HMF UPDATE

HYDEN, MIRON & FOSTER, PLLC

Small Business Growing Pains: Some Legal Challenges of Expansion

by Guy W. Murphy, Jr.

Every politician, regardless of political stripes, knows to chant the mantra that "small businesses are the key to economic growth, job creation, etc." Whether or to what extent that is true is the subject of debate by economists. However, there is plenty of evidence that small businesses do create jobs in surprising numbers and respond to economic recovery faster than larger businesses. According to a recent report, in April of 2013 small businesses (1-49 employees) accounted for 42% of all newly created jobs in the country and two-thirds of that 42% were created by companies with 1-19 employees (Source: ADP, Inc., Moody's Analytics).

Owners of small business can react quickly to increased demand for their company's sales and services and many times that means adding personnel. This is a good "problem" to have but it increases the potential for new legal difficulties that do not exist for the smallest "mom and pop" start-ups. This article will identify some of those problems.

Increasing a company's number of employees can subject the company to a laundry list of federal and state employment regulations which exempt the smallest employers. For example, the Arkansas Civil Rights Act, which protects against discrimination based on race, religion, national origin, gender, or disability, does not apply to private employers with fewer than nine employees. Federal "Title VII," which prohibits similar types of discrimination, and the Americans with Disabilities Act only cover employers with 15 or more employees for 20 or more weeks of the year. The Age Discrimination in Employment Act of 1967 ("ADEA") protections against age discrimination cover those with 20 or more employees for 20 weeks of the year. The

Family and Medical Leave Act of 1993 ("FMLA") covers those with 50 or more employees for 20 or more weeks in the current or previous year. Finally, the Affordable Care Act's (nicknamed "ObamaCare") requirement of employee health insurance coverage only covers employers with 50 or more employees (compliance with this requirement may be pushed back to 2015).

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Little Rock (501) 376-8222 | Conway (501) 336-8822 | Hot Springs Village (501) 984-6366 | Pine Bluff (870) 536-8222 | Toll Free (800) 467-8297

To Sue or Be Sued? WHEN is the Question

by Kendall Sample

The first question that should be asked with regard to any lawsuit is: "What is the applicable Statute of Limitations?"

There is a limited amount of time to bring a legal action when you have been wronged or for someone else to claim you have wronged them. Statutes of Limitations ("SOL") are the laws that set the time limits for when a lawsuit must be filed or be forever barred.

Under Arkansas Law, the following SOL generally apply to common civil actions (see table below). Be aware that each individual cause of action requires analysis of the applicable SOL, including any exceptions that may apply. Laws are constantly changing; therefore, legal advice should be obtained as soon as a lawsuit is contemplated to determine when it must be filed.

Generally speaking, the SOL begins to run when the cause of action or "wrong" occurred. In rare circumstances however (such as the victim being disabled, on active military duty or a minor when the cause of action accrues), the SOL will not begin until such time as the person can bring their suit. Also, in cases where fraud can be proven in the concealing of the wrong, a party will not be held to the SOL until they learn of the wrong against them. Again, each situation should be researched and evaluated by an attorney to determine the applicable laws and exceptions to ensure your rights are protected.

Keeping good records of your transactions, including dates and copies of documents or electronic files, will assist your legal team in determining the applicable SOL. Good records also assist your in evaluating the available causes of action and the defenses available to you.

Working primarily, but not exclusively, in the areas of commercial and business litigation, as well as tax, probate, and contract law, Hyden, Miron & Foster, PLLC brings a wealth of experience to meet your needs. If you have any questions regarding a possible claim, contact our office for assistance.

Possible Claim	Statute of Limitations	Arkansas Code Reference
Injury to Person	1 year	§ 16-56-104
Libel	3 years	§ 16-56-105
Slander	1 year	§ 16-56-104
Fraud (specifically common law fraud and fraud and deceit)	3 years	§ 16-56-105
Injury to Personal Property	3 years	§ 16-56-105
Professional Malpractice	3 years (legal) 2 years (medical)	§ 16-56-105 (legal) § 16-114-203 (medical)
Trespass	3 years	§ 16-56-105
Collection of Rents	3 years	§ 16-56-105
Contracts	5 years for written contracts 3 years for oral contracts	§ 16-56-111 (written) § 16-56-105 (oral)
Collection of Debt on Account	3 years if not written or under seal	§ 16-56-105
Judgments	10 years	§ 16-56-114

Corporation or LLC? Differences to Consider (Other than Tax Treatment)

by Carrie E. Bumgardner

One of the first and most important tasks when starting a new business venture is choosing a type of entity. In the vast majority of cases, the choice will be either a corporation or a limited liability company (LLC). Which one is appropriate for a particular business depends upon many factors and must be determined on a case-by-case basis.

The tax treatment of corporations and LLCs is a key difference and must always be considered. However, it is important to understand the differences between corporations and LLCs that have nothing to do with taxation in order to make an informed choice.

CONTROL OF THE BUSINESS AND AFFAIRS

Control of a corporation's business and affairs is vested by statute in a board of directors. A board of directors can be dispensed with only in very limited circumstances.

LLCs may be controlled by all, some, or none of their members.

SALES OF INTERESTS

A corporation's shareholders may freely sell or transfer their shares of stock. Unless the shareholders adopted a buy-sell agreement, there is no statutory requirement that the other shareholders have to consent before a person buying shares may become a shareholder and receive all of the seller's financial, voting, and other ownership rights and interests.

In an LLC, the members can sell their financial rights (the right to share in the profits and losses and receive distributions) without restriction. However, there are rules that require the other members to approve the sale of the remaining interests - including the right to participate in management. Approval is also required in order for the buyer to become a member, unless the operating agreement provides otherwise.

ARTICLES OF INCORPORATION VS. ARTICLES OF ORGANIZATION

Corporations and LLCs are created by filing articles of incorporation or articles of organization containing the information required by statute. In most states, very little information is required to be set forth. However, a corporation is frequently required to provide more information than an LLC.

BYLAWS VS. OPERATING AGREEMENT

Bylaws may be thought of as a corporation's rules and regulations. The bylaws generally cover a narrow range of issues dealing with the corporation's internal management.

In an LLC, the operating agreement is the most important document. This is an agreement members enter into that establishes the way the LLC will conduct business and that governs the rights, duties, powers, liabilities, and relations of members and managers.

MEETING REQUIREMENTS

The corporation statutes require an organizational meeting to be held after the articles of incorporation are filed, in order to complete the corporation's organization. In corporations, directors make their decisions at board meetings. For the decision to be valid, the appropriate notice, quorum, and voting requirements must be met. Corporations are required to hold an annual shareholders' meeting.

The LLC statutes do not require an organizational meeting to be held. LLCs may be managed more informally. LLC statutes do not require management actions to be taken at meetings nor do they impose notice, quorum or voting requirements. LLCs are not required

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by statute to hold an annual members' meeting.

RIGHTS OF JUDGMENT CREDITORS

If an LLC member has a judgment creditor, that creditor's rights against a member's interest in an LLC are limited to any distributions that the LLC makes to the member. The creditor has no right to the member's interest in the LLC and cannot assume the member's voting and other management rights.

The corporation laws do not contain a similar restriction on a shareholder's creditor. Therefore, a judgment creditor may attach the shareholder's stock and receive all of the shareholder's rights, including the right to vote on directors. If the shareholder was a majority shareholder, the creditor could even compel liquidation of the corporation.

DIVIDENDS

In a corporation, the board of directors decides, in its discretion, if and when a dividend will be declared. The shareholders do not have a say in whether dividends will be paid. When a corporation pays a dividend, it distributes it to shareholders equally on a per-share basis.

LLC members may receive a distribution. However, members have to approve the issuance of a distribution, unless their operating agreement denies them the right. Distributions may be allocated equally, based on the value of the member's capital contributions, or split almost any other way the members choose.

Determining whether a corporation or a limited liability company is the more appropriate entity for a business venture can be difficult. It depends upon the type of business, the sources of financing, the owners' long-term and short-term goals, and many other factors. Making the right choice also requires a solid understanding of what a corporation is and what an LLC is, how they are alike, and how they differ. If you are ready to begin a new business, please give one of the attorneys at Hyden, Miron & Foster, PLLC a call. We will be happy to assist you in choosing the right path.

Small Business Growing Pains

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None of this is to suggest that an employer should refrain from adding employees so that it can be free to discriminate with impunity. But, an increase in the size of a company's workforce can subject an employer to new rules to which it never previously had to adhere, or even know. The prudent employer will be mindful of this as it considers expansion.

Here are a few ideas:

* The smallest of companies can forestall "growing into" some of the employment laws referenced above by outsourcing work currently performed "in house" to truly independent contractors. Examples include third-party payroll companies, bookkeepers, and janitorial companies.

* Once large enough to be subject to the new rules, companies may find that their person formerly handling "human resources" may lack the experience and knowledge to be an HR director of a growing company. Either an existing employee needs to be "coached up" to meet those needs with training or someone new should to be added to fill the bill. Either way, one's HR person needs to be aware of the best practices to be in compliance with these laws.

* The company should have an attorney versed in such things to review its employee handbook or create one if there is none. Such manuals reduce the likelihood of employee misunderstanding over policies, procedures, and expectations, and therefore reduce the likelihood of litigation. If a lawsuit ever does arise, the manual can be an effective tool for demonstrating that those policies, etc. were explained – and presumably understood – when the employee joined the company.

* The employer needs to do an excellent job of performing and documenting performance reviews and disciplinary actions and take both seriously. Few things undermine a litigation defense of "we fired her for poor performance" more than an unbroken string of favorable performance reviews from a supervisor too lazy (or kind hearted) to document areas in need of improvement.

* Small but expanding companies need to review their organizational documents, especially shareholder or member operating agreements. These documents address many "what if" scenarios like death, disability, bankruptcy, divorce, and also address procedural items such as how and when official owner or board meetings are called, who may vote, how revenues are distributed, etc. Decisions that might have been informally made at the dinner table when the company was small and was literally run by "Mom and Pop," are not quite so simple when a company expands, particularly if said expansion has coincided with the addition of additional owner/investors.

* Finally, Mom and Pop need to develop a "succession plan" to address what happens when they die or retire. This gets more complicated as a company grows. If the business is to stay in the family, how will the next generation of owners share ownership and responsibilities? Is anyone in the next generation even interested – or competent enough – to take over the business? If not, an outright sale of the business might be considered. However, whether sold or passed down to the next generation of owners, taxation pitfalls exist and need to be addressed.

An expanding small business creates exciting opportunities for its owners. However, that very growth creates challenges which should be addressed by thoughtful planning. Steps taken now can reduce the likelihood of problems in the future.

Give one of the attorneys at Hyden, Miron & Foster, PLLC a call to discuss all of your small business needs.

HYDEN, MIRON & FOSTER, PLLC
200 Louisiana
Little Rock, Arkansas 72201

Return Service Requested

HYDEN, MIRON & FOSTER, PLLC

James W. Hyden, Of Counsel
jim.hyden@hmflaw.net

Danny W. Broaddrick
danny.broaddrick@hmflaw.net

Lori L. Holzwarth
lori.holzwarth@hmflaw.net

Nicholas Livers
nick.livers@hmflaw.net

Kendall Sample
kendall.sample@hmflaw.net

Philip Miron
philip.miron@hmflaw.net

Shaneen Kelleybrew Sloan
shaneen.sloan@hmflaw.net

Jane F. Strike
jane.strike@hmflaw.net

Carrie E. Bumgardner
carrie.bumgardner@hmflaw.net

Steven Napper, Of Counsel
snapper@aristotle.net

Lyle D. Foster
lyle.foster@hmflaw.net

Guy W. Murphy, Jr.
guy.murphy@hmflaw.net

Laura G. Wiltshire
laura.wiltshire@hmflaw.net

Tiffany Parker Nutt
tiffany.nutt@hmflaw.net

Jean Theus, Office Administrator
jean.theus@hmflaw.net

200 Louisiana
Little Rock, AR 72201
(501) 376-8222

4501 North Highway 7, Suite E
Hot Springs Village, AR 71909
(501) 984-6366

557 Locust Avenue
Conway, AR 72034
(501) 336-8822

123 West Second
Pine Bluff, AR 71601
(870) 536-8222