



# THE Practical Lawyer

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## INCREASE THE VALUE OF YOUR BUSINESS

*Exit Planning has received increased attention over the last five years because professional advisors and owners realize that in order to recognize the full value of a company upon its transfer, there must be thoughtful, strategic and systematic planning many years prior to the actual event.*

In a nutshell, someone will pay substantially more for a business if the value is readily transferable to them without the former owner as part of this equation.

One of the first characterizations of this principle is found in the "E-Myth-Revisited" by Michael E. Gerber. He noted that most owners only work in the business not on the business. This neglect leads to a poorly managed business where the value that might otherwise be created is lost.

Exit Planning is about preparing your business each day that it is in existence for that time when you will want to capitalize on its value by selling it.

Following is a non-exhaustive list of the building blocks of Exit Planning.

- Formal Management Team.
- Board of Advisors or Board of Directors.
- Team of Professional Advisors.
- Organizational chart with clearly defined positions and

job descriptions.

- Up to date internal minutes of significant events.
- Regulatory Reports prepared and filed (tax returns and annual reports, state and federal).
- Financial statements prepared and/or reviewed by a certified public accountant.
- Measurable employee incentives to increase participation in the success of the business. These incentives also help prevent a mutiny by the employees if they get wind that the company is being sold.
- Employment, confidentiality, work for hire, and non-compete agreements (where appropriate).
- Maintained, and properly documented, important transactions.

In summary, a business set up for sale on the date it commences and updated through out its existence will generally be successful and will yield its highest value upon sale. **cn**

*William D. Norman, Esq.*

## SUCCESS IN SUCCESSION

For most business owners, managing their business and maintaining a positive flow of income consumes virtually all of their time. Retirement and death are like distant specks on the horizon, and the thought of one day handing over control of the business that they have worked so hard to create is hard to imagine.

Less than one-half of small business owners have a business succession plan. Most business owners don't realize that the proper time to formulate an exit strategy is at least five years before the owner is ready to relinquish control so that he can receive the full value from the transition and is able to take full advantage of gift and estate tax savings.

Once a business owner has decided to develop a succession plan, he or she must address two initial questions: (1) who will manage my business; and (2) who will own my business. The succession options are: (a) family members continue to own and manage the business; (b) family members own the business with outside management; (c) selling all or a portion of the business; and (d) liquidating the business.

Most business owners value control of their business for both financial and emotional reasons. Many owners do not realize that a well-drafted succession plan can shift ownership without giving

up control. The owner can begin shifting ownership (non-voting common stock) while running the business and earning an income simultaneously. This will ease the new owners and/or managers into their new position, and allow the owner to slowly introduce new leadership to employees, loyal customers, suppliers and lenders.

When evaluating a family member as a successor, it is imperative that the owner be objective, taking into consideration the skills, interests and abilities of each person. Creating an estate plan making family members equal owners in the family business can be a recipe for disaster. Some family members put more time into and accept more responsibility for the business and so it is important to consider this when determining ownership, control and compensation. This will inevitably lead to family disagreements, and ultimately the demise of the business if there is no proper plan in place. It is very important to have an open honest discussion regarding the realistic expectations of each family member to avoid surprises, which may lead to family conflicts.

Regardless of what ownership/ management structure is chosen, it is important for the business owner to obtain a third-party valuation of the business. Knowing the market value of the business will give the business owner a starting point with potential successors and/or buyers, and allow the owner to plan for estate taxes.

Proper business succession planning requires sound preparation. Owners seeking a smooth transition of their business interests must plan early and plan smart. A good succession plan is crucial to giving an owner piece of mind that the business they have built will continue to thrive in the hands of the next generation of owners. **cn**

*David G. Aiello, Esq.*

## BUYER BEWARE: THE OTHER SIDE OF BUSINESS SUCCESSION

I have represented a number of individuals acquiring businesses from retiring owners, and have noticed some pitfalls to avoid. Here are the top four:

**1. Buying the Wrong Business for You.** Sometimes, a client doesn't really have an idea of the type of business to buy (except one that is making money). To succeed, most entrepreneurs need a knowledge of the industry, an extensive network of contacts (both in potential customers and suppliers), and an understanding of the needs of the customers.

Purchase a business in which you are already employed, or arrange with the owner to work for a period of time in a business that you are seeking to acquire.

Consider purchasing a business competitor or other related business (i.e. a supplier or customer) in your current field.

Talk to others in the industry. Business owners are usually very open to discussing the negative aspects of the business and the industry.

**2. Buying a "One Man Show".** There are business owners that have developed a profitable business through the strength of their personality and their extraordinary effort. In this scenario, there are usually few systems and every business decision is made by the owner with little responsibility dele-

gated to employees. I suggest that my clients read *The E-Myth* by Michael Gerber so that they understand the difference between buying a job and a business. Some suggestions:

Purchase the business using an earn-out, which requires the seller to stay involved in the business for a period of several years and sets the purchase price on the continued success of the business.

Begin working in the business prior to the purchase and design your own systems in order to improve and systematize the business.

**3. Not Having Sufficient Capital.** Many times, the purchaser of a business has just enough capital to acquire the business, but very little money to provide the necessary marketing, transition services, modernization, and other investments to make it thrive.

Prepare a realistic cash flow and financial projections, and make sure that you understand the difference between the two. In the event that events don't proceed according to plan, it is crucial that you make the necessary adjustments to operations immediately to reflect any reduced cash flow.

Ask an institutional lender, friends and/or family members for loans prior to opening the business, as there is very little interest in lending to a business that is desperate for cash.

**4. Not Performing Adequate Due Diligence.** Even if you are buying the business from a family member, it is crucial that you perform adequate due diligence prior to the purchase and understand the motivation for the sale. It could be that a large national

competitor is moving in next door, it could be that the industry as a whole is declining (i.e. video rental stores), or it could be a more direct threat to the viability of the enterprise.

Involve your attorney and certified public accountant early in the process. Also, most business attorneys use a due diligence checklist which ensures that they are less likely to miss any important aspect of the process.

Hold back some of the purchase price as an "earn out" to allow you to provide a fund to offset undisclosed liabilities that may be discovered after your purchase of the business.

Engage third parties to perform the necessary lien and liability searches for judgments, bankruptcy filings, law-

suits or other encumbrances that may affect the assets.

Agree in advance with the seller that you can arrive unannounced several times during the due diligence period. That is a great opportunity to see how many people are working, how busy they seem to be, and generally take a look at the operation.

My comments should not discourage you from purchasing a business from an existing owner, but rather to make sure that when you do see an opportunity you take all the steps necessary to make sure it is successful.

If have questions on any of these items, please call. **cn**

*John D. Colucci, Esq., CPA*

## BE FORE-WARN-ED:

THINGS EMPLOYERS SHOULD KNOW ABOUT THE WORKER ADJUSTMENT AND RETRAINING NOTIFICATION ACT

There are many reasons why an employer may need to reduce or eliminate its workforce. Sale of a company, merger with another or bankruptcy can lead to a situation in which an employer must make difficult decisions about its workforce.

While no one looks forward to these scenarios, employers should be aware of the provisions and requirements of the Worker Adjustment and Retraining Notification Act ("WARN"), determine whether WARN applies to them and take the appropriate notification measures, where applicable. While this article does not discuss every aspect of WARN, it will provide employers with the important factors they should consider before a layoff, workforce reduction or elimination are on the horizon.

### What is WARN?

The Worker Adjustment and Retraining Notification Act or "WARN" is a public law enforced by the U.S. Department of

Labor. The purpose of WARN is to make sure employers provide advance notice to employees prior

to a mass layoff. The theory behind the notice requirement is that if employees have advance notice that they are about to become unemployed, they will have an opportunity to seek alternative employment in advance, will have adequate time to transition to another job, thereby minimizing unemployment and hardship to the employee.

### Does WARN apply to me?

The provisions of WARN apply to non-governmental businesses that employ at least 100 full time workers, who have worked at least six (6) months during the past twelve (12) months

## Executive Director of Defense Technology Initiative to speak Tuesday, April 7, at Colucci Norman, LLP Business Forum

On Tuesday, April 7, the Colucci Norman, LLP 2009 Business Forum will feature a presentation by Donald J. Quenneville, Brig. Gen., USAF (Ret.), Executive Director of Defense Technology Initiative. He will be speaking on initiatives that DTI is undertaking in an effort to prepare New England military installations for the next round of Base Realignments and Closures as well as taking questions from the attendees.

**7:30 a.m. Registration and Continental Breakfast**

**8:00 a.m. – 9:00 Program**

**100 Cummings Center (Route 62)  
Conference Room Suite 221-E,  
Beverly, MA**

This is a no fee event.

For further information contact Patricia Islip, 978.921.4443 or [pislip@cnbusinesslaw.com](mailto:pislip@cnbusinesslaw.com)

and who work more than twenty (20) hours per week; or business that employ at least 100 employees who work a combined four thousand (4,000) hours per week. If such employer intends to eliminate employment by closing a facility – whether on a permanent or temporary basis – and that closing will affect at least fifty (50) employees for six (6) months or more, or will reduce at least fifty (50) employee’s hours by fifty percent (50%) or more during a six month period, then the employer must provide advance notice to the employee.

Further, if an employer lays off 50 or more workers, provided that number constitutes at least thirty three percent (33%) of its active workforce, that employer will be required to give his employees advance notice. Employers must understand that the above calculations apply in the event of a sale, merger and acquisition or any other business event.

When calculating the number of employees, an employer need not count the following: part-time employees; workers who retire; workers who are terminated for cause; workers who are offered employment at a different work site, within reason-

able commuting distance [regardless of whether or not the employee accepts]. Similarly, if an employer is forced to close its business permanently or temporarily due to a strike or lockout, WARN notice is not required.

Employers should be aware that WARN may apply if an employer declares bankruptcy. If the employer knew that it intended to close its business or engage in mass layoffs in advance, it must comply with WARN. Further, if the employer continues to run its business in bankruptcy while restructuring its operations, its obligations under WARN continue to apply.

Lastly, under the provisions of WARN, the Department of Labor may look at employment losses that occur over a ninety (90) day period. An employer will not be able to avoid WARN requirements by scheduling layoffs and workforce reductions in smaller numbers spread out in time in an attempt to avoid responsibility under WARN. **cn**

*Kathleen A. Malone, Esq.*

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