

Briefings

VOLUME 3, ISSUE 1
WINTER 2009

TN TOP 5

Actions to Take When an Employee Departs

It is never easy when an employee leaves, regardless of who decided upon the departure. There are steps employers should consider taking to promote a smooth transition and abide by state and federal laws. Below are five things to take under consideration.

Ensure Prompt Payment. It is always best practice to pay a departing employee as soon as possible after their departure for any salary, commission, holiday or vacation pay or other benefits they may have accrued. In addition, if an employee makes a written demand for payment, an employer has only 24 hours to pay the employee before penalties and other consequences may result (including the right to attorneys' fees if a suit is brought).

Provide COBRA Information. COBRA is a federal law that gives employees the right to continue coverage in a group health plan following their termination or departure. COBRA only applies to employers with 20 or more employees, including self-insured employers. Employers and plan administrators are required by federal and state law to provide written notice of the right to continue coverage, along with notice of the cost of the coverage and how to apply for the coverage, within 44 days of the termination under federal law and 10 days under state law.

Property Recovery. Ideally, an employee should take all personal property with them upon departure. If there are other personal items of the employee remaining, they should be returned immediately and the employee should sign a written receipt of the items returned. The employer also has the right to the employer's property, including assets and information the employee had about the business.

Reminder of Obligations. The best time to remind an employee of obligations the employee has to the employer is at the time of termination. Obligations include such things as non-disclosure or non-compete agreements that were signed by the employee before or over the course of the employment. Presenting the employee with a copy and having them sign a receipt can protect the employer against future claims that the employee was "unaware" of such agreements.

Severance in Exchange for Finality. When an employee leaves, consult with an attorney to determine whether offering the employee a severance package in exchange for a release of all claims would be beneficial. This is especially important if the termination was contentious.

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Chris Renz and Bill Sjöholm, shareholders, contributed to this article. Chris and Bill can be contacted at crenz@tn-law.com or wsjöholm@tn-law.com, respectively.

Picking the Right Entity for Your Business

An LLC isn't the only option, but often it is the right one

Picking the right business entity is important when you decide to start a new venture. Picking the wrong entity can result in additional expenses and unintended tax consequences. For small and medium sized businesses, a general or limited partnership, sole proprietorship, limited liability company (LLC), S corporation (S corp) or C corporation (C corp) are the most common types of business entities.

The LLC is the vehicle of choice for many business entities today because it combines the organizational benefits of a corporation with the tax benefits of a partnership. It also limits the personal liability of its members, similar to corporations, because it is a separate legal entity and distinct from its owners. LLCs are created by filing Articles of Organization with the Secretary of State. LLCs have "members" rather than "shareholders," and there is no maximum or minimum number of members allowed. Members are not given "shares", but "units". The LLC is governed by an operating agreement or bylaws which outlines the relationship between the members and the LLC.

Filing Articles to create an LLC can be done in one day if you are willing to pay an expedited filing fee to the Secretary of State. Otherwise, the normal filing fee is \$160 and the LLC can be created through the mail in less than a week. As with any business entity, the Secretary of State requires an annual renewal, but if done on a timely basis, there is no fee. If you miss the deadline, you will pay a fee for reinstatement.

There are tax advantages to an LLC because it is taxed like a partnership. This is often advantageous in the first years of operation when the business may show losses associated with start-up costs. Profits or losses are not carried forward into later years, unlike a C corp. Although an LLC is similar to an S corp in that they both allow for limited liability protection and flow-through tax benefits, there are many more restrictions involved in an S corp, including: limitation on the number of shareholders;

only a single class of stock is allowed; and restrictions on who can be a shareholder, including U.S. citizenship restrictions for the S Corp. There are also income and payroll tax differences that are beyond the scope of this article and should be discussed with your tax advisor.

Determining the correct entity for your business is crucial to protect your personal liability and give you the greatest flexibility and tax benefits available. If you have any doubt about which entity would be best for you and your company, contact the lawyers at Thomsen & Nybeck and we can walk through the process with you to make sure you start your company off right.

Real Estate and the Right Entity Choice

When it comes to owning income-producing real estate, forming an LLC is almost always the right choice. Many lenders require that the owner of the real estate, and the borrower on the loan, be a single purpose LLC. That is, the LLC is to have a single purpose – to function only as owner of the property. The primary reason for this is to protect the bank and the loan from other business activities of the LLC. If the LLC has other business activities, and those activities result in loss to the LLC, they could bring down the LLC and force it into bankruptcy. The lender wants the property and the LLC to rise and fall on its own and not be tied to other business operations.

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Thomas R. Kelley, shareholder, contributed to the content of this article. Tom practices in the firm's transactional group with a focus in the areas of Business Law, Financing, Real Estate, as well as Estates, Wills and Trusts; tkelley@tn-law.com.

Five Considerations in Creating or Reviewing a Non-Compete Agreement

Employers typically want to restrict former employees from immediately going to work for a competing business. To do this, a covenant not to compete (also known as a non-compete agreement) can be used. In determining whether the non-compete agreement is enforceable, consider the following:

Whether something was given in exchange. In order for a competition restriction to be enforceable, "consideration" had to be given in exchange for that agreement. If a person has not received anything of substance in exchange for the promise to not compete, there is no consideration and the agreement is unenforceable.

When the covenant was signed. There is sufficient consideration where an employee is required to sign a covenant not to compete in order to commence employment. If the employee has already begun work when the covenant not to compete is signed, even if only days into the job, there needs to be additional consideration (bonus, raise, promotion) given for the agreement to be enforceable. There is no consideration if an employee is already employed and nothing further is given in exchange for the agreement; continued employment is not enough.

Reasonable size of restriction. The span of the restriction can be very subjective. The basic rule is that the restriction cannot be greater than what is necessary to protect the former employer's legitimate interest. Courts consider such things as: the relationship between the restricted territory and employer's current territory; the new duties/job of

the former employee and their similarity to the prior position; the amount of customer contact by the former employee; and the resources that had been furnished by the employer.

Reasonable time of restriction. The length of a non-compete agreement is also subjective and has the same basic rule of being no greater than necessary to protect the former employer's legitimate interest. Factors considered include length and time of restriction compared to length and time of the contract with the former employer. Each case is looked at independently, but as a reference, restrictions of up to three years have been enforced.

Remedies for breach. Where "the rubber hits the road" for non-compete agreements is what the consequences are if the agreement is broken. A well-drafted non-compete will allow the employer the ability to seek an order from the court stopping the former employee from continuing to breach the agreement. Whether or not damages and attorneys' fees are recoverable are often determined by the contract as well.

The law in Minnesota does not allow covenants not to compete to be blunt instruments. As a result, there are a number of variables that skilled legal counsel can help assess when putting such an agreement together or determining how to proceed in relation to an agreement into which parties have already entered. In order to determine how to proceed in constructing such an agreement or determining the enforceability of such an agreement, contact the professionals at Thomsen & Nybeck, P.A.

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Chris Renz, shareholder, contributed to the contents of this article. Chris concentrates his practice in the areas of general civil litigation, real estate litigation, employment litigation, construction litigation, and criminal law. Contact Chris at crenz@tn-law.com.

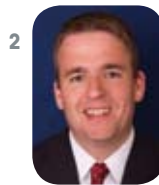
NEWS & NOTES



Thomsen & Nybeck, P.A. has launched its **new wind energy practice group**. The group is focusing on the representation of land owners, individually or collectively, in relation to wind projects. The firm's strengths in the areas of real estate, contracts and business formation make this new practice area a perfect fit. To kick off this focus, Thomsen & Nybeck sponsored a conference on alternative energy called "Bringing Renewable Energy Home," held at St. Olaf College on January 9, 2009. More information on the new practice group can be found at www.tn-law.com.



1 **Matt Drewes (1)** was named head of the Association practice group.



2 **Chris Renz (2)** and **Matt Drewes (1)** were named to *Minnesota Law and Politics'* list of Rising Stars.



3 **Gretchen Schellhas (3)** was named to the Who's Who in Family Law appearing in the February/March 2009 issue of *Minnesota Law & Politics*.



4 **Dennis Patrick (4), Ivory Ruud (5)** and **Jack Carlson (6)** attended and exhibited at the 54th Annual Minnesota Society of Certified Public Accountants Tax Conference in November.



5 The firm held its **16th Annual Association Seminar**, which yielded record-setting attendance of over 150 board members and management company representatives. Attendees received information and materials in a range of subjects helpful to management companies and board members of condominiums, townhomes and other common interest ownership communities.



6 In sporting news, **Deb Newel's** soccer team won its league championship and **Natalie Walz** completed the Chevron Houston Marathon in 3:54:32.

ATTORNEYS

This newsletter is presented to you by the attorneys of Thomsen & Nybeck, P.A.

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PRACTICE AREAS

Thomsen & Nybeck has in-depth experience and knowledge in the following practice areas. Call us at (952) 835-7000 to discuss your concerns or to determine if you have a case.

Business Law
Construction Defect Litigation
Corporations & Partnerships
Criminal Law
Employment Law
Estates, Wills and Trusts
Family Law

Financing Litigation
Personal Injury
Real Estate
Taxation
Townhome & Condominium Law
Wind Energy

"Large enough to be effective.
Small enough to care."