TEN WAYS BUSINESSES CAN LIMIT RISK AND AVOID LITIGATION

By: John Holcomb, Jr.

All businesses recognize the importance of limiting risk, but a surprising number of companies neglect to ensure they are effectively utilizing the law to limit risk. While we represent clients in all forms of business litigation, we also advise clients on ways to avoid litigation. Set forth below are ten simple ways businesses can shield against risk and lessen the likelihood of litigation:

(1) Proper entity selection:

An astounding number of businesses do not utilize the best entity structure for their operations. While a certain entity structure may be appropriate during a business’ formation, this structure may be less effective for the company as it grows. Substantial changes in the company’s operations can have a significant impact on tax savings and the limitation of liability to the company’s owners and officers.

As a company’s operations expand, it may be beneficial to set up subsidiaries for specific operations. Creation of multiple entities can help to avoid liability of the main company and its shareholders or members. Although relying on services like Legal Zoom to effectuate entity changes may seem cost effective, contacting a lawyer now relative to entity structure can save huge amounts of both tax and litigation money down the road.

(2) Written contracts

A quote famously attributed to the motion picture producer Samuel Goldwyn is: “A verbal contact isn't worth the paper it is written on.” One of the most common causes of business litigation is the failure of the parties to proper memorialize the duties and obligations of the contracting parties on paper. Usually, this is because the parties are either too busy to get down to the details, or because they have a past dealing relationship.

Neither of these excuses is worth the nightmare that a well drafted contract can help to avoid. Before any party performs on a contract, good care should be taken to ensure that there is a written memorialization clearly setting forth the duties and obligations of the contracting parties.

(3) Retention of attorney to review contracts

To save costs today, business owners often opt to utilize standardized contracts they find online for particular transactions. Web-based services which offer standardized documents are certainly useful and time-saving, but often these forms do not take into consideration specific needs or technicalities of the businesses involved or jurisdictional laws. Retaining an attorney to review contracts is therefore imperative, especially when you are dealing with a new client or business partner. It is only with an actual human set of eyes on the documents that the business’ needs can truly be met, and risk can effectively be reduced.
(4) Know your business partners / clients

Make sure you understand the intentions of your clients or business partners and properly gauge their ability to perform on a deal or contract. If a contract or order seems to good be true, it probably is. If you do not know your business partners well, the first step is usually to ask around in the business community about the reputation of the other party. From there, conducting some sort of a background check on the entity or at least doing a simple Secretary of State search to ensure the business is active will drastically help to limit risk on the deal.

(5) Ensure you have up to date employment contracts with your employees

California is an at-will employment state, meaning that under most circumstances either employer or employee can terminate the employment at any time. However, for most businesses it makes sense to have a written contract between the employer and employee setting forth the general responsibilities of the employee and expectations of the employer. Additionally, employers should consider whether they want to include an arbitration clause in their employment contracts.

KHS has extensive experience in helping employers and employees negotiate employment contracts. Experience shows that having written contracts helps to limit future litigation by setting forth written expectations of the parties. The employment contract should be updated and revised or at least revisited on a determined basis depending on the seniority or responsibilities of the employee.

(6) Make sure you have an employee handbook which is reviewed or revised yearly by an attorney.

Every company should have an employee handbook and provide it to all employees. The handbook is a very important tool for both supervisors and lower level employees. It sets forth employer expectations and also provides statements of compliance with federal and state laws and regulations. It is an especially important tool for stating compliance and reporting procedures relative to discrimination and harassment.

KHS is involved in many employment lawsuits wherein employers have outdated handbooks or no handbooks at all. This can be detrimental to the defense. Oftentimes, the only handbook an employee ever received was on the date of employment. When a dispute arises in these situations, all an employer has to rely upon is an outdated handbook which does not conform to today’s standards.

Maintaining a current handbook is essential to employers and an attorney should be consulted with on a yearly basis to ensure that the handbook remains current.

(7) Conduct annual training of your employees

Employees should undergo training on a yearly basis relative to the prevention of discrimination and harassment. Some insurance carriers require this, but regardless of insurance, employers can save huge amounts of money down the line by ensuring that all employees are aware reporting procedures and of just what constitutes discrimination and harassment. Having clear reporting procedures in place is a huge benefit for employers as it helps to ensure that the company is doing its best to prevent discrimination and harassment, and it encourages all employees to report any types of unlawful activity that may arise in the workplace.

(8) Ensure proper forms of insurance for your operations.

Although nearly every business maintains some form of insurance, somewhat regular consultation with an insurance broker is essential to limit risk. As a company grows and changes, different insurance needs arise.
There are countless instances when litigation arises that the particular issue being litigated is not covered by insurance. This can be disastrous for companies and employees and should be limited as much as possible. Amongst other forms of insurance, most businesses should make sure they have business appropriate forms of errors and omissions, EPLI, workers compensation, and liability insurance. A good source to help with evaluating insurance is the following link from the Small Business Administration: http://www.sba.gov/content/types-business-insurance

(9) Maintain Comprehensive Intellectual Property Policies

Depending on the business, trademarks, copyrights and patents can be the most valuable asset for a company. Great care must be given in protecting and enforcing a company’s logos and other IP assets, especially when it comes to selecting the brand name and logo that you plan to expend substantial time, money and other resources to build.

For instance, KHS represents clients dealing with trademark infringement lawsuits, several of whom came to the firm after they selected their brand name and were later confronted with third party infringement allegations. In many of these cases, had the client and attorney initially conducted the necessary due diligence and analysis to identify potential conflicts, they could have saved thousands on litigation costs.

(10) Maintain Current Terms of Use and Privacy Policies for Company Website and Affiliated Social Media Sites

Businesses with a high amount of activity online expose themselves to an extensive amount of potential liability. They must be aware of issues pertaining to copyright and trademark, privacy laws, international e-commerce regulations, and so on. Accordingly, companies should have a comprehensive Terms of Use policy on their site, and in particular instances, have users expressly agree to the Terms. The Terms should include provisions that protect the company from misappropriation of its intellectual property assets as well as third party claims, particularly with respect to user generated content. If the site collects and uses personal information of users in any way, then it should have a Privacy Policy that defines exactly the information that is collected and the manner of use the company intends to make.