

# Illinois Legal Update

Insights and Developments in the Law

Winter 2009

## Business Start-Up Checklist

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Both heart and mind must be working well if the owners of a new small business are to experience success. While it is only human nature, not to mention fun, to indulge one's imagination about what a new business started from scratch could be like, would-be entrepreneurs need to engage in some cold, hard thinking and planning before taking the plunge. At the risk of pouring cold water on some of the anticipation and excitement, what follows is a guide for how to plan for and think through the many decisions that must be made well before you have that "Grand Opening" sign made.

### **Why?**

This may seem obvious, but you should know just what your reasons are for wanting to start a new business. If the motivations are weak, odds are the business will be a bust, but well-founded reasons can help a business persevere through good times and bad. Some common reasons for starting a new business include escaping the whole 9-to-5 routine (though it may be replaced by an 8-to-8 routine), answering to no one else, upgrading your standard of living,

and being convinced that you can provide a needed product or service.

### **Why Me?**

Let's face it, not everyone is cut out to be a captain of industry, or even a captain of a small business. Maybe you need not subject yourself to an intensive psychological and life-experiences evaluation, but be honest with yourself about whether you have the necessary characteristics, skills, and experience. A few examples give you the idea:

- Can you make yourself pull the trigger on an important decision?
- Do you see competition as exciting or just stress-inducing?
- Are you willing and able to plan ahead?
- Do you like interacting with people you don't know?
- Do you have the perseverance, not to mention the physical stamina and health, to put in long hours if that's what is needed to make the business succeed?

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# Is It Time for an Estate Planning Checkup?

Even the most detailed and carefully crafted estate plan should be revisited periodically to make sure that it is in line with changing laws and life circumstances.

- ✓ Be sure that estate assets are held in such a way as to minimize estate taxes at death and to avoid overfunding or underfunding of post-death trusts;
- ✓ Review the powers of attorney for health care and property to confirm that they reflect current wishes;
- ✓ Make adjustments to reflect the death or disability of a beneficiary, or a significant change in a beneficiary's needs;
- ✓ Update or prepare a living trust, which allows an estate plan to be carried out with minimal court involvement;
- ✓ Retitle assets in your name as trustee of your living trust if you want to avoid probate upon disability or death;
- ✓ Review how you hold title to assets (i.e., payable on death, joint tenancy, tenancy by the entirety, etc.);
- ✓ If you have not already done so, name appropriate guardians for minor children in your will;
- ✓ If you have included a marital gift or a marital trust upon the death of one spouse, consider making the provisions more or less restrictive;
- ✓ Examine the scope of "powers of appointment" that allow a survivor to redirect where assets will eventually pass;
- ✓ Confirm that the timing as to when a beneficiary will receive or have the right to demand principal is compatible with current wishes;

- ✓ Make any revisions suggested by changes in the family such as disabilities, births, deaths, or changed marital status;
- ✓ Reassess how title to your home is held;
- ✓ Consider the different options for designating beneficiaries for IRA accounts, pension plans, and other assets related to retirement;
- ✓ Possibly make annual gifts to children and others free of estate and gift taxes (up to \$13,000 per person per year in 2009);

- ✓ Consider setting up separate trusts or Section 529 education funding plans for children or grandchildren.

In addition, there is a broad range of estate planning options, one or more of which may be desirable based on current circumstances. Among these devices are charitable trusts, irrevocable life insurance trusts, family limited partnerships, and qualified personal residence trusts. A qualified professional can help you arrive at an estate plan that keeps up with changing conditions.

## Tougher Traffic Laws in Illinois

In an attempt to make driving in Illinois safer, the General Assembly recently amended a number of traffic laws, stiffening penalties for violators, especially teenagers.

Teens will have to be more careful, because one of the new laws allows their parents or guardians to view their driving records online. Parents are also provided with access to the results of blood-alcohol tests. Teens will have to wait longer (nine months, up from three) before receiving a graduated driver's license, and longer still if they get any tickets.

Lawmakers also passed new laws affecting all drivers, with the goal of increasing safety. Reckless drivers who harm children or school-crossing guards face more serious criminal charges, and if the injury they cause is permanent, the punishment becomes even more severe. The penalties for reckless homicide that occurs when a driver kills someone in a school zone or in a posted working zone have also been made more serious, as have the penalties for failing to report a hit-and-run collision involving injury or death.

Finally, convicted drunk drivers will find it more difficult to evade an ignition interlock device that is installed on their cars. It was already unlawful for a driver whose car had an interlock to drive the car without the device or to have someone else blow into it for the driver, but these acts have now been made Class A misdemeanors, and the driver also stands to lose his or her license for up to an additional year.

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# Governmental Immunity

In 1965, the Illinois Supreme Court abolished the doctrine of “sovereign immunity,” which provided that the government could not be sued for the harm it caused in the way that a private citizen could. In order to protect the government from lawsuits and to ensure that public money was not spent on damage awards, the legislature then enacted the Local Governmental and Governmental Employees Tort Immunity Act (the “Act”), which restricted the number and kinds of lawsuits that could be brought against the government or its employees. The operation of the Act can be extremely complicated, as two recent cases illustrate.

The first case arose out of a stampede in a Chicago nightclub that killed or injured dozens of people. Many of the injured and their families sued the city, alleging that the cause of the stampede was the city’s failure to enforce its building codes (governing the number of exits required) and to provide adequate police protection. The city argued that it was immune from suit under the Act, and the Illinois court agreed. It ruled that the Act, which precluded suits arising out of a failure to “enforce any law” or to “provide adequate police protection,” barred the lawsuits arising out of the tragedy.

However, a similar argument did not work for the City of Park Ridge, which was sued when a minor died from a drug overdose. The mother of the child alleged that the

EMTs and the firemen who responded to the 911 call did not evaluate the victim or take him to the hospital for treatment. The city tried to dismiss the suit, arguing that it was immune under the Act. This time, the Illinois Supreme Court disagreed. It found that the case was governed by a different statute, the EMS Systems Act, because it was both more recent and

more specific than the Act. Because it was subject to a different law, the trial court’s order dismissing the claims under the Act was improper.

As these cases show, the question of when the government may be sued and when it is immune from suit can be a very complicated one.

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## Travel Safely on Airlines

Because plane crashes are so spectacular, they tend to make the evening news. As a result, people often forget how safe air travel is—it’s much safer than driving. However, from time to time planes do crash. While passengers in the plane can hardly prevent a crash, they can take some common-sense steps to make sure that they survive any crash that may occur.

Airline safety starts before you leave home. Dress sensibly, preferably in long pants and sturdy shoes. After a crash is no time to find out that the shorts you’re wearing do not protect you from flames, or that your sandals do not protect your feet from glass and metal, or that your clothes are insufficient to protect you from the elements after you exit a crashed plane.

When you take your seat, note the location of the nearest emergency exits in front of you and behind you. Count the number of rows to these exits, and remember the number; this will help you in case the plane fills with smoke.

Plan how you will escape from the plane in the event of a crash. While a plane is crashing is the wrong time to be formulating your escape plan. As part of the plan, think about how you will help any children traveling with you.

Finally, get out of a crashed plane as fast as you can. Leave your luggage and everything else and save yourself. If you have to use an emergency slide, slide feet-first and then clear the bottom of the slide for the next person.

*Resolution of legal issues depends upon many factors, including variations of facts and interpretations of Illinois law. This newsletter is not intended to provide legal advice on specific subjects, but rather to provide insight into legal developments and issues. The reader should always consult with legal counsel before taking action on matters covered by this newsletter.*

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## Business Start-Up

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- Are you, and anyone else financially dependent on you, prepared to risk your savings in pursuit of the business dream if that's what it takes?
- Unless you are planning a one-man band of a business, are you comfortable with hiring, supervising, and possibly having to fire other people?
- Are you reasonably well organized?
- Do you know anything about the paperwork and legal side of running a business, such as payroll and accounting, the permits or licenses you will need, or the regulations and laws that may apply to the business?

### Why This Business?

You may have the best motives and a skill set that would be the envy of any MBA graduate, but if there is no niche for your planned business, or, simply put, if not enough people will want to buy what you are selling, the new business will fail. The variables here include timing, location, and simply whether your business is feasible or practicable, so that you can be the one to fill that niche that you have first identified. Don't make your business the equivalent of carrying coals to Newcastle.

In economic terms, you want to do some investigation to determine if there is some currently unmet demand for the product or service you want to supply. Then you want to meet that demand with a product or service that is competitive in quality, selection, price, and/or location. In short, learn as much as you can about the market you will be in.

Learn who your customers will be and try to understand their needs and desires. Anticipate how your fledgling business will compare with any established competitors. What can you do in setting up and running the business to make sure you get your share of whatever market there is for your product or service?

### How?

Turning the idea into bricks and mortar (literally or figuratively) involves a lot of decisions, some of which are best made only after getting professional advice. Still, you should acquire at least a layperson's understanding of the pros, cons, and consequences of each decision.

Choose a name for the business that you find appealing, but also one that is informative for someone hearing it for the first time. Select the most appropriate business form, such as a sole proprietorship, a partnership, or a corporation. Investigate which local, state, and federal laws and regulations will apply to the business. This will run the gamut from laws of universal application (e.g., taxes) to laws specific to your business.

Make an unflinching and detailed examination of your financial picture. How much do you have now, how much will you need to start the business, and how much will you need to stay in business? Projecting cash flow into the future means taking into account such variables as seasonal trends in sales, the amount of cash taken out of the business for personal expenses, whether and when to expand the business, and the rate at which customers will pay off accounts if credit is extended to them.

Find a location for the business that is convenient for customers,

appropriate in size and configuration, and zoned so as to allow your type of business. When you have settled on the product or service you will sell, calculate the inventory you should create and maintain and locate reliable suppliers.

Finally, if you go to all the trouble and expense involved in creating a small business, don't forget to think about protecting against losing the business from such threats as fire, theft, robbery, vandalism, and liability for an accident. This means taking measures to provide security, but also arranging for the appropriate types and levels of insurance.

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## New Nonprofit Tax Forms

The Internal Revenue Service recently published new draft instructions for a revamped version of Form 990, used by nonprofit organizations. The new rules will go into effect when nonprofits file their 2008 tax returns.

In the interests of greater transparency and accountability, more information now must be divulged about the inner workings of the nonprofit. There are some detailed questions about such matters as compensation for officials, fundraising sources, and whether the organization has an ethics policy.

Whereas, previously, nonprofits with gross receipts of less than \$25,000 were exempt from filing requirements, now all nonprofits must file some version of Form 990.