluded, however, that no reasonable person could have believed the single comment amounted to unlawful sexual harassment. (Brannum v Missouri Dept of Corr., 8thCir, March 3, 2008).



BUSINESS LAW NOTES



CONGRATULATIONS TO OUR CLIENTS!!

Barry Doyle and **Barry's Cafe** won the National Restaurant Association's "Good Neighbor Award" for 2008. He will represent North Carolina in Washington, D.C. in September at the national awards ceremony. Barry's Café, located in the Swift Creek Shopping Center, is renowned not only for its food but also for its unselfish efforts to feed fire fighters and emergency personnel. His emergency food service is the subject of legends. Barry Doyle is truly one of this world's great guys!

Wendy Coulter has been named a 2008 Impact Women Business Owner by Business Leader Magazine. The awards are presented to recognize the outstanding leadership of the selected women not only in their professional fields but in their communities as well. Wendy is a very talented lady known also for her community service. For more information regarding Hummingbird Creative Group, visit their Web site at www.hummingbird-creative.com.

THE CLICK OF DEATH

(The Brave New World of E-Signatures)

By M. Blen Gee Jr.

Most people are familiar with online purchases with credit cards, Paypal and similar methods of payment. Increasingly, commercial contracts are being entered into entirely electronically. There is a tendency to think of such electronic transactions as being limited to small matters with relatively little risk, especially if you can dispute the particular charge through your credit card company. However, under the current state, federal and international framework, almost any contractual relationship can be entirely electronic and "signed" by the click of a button. For example, Dell Com-

puters' financial arm leases computers to businesses based entirely upon an electronic document with an electronic signature.

Any commercial electronic contract must be examined with the same care as a written contract. The boilerplate in fine print is just as important for an electronic contract as it is for a paper one. Ask the same questions: Am I required to arbitrate or sue in another jurisdiction? Are the promises that the salesman made written in the document? Does the contract automatically renew unless I give several months' advanced notice? Are the default provisions unfair? Will I be required to pay attorney's fees and costs? Is there an unreasonably high interest rate on default? Are disclaimers or indemnity provisions overbroad?

Electronic commercial contracts should not be delegated to lower level personnel without direct supervision. For example, many vendors will attempt to require a personal guaranty of a corporate obligation. An unsupervised employee might fill in the name of the company's president and click "accept"! You will have the burden of proving that the employee was not authorized to electronically "sign" on behalf of the personal guarantor.

If mistakes are made, notify the other party promptly and take reasonable actions to correct the error. Return any goods or money received. This is especially important where orders are automatically processed without human intervention. The law is a little more forgiving, especially in North Carolina, for mistakes in this circumstance.

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JOHNSON, HEARN, VINEGAR, GEE & GLASS, PLLCTwo Hannover Square, Suite 2200
Post Office Box 1776
Raleigh, North Carolina 27602-1776**Your Business Lawyers Working for You****Phone: 919-743-2200****Fax: 919-743-2201****Email: jhvgg@jhvgglaw.com****Website: www.jhvgglaw.com****About the authors:**

M. Blen Gee, Jr is an honors graduate of the University of North Carolina School of Law. His areas of concentration include business and corporate law, including sales of businesses; business litigation, including arbitration and mediation; franchise law; automobile dealer law; and insurance company insolvency.

F. Stephen Glass is the author of *The Legal Handbook for North Carolina Businesses; Your Estate Planning and Administration Handbook; Limited Liability Companies Update 2004 (Formation and Operation; State LLC Law Issues; LLC Tax Issues; LLC Securities Law Issues; Special Uses of LLCs); Contract Preparation: Drafting Complete and Unambiguous Contracts; North Carolina Family Limited Partnership Update*. He is a frequent speaker at business law continuing legal education programs. His practice is concentrated in the areas of business, employment and corporate law, business succession planning and estate planning. He serves on the Cary board of Capital Bank.

BUSINESS TAX LAW**F. Stephen Glass****EBITDA: What is it??**

EBITDA is an acronym for "earnings before interest, taxes, depreciation and amortization." This concept is often used measure of the value of a business. However, its value as a measurement of the value of a business is sometimes questioned. Critics of this concept of business valuation often point out that it is a dangerous and misleading number, due to the fact that it is often confused with cash flow.

EBITDA is calculated by taking operating income and adding depreciation and amortization expenses back to it. EBITDA is often used to analyze a company's operating profitable before non-operating expenses (e.g., interest and other non-core expenses) and non-cash charges (depreciation and amortization).

