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So, is your "PLAN" to live FOREVER?

Top 5 Reasons for an entrepreneur to have a buy-sell agreement

Family businesses comprise over 80 percent of all business enterprises in the United States. Many of these businesses were formed by an entrepreneur who raised initial operating capital for the venture from "friends and family". Each of these so-called "family-owned businesses" face unique challenges that may threaten its continued success and sustainability, not to mention potential attacks upon ongoing family harmony. One of the most effective ways to insure the continued success of a family-owned business and minimize arguments at family picnics is for the owners to have a well drafted Buy-Sell Agreement.

A Buy-Sell Agreement is simply an agreement between a company or individuals to buy and the owners to sell their ownership (typically stock) in the company when certain things happen (a so-called "triggering event"). Typical triggering events include the retirement, death or disability of an owner, divorce (or separation), termination of employment, creditor issues, non-permitted transfers (whether voluntary or involuntary), or an irreconcilable disagreement among owners about the business and operations of the company. For entrepreneurs and other owners of a family business, a well-designed and thoroughly thought-out Buy-Sell Agreement can protect the parties and help ensure that the owners understand their rights and obligations to the business and to each other.

The two basic types of Buy-Sell Agreements are cross-purchase agreements and corporate redemption agreements. In a cross-purchase agreement, the remaining shareholders have an obligation to purchase the selling shareholder's shares using their personal savings (or life insurance). In contrast, a corporate redemption agreement requires the company to purchase the selling shareholder's shares from monies of the company. Cross-purchase agreements tend to be used in smaller companies where there are not too many shareholders; redemption agreements often work best where there are several shareholders. Each agreement has distinct advantages and disadvantages that need to be carefully considered before deciding which form is most appropriate.

Regardless of form, a Buy-Sell Agreement should include provisions that address multiple issues, including rules for managing and controlling the business, how distributions will be made to the owners, restrictions on transfer of shares due to retirement, death, disability or incapacity, divorce (or separation), bank-

continued from page 26

ruptcy and similar "life events", and how the dissolution of the business will be handled if the owners can no longer work together.

Five important reasons a business should have a Buy-Sell Agreement:

1 Facilitates Succession Planning upon the occurrence of a "Triggering Event". Because of the obligation imposed upon an owner to sell his or her stock upon the occurrence of a triggering event, a Buy-Sell Agreement enables the remaining owners to effectively prevent unwanted individuals from becoming co-owners in the company. The provisions related to such triggering events may differ significantly in agreements where the business owners are family members and as opposed to where the business owners are unrelated.

2 Ensures continued Harmony by Providing for Effective Dispute Resolution. Disputes are inevitable in every business. A Buy-Sell Agreement can help establish a dispute resolution process such as mediation, arbitration, selection of one or more independent "family advisors" or possible injunctive relief. Without such an agreement, ownership disputes could lead to lengthy litigation, drained financial and emotional resources, and result in the breakup of the business.

3 Provides Ownership Liquidity at an Agreed Valuation. Properly drafted Buy-Sell Agreements address the purchase price of and payment for the shares upon the happening of a triggering event. By establishing a price or setting forth the required method of valuing the shares to be transferred, family members can avoid costly and often uncertain negotiations between the selling and purchasing parties. In addition, a Buy-Sell Agreement can establish the terms of payment, provide a method of funding for the payment of the purchase price and provide liquidity to the family of a deceased, disabled or terminated shareholder.

4 Retains Ownership Value by Retaining Tax Advantages. One of the most important tax aspects of a family-owned business may be its status as a "pass-through" entity as a result of electing to be treated as an Subchapter S-Corporation for tax purposes. To preserve this favorable tax treatment, the stock in a S-Corp cannot be transferred to any person or entity that would cause termination of the so-called S Election. If the status as an S-Corp is terminated, the company will generally be precluded from electing similar treatment for five years. As a result, any profits distributed to shareholders during the interim period could result in a double tax and the pass-through of losses for shareholder-level reporting would not be allowed. A Buy-Sell Agreement typically restricts the ability of a shareholder to transfer shares outside of the current ownership group in a manner that would jeopardize the election to be treated as an S-Corp.

5 Fixes Value for Estate Tax Purposes. With the repeal of the Indiana Inheritance Tax effective January 1, 2013, and the new American Tax Payer Relief Act of 2012 which made the $5,000,000 (adjusted for inflation) estate and gift tax exclusion permanent, fewer family-owned business are impacted by estate and inheritance taxes which may significantly affect the transfer of ownership. However, estate taxes should remain a major concern for many successful family-owned businesses. Properly considered language in a Buy-Sell Agreement can set the value of the ownership interest being transferred for federal estate tax purposes. With a fixed estate tax value, the family owners are better able to plan and prepare for potential estate taxes at the death of a shareholder, although there are numerous standards that a Buy-Sell Agreement must satisfy in order to establish the estate tax value.

Probably one of the best arguments to be made for a business having a well-drafted Buy-Sell Agreement is to consider the economic and emotional consequences of not having one. With so much invested in making the business a success, it is imprudent to risk failure by ignoring the very basic assurances provided by through entering into such a document.

continued from page 19

TRADEMARKS

A trademark (service mark) is a word, phrase, symbol, or design that identifies and distinguishes the source of goods (services) of one party from those of another. Generally, trademarks or service marks protect brand names and logos used on goods and services.

Selecting a mark can be a difficult task, but doing it correctly can save an immense amount of expense and troubles down the road. The more unique and fanciful the mark, the less risk there is of inadvertently infringing another's rights, and the more likely that federal trademark registration can be obtained. Spending money up front to clear a mark before investing in printing branding materials is wise.

In the U.S., trademark rights automatically arise upon "first use" of the trademark, not just registration of the trademark with the U.S. Trademark Office. So, once chosen, use the mark properly in both form and substance. And, begin policing your marks against third parties that may begin using a similar mark on similar products.

PATENTS

A patent is a right granted by the government to an inventor for an invention. A patent holder has the right to prohibit others from making, using, selling, offering to sell, or importing their claimed invention. For an invention to be patentable under U.S. patent law, it must be both novel and non-obvious.

Novelty is generally understood to mean no single prior art reference (e.g., a patent or technical paper) teaches or discloses each element of the invention for which patent protection is sought. Non-obviousness is generally understood to mean that two or more prior art references cannot be combined to produce the invention.

For entrepreneurs, financial resources are usually limited in the early years of the entity. Thus, while it is desirable to create a patent portfolio providing comprehensive protection for your entire product area, this "patent everything" approach is rarely possible. A cost/benefit analysis is generally recommended to cost-effectively create strategic roadblocks for competitors. It is wise to evaluate the competitive landscape in light of your inventions in order to judiciously protect the more important aspects of your venture. Then, once your venture is safely in the black, you can re-evaluate your patent strategy and pursue additional roadblocks for your competition.

Understanding these issues, and dealing with them early, can minimize a lot of problems. Early planning can also deter your competition, save you money in the future, and allow you to continue to build on the goodwill developed in your products and services.