March
2007
Volume 7
Issue 2

BEAN KINNEY & KORMAN PC
ATTORNEYS

Business Law Newsletter

Inside This Issue:

Buyer of Government Contractors: New SBA Size Recertification Rules Will Affect Merger & Acquisition ("M&A") Transactions

By: *Phil W. Jaeger*

The U.S. Small Business Administration ("SBA") has issued new regulations requiring small businesses to recertify their size status for all of their small business contract awards if they are the target of a merger or acquisition, or if they acquire another business. The acquired company must recertify its size to its customer within 30 days after the close of the transaction. These regulations become effective June 30, 2007.

The impact on M&A transactions could be significant. Under prior SBA regulations, a buyer could avoid recertification by structuring an M&A transaction as a stock purchase or a reverse merger. In such a case, no size recertification was required, even if the combined revenues of the buyer and the target surpassed the small business size standard for the original contract award. Under the prior SBA regulations, larger buyers could be aggressive in acquiring companies with small business contracts.

Under the new regulations, which are applicable to all contracts with durations of more than five years, all M&A transactions with small business contractors will require a size recertification and notification to the customer if the size standard is exceeded by the combined size of the buyer and seller after the M&A transaction.

The impact of this regulation on M&A transactions requiring size recertification is not yet clear. At a minimum, upon recertification, if the contractor cannot meet the SBA size standard, the agency cannot take the SBA business credit. However, the contract terms will be unchanged and the contract will remain in place.

How this will play out for M&A players is also uncertain and many questions remain unanswered. However, M&A players should try to get ahead of the curve by closely reviewing these regulations and evaluating, on a contract by contract basis, the possible discretionary outcomes within the control of the government contracting officers. M&A transactions will continue and players should move quickly to fully understand and adjust to the consequences of these new regulations.

2300 Wilson Boulevard, 7th Floor, Arlington, Virginia 22201
703·525·4000 fax 703·525·2207
www.beankinney.com

BEAN KINNEY & KORMAN PC
ATTORNEYS

7 For '07: Assessing Your Employment Practices

By Philip M. Keating

It often is said that a company's greatest assets are its employees; however these employees can also pose significant potential liability. Therefore, it is extremely important that employers take the time to review the state of their employment practices, and there is no time like the present.

1. Employment law is complex and covers a wide range of topics and employers must comply with a large number of federal, state and local laws. While it is impossible to eliminate the risk of litigation or of liability arising out of the employment relationship, advance planning and training can reduce it substantially.

We have outlined seven key areas that employers need to address. Taking appropriate preventive measures is part of a prudent overall employment practices strategy.

Employment Policies and Handbooks - The starting point of any employment practices review is the employee handbook. Employers should review their handbooks periodically to be certain they are up to date and that the policies contained in them are what actually are being utilized. Employers have a great deal of latitude to develop and implement the policies they desire. However, stating a policy but not following it is asking for a discrimination suit. While it is true that most employment relationships are "at will", discrimination cases are comparative by definition. An agency such as the EEOC will investigate whether an employer treated one employee differently than another on the basis of race, sex, age, disability, or a number of other factors.

The employee handbook is an important document to establish and confirm the at will employment relationship. Having a signed receipt from each employee is an extremely important piece of evidence in employment cases.

2. Wage-Hour Compliance - Federal wage-hour laws apply to every employer, regardless of size. The primary wage-hour laws are the minimum wage and overtime. Our focus is on the overtime requirements, which frequently are a source of confusion with the potential for significant liability.

Under federal law, all employees are entitled to overtime for all hours worked over 40 in a week unless they fit into one of the exempt classifications. The main exempt classifications are professional, executive and administrative personnel. There also are exemptions for outside sales and some computer professionals.

The Department of Labor recently updated their tests for the exempt classifications. Careful employers will review their job classifications to be certain that particular jobs are properly categorized as exempt or non-exempt. This assessment must focus on the requirements of the position and, most importantly, the actual duties performed by the employee.

Mistakes in the exempt classifications can be costly, as the Department of Labor, or private party lawsuits, can seek to recover all overtime amounts due going back two years. The wage-hour law also allows for double damages and provides for the award of attorneys fees to plaintiff's lawyers.

7 For '07: Assessing Your Employment Practices

Continued from Page 2

3. Sexual Harassment Prevention and Training - Prevention and preparation are the watchwords in sexual harassment law. We all know that sexual harassment in the work place is prohibited. However, federal law provides that it is possible for employers to avoid or limit liability if the proper procedures and policies are in place, and if the employer responds appropriately to allegations of sexual harassment. This is an advantage employers should not squander, but advance planning is required.

Sexual harassment takes many forms, ranging from what is known as quid pro quo harassment, to the much more common hostile environment harassment. Your managers and supervisors are the front line in sexual harassment prevention and response. They need to know what is expected of them, what is and is not sexual harassment, and how to respond if they witness or receive complaints of sexual harassment.

4. Hiring, Firing and Performance Evaluation - Litigation risk can arise at any point in the employment relationship, including the very start. Employers should periodically review their applications for employment and their hiring procedures. Are all the questions asked during the hiring process job-related? When can employers ask about the physical capabilities of prospective employees and how must that be done? Do you check references and how do you respond to reference checks? Do you give regular performance reviews and what is your process for doing so?

5. Protection and Company Assets - Because your employees have access to valuable information about your company, the law authorizes protection of those assets. What is appropriate will depend on the type of business in which you are engaged and the particular jobs involved. Businesses frequently should have agreements with employees to protect the company's intellectual property, inventions, and proprietary information. Furthermore, you may wish to consider whether it is appropriate to enter into non-competition and non-solicitation agreements with employees. Courts will enforce non-competition agreements with employees if the agreements are drafted properly and narrowly tailored to protect the identifiable business interests of the employer. This is not an area where a one size fits all boiler plate agreement will suffice.

6. Leave Policies - There are a number of federal laws impacting leave policies, including the Americans with Disabilities Act ("ADA") and the Family and Medical Leave Act ("FMLA"). In some cases, state and local laws impose obligations on smaller employers that are not covered by the federal laws. Employers should take care to understand when the various laws come into play, such as what is and what is not a disability and when leave requests are covered by the FMLA. Employers also may wish to review whether and how to update their vacation and sick leave policies. For example, some employers have changed from having individual vacation, sick and personal days, to a combined paid time off policy.

7. I-9 Compliance - All employers are required to check the identity and eligibility for employment of all individuals hired. This check is recorded on Form I-9 and the records must be maintained. In recent months, the federal government, through U.S. Immigration and Customs Enforcement ("ICE") has dramatically increased its investigation and prosecution of employers violating the I-9 requirements. Employers need to understand the process, what documents are acceptable, and how to maintain the required I-9 records.

We strongly recommend that you take the time to review your company's employment practices and assess where improvements and updates are needed. Advance planning will pay dividends in the event trouble arises from your employer-employee relationships.

Contact Us
2300 Wilson Boulevard, 7th Floor
Arlington, Virginia 22201
703·525·4000 fax 703·525·2207
www.beankinney.com

Saloonkeeper Liability

By: James V. Irving

In a case of particular interest to our restaurant and insurance clients and friends, a U.S. District Court judge in Norfolk has ruled that an insurance company must provide a defense to a saloon in a case arising from a claim for personal injuries caused by an allegedly drunk driver.

April Mapp sued the Three Cheers bar after she was injured by an intoxicated motorcyclist in June of 2003. When Three Cheers asked Penn-American Insurance Co. to provide a defense, Penn-America argued that the policy's liquor liability exclusion and state law insulated them from this obligation. Under the "Dram Shop" laws enacted in many states, a purveyor of alcoholic beverages may be held liable for the injuries caused by those who become intoxicated on their premises. Virginia does not have such a law.

However Mapp had characterized her case as one of "premises liability," arguing that Three Cheers had a duty to warn and protect her from the known danger posed by their intoxicated patron. Penn-American responded to Mapp's state court suit by asking the local federal court to enter a judgment declaring that they had no duty to defend or indemnify the bar. Judge Henry Coke Morgan, Jr. denied Penn-American's request. Further proceedings are pending.

BEAN KINNEY & KORMAN PC
ATTORNEYS

2300 WILSON BOULEVARD, 7TH FLOOR
ARLINGTON, VA 22201

GETTING IT DONE®