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Is Your Business Heading Off Its Own Fiscal Cliff?

NEWS & EVENTS: IN THE NEWS

PRACTICE GROUP: BUSINESS LITIGATION, BUSINESS

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Can you answer the following questions?

Now that we've had a chance to exhale after watching the media blur coverage of the government's fiscal cliff fiasco, if you're a small-business owner, this is a good time to ask yourself whether your own business is fiscal-cliff-proof. *Corporate governance* and *succession planning* have no sense of urgency. The deadlines are ever so random, often determined by the sudden death or debilitating illness of the small-business president, a natural disaster, or the random departure of a trusted *key employee* or *partner*.

How would you answer the following questions?

- Do your articles of incorporation, bylaws or operating agreements reflect the current day-to-day operations of your company?
- Does your personal estate planning dovetail with your corporate planning?
- In the absence of the president, is there a mechanism to appoint a temporary or permanent successor?
- Is the successor your choice; is he or she ready to lead; and will third parties, e.g., financial institutions, recognize the successor?
- Does your company have the buy/sell agreements binding the other owners and confidentiality and noncompeting agreements sufficient to prevent the key employees or other owners from walking away from the company with your good will?
- Does your company have personnel files for all employees? Do you conduct annual reviews? Do you have I-9s for all employees, and do you understand the wage and hour laws pertaining to each class of employee?

- Do you have adequate insurance to compensate for the loss of a key officer or employee? Or contemporaneously, do they submit to annual executive physicals and regular exercise?
- Do you have adequate insurance to address all risks associated with your business and understand the interrelations between policies and their copays?
- Is your company in good standing with local and state annual registrations and licensing?
- Who has the institutional knowledge of the company, passwords, or keys?
- Will your successor find the important company documents, and in what kind of condition are they?
- Will the sudden transfer of ownership trigger a negative covenant in borrowing or leasing agreements or the qualification of DBE, MBE, or WBE status?
- Is your company party to a collective bargaining agreement that participates in an underfunded multiemployer defined benefit plan, and if you have other companies, are they exposed to the underfunded liability?
- Do you have contingency management plans in the event of a disaster or interruption of services?
- Have you performed a risk analysis of your company's operations and prioritized a remedy for the greatest and most likely risks?
- Are your personal assets and company assets properly titled or as intended?
- Can you find your company's stock or ownership ledger?
- Is your company utilizing the best "choice of entity" (S or C corporation, LLC or other entity)?
- Are all deadlines for contractual, financial and governmental obligations and company priorities calendared on Outlook?
- Are you a shareholder, partner or member with a fiduciary duty, or do you owe corporate opportunity to another?

It's never too late to get your house in order. If the government can (almost), so can you. Feel free to reach out to me if you have any questions or concerns.

By Anthony Soukenik

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