

Ten Planning Issues to Prepare a Business for Sale

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In today's competitive market, in Arizona and elsewhere, business owners are increasingly busy concentrating on the issues needed to make their business successful. Plans are made for marketing, manufacturing, distribution, customer service, financing and all of the other issues a business owner must address.

Unfortunately, this means the typical business owner may not address issues necessary to successfully sell a business until a prospective buyer has been found. This lack of planning and preparation can often delay a potential business sale, or result in the loss of a sale altogether. Doing the right things now, and on a continuous basis even if the owners have no present plan to sell, will mean more money and advantageous terms when it does come time to sell.

The following ten planning issues will help prepare the business for sale and reduce unanticipated problems that may arise when a prospective buyer begins investigating the business for possible purchase. Regardless of whether the business is operated as a corporation, a limited liability company, or through some other type of entity, addressing these issues now will not only help facilitate a sale, but may bring to light areas in which the business can be operated more efficiently and profitably.

1. The Accountant. If the company does not have a good accountant, get one. At least twice a year, business owners should confer with the company's accountant regarding the company's activities and results of operations. An experienced business accountant can share the wisdom acquired from other clients' experiences. For example, the accountant can ensure the business avoids costly mistakes over issues such as the proper collection and reporting of sales and excise taxes, and can help guide the owners through compensation and employment tax minefields. If not addressed early, unpaid tax liabilities can result in liens that may sabotage any prospective sale of a business.

2. The Lawyer. No matter what the size of the business, the company should have a lawyer with whom the owners can confer throughout the year, not just when a crisis arises. Such a lawyer should be pro-active, not merely reactive. The practice of "preventive law", the thorough review of, and consultation regarding, business operations and procedures, leads to litigation and dispute avoidance and cost savings. The Company's lawyer should also consult with other professionals who serve the business to bring a team approach and fast, responsive answers to business problems.

3. The Insurance Agent. Business owners should review a number of issues, at least annually, with a qualified insurance professional. Items to be reviewed with the agent include (a) the company's operations; (b) amount and scope of coverage for public liability, casualty, product liability, workers' compensation, and employment practices insurance; (c) the financial condition of the insurers; and (d) whether the premiums are competitive. This review should be

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done in person. Often, whether it's with the company's accountant, insurance agent or lawyer, in person discussions result in the exchange of better information and responsiveness.

4. Forms of Financial Statement. Upgrade the company's financials from compilation to at least reviewed statements. Also, keep in mind that public companies much prefer to acquire businesses that have audited financial statements. You should therefore have a cost/benefit discussion with the company's accountant as to upgrading to audited statements.

5. Confidentiality, Non-Disclosure and Non-Compete Agreements. The existence of confidentiality, non-disclosure and non-compete agreements are not only important considerations for a potential buyer, but are critical to the protection of the operating business. Long before a potential buyer comes on the scene, key employees having intimate knowledge of your customers, customer lists, methods of doing business, pricing and other similar proprietary information might be tempted to leave for a competitor or to establish their own competing business.

Even if a key employee has not left by the time the owners are negotiating for a sale of the business, the absence of a non-compete agreement can result in the killing of the deal or the transfer of some of the monies that would have been paid to the owners to the employee. For key employees, reasonable agreements covering confidential information, and, where applicable, non-competition after termination of employment, are highly desirable to both current owners and potential purchasers.

6. Protection of Intellectual Property. If a patent, trade name, trademark or copyright is important to the business, its owners should confer, at least annually, with a qualified intellectual property lawyer to see that they are doing all that is necessary to protect the company's investment and rights. For example, some patent owners, having fallen out of contact with their intellectual property lawyer, have lost their patents for failure to pay a required annual maintenance fee.

7. Human Resources and Employment Practices. Lawsuits and EEOC complaints seem to occur more frequently each day over issues such as sexual harassment, discrimination in hiring or termination, wrongful termination, wrongful elimination of job positions and refusal of the company to offer other duties to a partially disabled worker. These and other HR problems can turn a small fire into a major conflagration, with high legal costs, and exposure to potentially huge compensatory and punitive damage awards. In a proposed sale or merger of ownership interests, rather than a sale of assets, uncertainty over contingent liabilities in the employment practices area can quell a potential deal. Even in an asset sale, where the buyer is acquiring an in place work force to continue to operate, poor past employment practices can hinder a deal. It is imperative that business owners have policies in place and review their employment practices with a qualified professional to ensure they do not let inattention to these matters destroy a pending deal.

8. Assignment of Leases. Real property and equipment leases typically contain provisions restricting or prohibiting transfer or assignment absent the consent of the landlord or lessor.

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Usually, this consent can be obtained only upon satisfaction of certain requirements, which can cost time, money and sometimes kill the deal. This is especially true in the case of an asset sale, which will usually involve transfer of the seller's equipment and property leases. If the business leases real or personal property from a non-related third party, be sure these leases contain provisions permitting free assignment in case of a sale of the business, or at least impose only reasonable conditions concerning the financial strength of a proposed assignee and limit the right of the landlord to refuse to consent to the assignment. Negotiation of these lease provisions with a future sale of the business in mind will help ensure these agreements will not be the stumbling block to that sale.

9. Agreements with Third Parties. If the business depends on any key agreements with third parties (e.g. distributorship, license, franchise, sales representation, furnishing of a third party's requirements), make sure these agreements are in writing and protect against unreasonable termination. Business owners need to be sure that such agreements, like property and equipment leases, are freely assignable, or only have reasonable restrictions against assignment, and cannot be terminated upon a sale of the business.

10. Environmental Investigation of the Company's Facility. When a facility used by the company is an environmental unknown, or the company engages in operations that give rise to environmental concerns, negotiations regarding environmental contingencies and responsibility for clean-up costs, indemnifications and escrows are sometimes so difficult that the deal dies. Quite often, the buyer does not have time to delay the closing until all the environmental questions are answered and problems resolved to the buyer's satisfaction. Accordingly, whether the company owns or leases its facility, investigate the property now for the presence of hazardous materials, long before a sale is on the horizon, so that any problems can be dealt with in a timely manner and no surprises turn up during the buyer's investigation of the business.

Following the above suggestions will not only better position a business for sale, but will also enhance its opportunities for sale and protect its interests along the way.