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It’s a great time of year.

We are creatures of routine, of seasons and cycles. We need endings and new beginnings. Death and rebirth. 2010 is dead and gone. Whatever it was for you, it is now in the history books.

The new year brings both threat and opportunity. If 2010 was a successful year for you, don’t allow the success to lull you into thinking you don’t have to work as hard in 2011, or to cloud your view of what it will take for you to really succeed in 2011. Rather, assess 2010 objectively and address what must be done to make this coming year even better.

If 2010 was a struggle, put those struggles behind you and begin anew. Commit to the future and don’t live in the past. What has happened in the past lives only in the pages of history. It can enter our lives only by invitation. The only rational choice is for us to find value in every page of history. Glean lessons, strength, inspiration, and reason — and use them constructively in our effort to make the very most of our days ahead.

Here’s to a happy, healthy, prosperous and meaningful 2011.

Sincerely,

David L. Perkins, Jr.
Managing Editor
The Business Owner Journal
The rigor and complexity of business today leave most owner-managers unsure where to focus their limited energies and resources. It’s as if blues guitar prodigy Joe Bonamassa were singing about business ownership when he growls, “So many roads, so many trains to ride.” But every once in a while, out of the confusion, a clear and compelling pathway comes into focus. Albert Einstein spoke of these moments of clarity. He said, “When the solution is simple, God is answering.”

Are you looking for clarity about where to focus your energies this year, right now, or how to make your company stronger and more successful? Here’s the answer: Reduce your operating costs and invest the savings in sales and marketing. Yes, it’s that simple.

Reduce Operating Costs

Your largest expense categories offer the most promise for expense reduction. For most companies, they are labor, occupancy expense and vehicles.

**Overhead Labor Expense:** Every dollar of salary and wage expense that does not bring in revenue is a burden. Burden must be continuously cut away. Technology and the ever-expanding buffet of outsourced service options make it possible. And because it’s possible, it’s imperative. The competitive marketplace means you’re in a race against your competition to adapt and to adopt more efficient means.

- By reorganizing necessary tasks this way or that, can one person do the work you’ve been paying two to do?
- Can a part-time contractor perform work you’ve been paying a full-time person to do?
- Can you use inexpensive technology — or train your customers — to do some of the overhead task work for you?

Also, if you’re a baby boomer, your formative working years were marked by inflation. Annual, automatic pay raises for each employee became the norm. But inflation is no longer part of our economy. At least not today. Stick with your automatic annual pay raises, and you’ll simply transfer your profit to your employees.

**Occupancy Expense:** Every dollar spent on facilities is a profit dollar lost. Do you really need all that space? Do you really need that quality of space? Does the premium you pay over “C-class” space really aid your ability to earn a profit?

If you own space that is larger or of higher quality than you need, sell it or lease it to a user who can garner higher utility from it than you (and therefore justify paying a premium to you). For your own needs, buy or lease more economical space elsewhere. Now’s the time to reduce occupancy expense. Real estate values are in the tank. Negotiating strength has shifted away from sellers and landlords to buyers and lessees. Get tough and lock in a deal that can save you big bucks for years to come.

**Vehicle expense:** Many owners and employees seem to think it’s important, or somehow required, to have expensive cars and trucks. Does the quality of your vehicles — or even whether you have them — really add value to your product or service? Cars and trucks are a terrible place to put your money. They lose 30% of their value in the first year — 95% over 10 years — and cost a bundle to operate, maintain and insure. If you deliver physical goods, consider doing what Michael Wasserman does — use contract carriers.

Where to Invest Operating Cost Savings

The fount of life for your business is sales. More buyers of your goods and services are “out there.” You just need to expose them to you as a source, and teach them to buy from you. To do so, invest in your brand and create awareness by sending salespeople out to court and serve. It’s a conventional war. You need “boots on the ground.” Send as many as you can afford to recruit and equip. Reductions in overhead expense will allow you to afford more and equip more.

Are these suggestions divine providence? Well, one thing’s for sure — these suggestions are pretty simple.

“*When the solution is simple, God is answering.*”

*Albert Einstein*
Many slam-dunk deals are derailed by latent defects uncovered during due diligence.

Real Estate. In three classic situations, real estate can bite you. First, location is critical, but you can’t convey it to the buyer at a price certain for a sufficiently long time into the future. Second, you are obligated to a long-term lease, but the buyer wants to relocate the business. Third, you own the facility occupied by the business, the buyer wishes to relocate it, and you’re not confident you could find another buyer or tenant.

Unresolved Litigation. Business buyers avoid acquisitions that include assumption of unquantifiable liabilities. Unresolved disputes, litigation and threatened litigation are unquantifiable liabilities. That is, they carry a cost — in both time and money — that’s difficult or impossible to estimate.

Environmental Liability. Business buyers test the ground and groundwater beneath any business they consider purchasing. If contamination is found, the deal is as dead as the tree your letter of intent is made from. If there’s any chance you could have an issue here, consider going ahead and investigating the facts now and remediating any problems.

Assignment of Contract. Anytime a landlord, lessor, franchisor, distributor or licensor must approve a sale or transfer of control, the deal is not entirely in the hands of the buyer. The time to avoid or minimize the clauses is when the agreements that contain them are established, or at the very least, well in advance of an attempted business sale.

Title Issues. Whenever rights to an asset are critical to the ongoing revenue stream or profitability of a business, buyers want total assurance that after their contemplated purchase they will have use of the asset. In some cases, assurance of exclusive usage is required. To the extent that buyers can secure use of the important asset but at an inflated price, the business purchase price goes down commensurately.

Unlicensed Use of Copyrighted Works. If you’re using a software program or other intellectual property on an unauthorized basis, your buyer may not be willing to “risk it” as you have been doing. Most buyers — during the pre-purchase audit — identify all intellectual property used by the company and then investigate whether the company’s use is authorized. If unauthorized use is identified, most buyers want to figure out the total cost of “going legit.” Such may include penalties plus ongoing costs. If the expense can be pinned down pre-closing, the purchase price can be reduced dollar for dollar. If it cannot, you may have a problem.

Debt Prepayment Penalties and Re-Price Triggers. Typically, interest-bearing debt of the seller is paid off in full at closing (by the seller, using monies paid by the buyer). If said debt has a prepay penalty, it could put a dent in the seller’s sale economics. Conversely, if the seller enjoys debt financing that’s attractive to the buyer, so-called change-of-control covenants could spoil the party.

Double Taxation. Uncle Sam takes a healthy cut whenever a gain is realized, but few sellers pull back from the closing table because of the taxes, that is, except when the selling entity is a C-corporation. C-corporation sellers face double taxation when the buyer buys assets. Yes, the seller could require the buyer to purchase the stock instead, but it’s not that easy. Buyers pay less when they are forced to acquire C-corporation stock. There are a few strategies for reducing taxes in a C-corporation asset sales (see “Reducing Taxes in a C-Corp Sale,” May/June 2006 issue), but it’s an uphill battle. The best strategy is to convert to S-corporation status well in advance (eight or more years) of the anticipated sale date.

Minority Shareholders. If you don’t own 100% of your company, your deal could get held up. First, if the parties choose to effect the sale by purchase of stock, any minority shareholder could hold up the deal if you don’t have agreements in place that force them to accept terms agreed to by the controlling shareholders. This is because buyers almost always want to buy 100% of the outstanding stock. Second, minority owners can hold up asset sale transactions if a so-called super-majority provision exists in your governing documents.
Want to know where the economy is headed? The stock market? Inflation and interest rates? Dr. Gary Shilling tells you. The only question is whether you believe him. He apparently has correctly forecast recessions and interest rate trends over the past 40 years. He’s foretold the Internet stock collapse of 2000 and the global real estate and mortgage debacle in which we are now mired.

Who is this seer? He’s no slipper-footed swami. He’s an economist. He studies the pages of history and analyzes mountains of macroeconomic, socio-demographic and financial data — past and present — and spots unsustainable irregularities and instances where history is repeating itself. He’s able to look into layers of data and see weather patterns where most see just clouds.

Over the next 10 years it will become cool again to be thrifty and practical, but it won’t be good for the economy or stock market.

How does he do it? He’s an intellectual cyborg. Bachelor’s in physics from Amherst, magna cum laude. Master’s and doctorate in economics from Stanford. He worked for The Fed while in his 20s and became chief economist for Merrill Lynch at the age of 29. He’s an economic advisor to investors and institutions across the globe and former member of the New York Stock Exchange. He has been named one of the world’s top stock market forecasters. He’s made a fortune investing his own funds. For example, he was an advisor to and co-investor with John Paulson (Paulson and Co.), who earned $20 billion in 2009 betting correctly on the collapse of collateralized debt obligation (CDO) securities.

In The Age of Deleveraging, Shilling tells us where he thinks the economy is headed and why. He also tells us where he thinks we should put our money in the years ahead. The Age of Deleveraging is fresh off the press. The foreword is dated May 2010 and the copyright is 2011.

Shilling says the coming decade will be marked by lower levels of consumer expenditures. The reason? Aging U.S. baby boomers will finally turn in earnest toward padding their financial nests for retirement. Real estate values have collapsed and home value appreciation can no longer be counted on. So consumers are amending their big-borrowing and big-spending ways. Savings rates will rise and spending will fall.

The impact? Low levels of economic growth worldwide.

U.S. consumer spending accounts for a whopping two-thirds of U.S. GDP and is the locomotive that pulls the entire world economy. Any sustained reduction in consumer spending will result in lower levels of economic growth. Slack demand — for everything from cars and houses to travel and entertainment — will result in excess supply and cutthroat price competition.

As a result, deflation poses a far greater threat than inflation.

What can the business owner do with this information?

- Read the book. Don’t rely on this summary.
- Be cautious about adding capacity. Revenue growth may not be there to support it. Focus instead on cost reduction and efficiency enhancement.
- Pay down debt. Profit growth will be difficult. Survival could at times hinge on who has the lowest cash flow burden.

According to Dr. Shilling, the next 10 years will be more like the 1950s than the 1980s, 1990s or 2000s. It will become cool again to be thrifty and practical. It’s what we need to pay down debt at the personal, corporate and governmental levels, but it won’t be good for the economy or stock market.
The Internet is a marketplace, one in which virtually every business in the world can participate. It’s BIG business. For that reason, it’s a battleground. Businesses, products and services — and jobs and fortunes — are won and lost based on search engine results and web page views.

People search the Internet and you want them to find you and your products. Your customers search and you’d like them to find you. But someone has your URL or more particularly, your business or product name in a URL he or she now owns.

What can you do?

First, understand the law. Just because the name of your business or product or service is in someone else’s URL does not necessarily mean that he or she is infringing on your rights. A URL is a location, first and foremost, like a piece of real estate. What is sold at the URL is the product or service.

If someone had bought apple.com before Apple did, the computer company would not necessarily have had a claim nor would it have been harmed. After all, Apple could always have used applecomputer.com, for example. The way the law has developed, this “case” would pivot on the intent of the party and how the owner put the URL to use.

If the presumptive owner of apple.com had provided goods or services under the name Apple, such as Apple Tree Service or Apple Children’s Clothing, he or she would have been exercising a legitimate right to use the URL for this purpose. The owner would not have been infringing on Apple computers in any way. But if the owner had attempted to use the domain in a manner that simply profited (or attempted to profit) from Apple’s brand, such as by setting up a website that would profit from the traffic that would come from Apple’s brand or marketing efforts, or by buying and holding the valuable URL in hopes of simply selling it to Apple for an inflated price, Apple would have recourse under the law.

If someone owns or is using a URL that contains the name of your business or one of your products or services, there’s a low-cost and efficient means for seeking justice, i.e., gaining ownership of the domain. It’s an alternative to the court system; you can use it against any URL owner anywhere in the world. The total costs should not exceed $2,600 (at the very most), and you don’t have to travel or hire an attorney.

ICANN and UDRP

The Internet Corporation for Assigned Names and Numbers (ICANN) developed the Uniform Domain Name Dispute Resolution Policy (UDRP) for resolution of disputes over registration of Internet domain names. UDRP currently applies to all .biz, .com, .info, .name, .net, and .org domains, and some country code top-level domains.

What you may not be aware of is that when you or ANY person or entity ("registrant") in the world purchases a domain name, the registrant represents and warrants, among other things, that registering the name "will not infringe upon or otherwise violate the rights of any third party." The registrant also agrees to participate in an arbitration-like proceeding if any third party asserts such a claim. In such a proceeding, called a UDRP proceeding, the claimant must establish three elements to succeed:

1. The domain name in question is identical or confusingly similar to a trademark or service mark in which the complainant has rights.
2. The registrant does not have any rights or legitimate interests in the domain name.
3. The registrant registered the domain name and is using it in “bad faith.”

The registrant will fail the “legitimate interest” and “bad faith” tests if the primary economic motive was to profit, in some way, from the brand recognition or goodwill of another. More particularly, in a UDRP proceeding, the “judge” (UDRP panel) will consider several non-exclusive factors to assess bad faith, such as:

- Whether the registrant registered the domain name primarily for the purpose of selling, renting or otherwise transferring the domain name registration to the complainant who is the owner of the trademark or service mark.
- Whether the registrant registered the domain name to prevent the owner of the trademark or service mark from using the domain. For more on trademarks and trade names see “Patents, Copyrights, Trademarks and Trade Names” in the September/October 2010 issue of this publication.
- Whether the domain name owner has engaged in a pattern of such conduct.

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A Denver-based business owner called me today to discuss his desire to sell. He said:

“I know a handful of companies that would be really good buyers for this business. I could just call them, but for some reason that doesn’t feel right. Why?”

This business owner’s instincts are right, and he’s in the minority. A good many business owner-sellers make the mistake of handling the sale themselves. After all, “if you want a job done right, do it yourself,” right? But “For Sale by Business Owner” is not the way to garner maximum value. It’s not the way to maintain confidentiality. It’s not the way to get the deal done in a timely manner.

Pitching for your own benefit just does not work well. Why? I explained it to the Denver business owner like this:

Joe Wright would like to join Old Pine Country Club, the most prestigious in the region. Joe knows several members, so he calls them and expresses his interest. Each is a bit taken aback by his directness. No big deal, but when they learn that Joe called several of them, it becomes a bit of a joke among the members. And because Joe’s the subject of ridicule, nobody wants to sponsor Joe and nobody’s very excited about him becoming a member.

Nobody wants to pad the pockets of a person who toots his own horn.

Kevin Best also wants to join Old Pine, and has friends who are members, but he instinctively knows the job is one best handled by a representative. It’s a bit like enticing a cat onto your lap. He knows the members will want him only if he doesn’t want it too badly, and he’s humble and appreciative. So Kevin doesn’t make calls and inquiries himself but rather figures out who might be the most willing and able to represent him. Then, when he happens to be around this person and the time is right, he expresses his high regard for the club and the quality of the membership. Inevitably, the member says, “Hey, Kevin, you should join.”

Now Kevin reacts with great humility and flattery, but he’s careful to temper his enthusiasm. He says, “If you would like to have me as a member, I would not object, but I doubt seriously that I meet the qualifications,” or something of that order.

Kevin’s sponsor now takes it upon himself to call various members and explain what a great guy Kevin is and what a great member he’d be. The sponsor makes it his personal mission to get Kevin in, and the members lend their support because of the sponsor’s efforts as much as anything. And because Kevin is not tooting his own horn, everyone trusts that what Kevin’s sponsor says about Kevin is true. In fact, because perception is reality, all those flattering things being said about Kevin ARE true. Kevin’s application is well received, he gets in, and it’s an easy and enjoyable process for him. All he has to do is smile and be gracious. Joe Wright? Unfortunately, he’s still making calls, schmoozing, and word’s all over town that he wants to get into Old Pine, but nobody wants him.

Buyers simply do not trust sellers who peddle their own business. They innately think something must be wrong. But when a skilled representative calls and talks to buyers and explains why such and such business is a great investment opportunity, and that Mr. Seller is a great guy, buyers listen and the seller can stick to what he should: running the business and being a “nice guy.”

Selling a business is like applying to join a country club. Nobody wants to pad the pockets of a person who toots his own horn.

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• Whether the registrant registered the domain name primarily for the purpose of disrupting the business of a competitor, or whether by using the domain name, the registrant has intentionally attempted to attract, for commercial gain, Internet users to the registrant’s website by creating a likelihood of confusion with the complainant’s mark.

If a claimant loses a UDRP proceeding, in many jurisdictions it may still bring a lawsuit against the domain name registrant under local law. If the claimant wins, ICANN simply instructs the defendant’s Internet Domain Registrar to transfer ownership of the subject URL to you. Then you can move it to your registrar if you wish.

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Send your comments and questions to editor@thebusinessowner.com.
**LEGAL**

**Q&A: Employee Commits Biz to Unwanted Obligation**

**Question:** If an employee enters into an agreement that obligates the company financially, and we did not give him permission to do so, do we have to honor it?

**Answer:** It depends on whether the counterparty to the contract justifiably relied on the employee having the authority to bind the company to the agreement.

An employee, whether or not he or she is an officer, may commit the company to an obligation if you hold him or her out as authorized to make that type of obligation. For example, a supplier can regard a company purchasing agent as having the authority to place orders. This is referred to as “apparent authority.”

An employee with what is referred to as “apparent authority” may also bind your company. Apparent authority is when the employee carries a title that implies the ability to bind the company, such as manager or vice president. So, irrespective of your internal understanding with that employee, an employee’s title may make you liable for acts he or she takes without your direct or personal authorization.

**INVESTMENT**

**The Diversification Imperative**

Owners of small and midsize private businesses may bear more undiversified risk than any other group. Starting or buying a business requires cash. Growing a business requires cash, too. Most business owners have limited funds, and obtaining additional equity or debt capital can be difficult or at least costly and time-consuming. The common result is extreme concentration of assets in the business. In doing this, the owner breaches one of the most widely accepted principles of prudent investment — diversification.

The validity of diversification is so well accepted in finance that it is sometimes called the law of diversification. It’s a risk management technique. It espouses spreading around your investments among a diverse, unrelated group of investments rather than concentrating them in a single investment or a few, related investments. Diversification allows the investor to limit the impact that random and unforeseen events can have on a portfolio.

The inverse of diversification is concentration risk.

In the first days when a business is newly formed or purchased, there aren’t many ways for the typical investor/owner to avoid concentration risk. Consciously or subconsciously, he or she bears that risk in exchange for the chance to live the dream of freedom and independence. Some ways to limit concentration risk at the outset include obtaining additional equity investors, securing non-recourse debt financing, avoiding having your spouse sign as guarantor, not pledging your home or other personal assets as collateral, and buying or starting a business that requires only a portion of your cash or investable funds.

But as the business grows and prospers, the opportunities to diversify improve. The prudent business owner will do so, and the Internal Revenue Service Code provides meaningful incentives. Regular allocation of company profits to owner accounts (e.g., IRA, 401(k), Keogh, SEP) can yield significant gains over time in personal financial security and risk reduction. The goal is that the quality of your retirement would be acceptable even if disaster struck your company.

We all know that private business is inherently risky. Private investment is risky. Even home prices have declined recently. To gamble your entire financial well-being and retirement security on a single, private business is a risk no one should have to bear for an entire lifetime. It may be the nature of private business ownership, but it doesn’t have to be — at least not forever. Talk to your financial advisors about ways to diversify and lower your concentration risk. The Business Owner offers ideas that may be good places to start.
All investors, including business owners, should use diversification as a defense against random and unforeseen events. You’ve placed your money in what is called “private equity,” i.e., your business. You must work to achieve meaningful financial diversification by investing outside of your business, but you should also use the law of diversification within your business to fortify and protect the business:

Customers. What would be the impact on your company if you lost your largest customer? If the answer is “severe,” then you bear customer concentration risk. Do you think you have an exceptionally strong relationship with your largest customer? If so, can your relationship prevent such things as fire, fraud, death, divorce or change of ownership? Probably not.

Contrary to what many owners think, diversity is achievable. It may take years, but once you secure customer diversity, then you have significantly increased the chance that your company will be around for the long run. You have increased its value, too.

Most regular acquirers of companies consider 10% to be the threshold between healthy customer diversification and concentration risk. If the largest customer, or any customer, accounts for more than 10% of annual revenues, buyers typically reduce the price they’re willing to pay — to account for customer concentration risk. Business owners should use this gauge, too.

Industry. What industry do you serve? If you could answer this question with the name of a single industry, then you bear industry concentration risk. Only companies that sell into multiple industries enjoy industry diversification. Over time, small companies should identify and penetrate multiple industries. For example, a printer that specializes in Baptist church books and magazines should expand to other denominations, then expand outside of faith groups to produce corporate annual reports, for example, or travel-related magazines.

Product. The “category killer” of the 1800s, U.S. Saddle and Whip Co., no longer exists because of its failure to diversify its product lines. If the company had only diversified into other types of leather goods, such as automobile seats or driving gloves, its great-grandchildren might be graduating from Harvard Business School today and managing the family foundation.

Employees. Reliance on a single, or a few, talented employees has caused the failure of more than a few companies. A private company owner should do all that he or she can to reduce exposure to the sudden departure of key employees.

First, consider key-man insurance to insure against death or disability of key contributors. Next, break up key tasks performed by your most critical people and spread them around to as many people as possible.

Vendors. Private companies that purchase unique items or services from a single vendor, or purchase components that would be hard for another company to duplicate, may bear significant risk. Take your key vendors and ask yourself, “If XYZ vendor burned down or closed due to financial problems, how would my business be impacted?” If the answer is “greatly,” you need a contingency plan. You should consider insurance, and begin plotting a course of action to mitigate this random risk exposure.

Credit. The lifeblood of many businesses is their source of funding. What if your banker pulled your line of credit, or your largest vendor stopped offering you attractive payment terms? During difficult economic times, credit sources can dry up unexpectedly. Business owners should recognize credit risk and work to ensure that this lifeline remains extended.

Geography. The business cycle tends to roll through industries and geographic regions in a less-than-uniform manner. If all of your customers are in a single state or country, you bear risk associated with your lack of geographic diversification. Try to find customers located elsewhere.

1 Concentration risk is lack of diversification in revenue or profit sources.
Legal challenges an employer faces on hiring an employee begin with the interview process and continue long after an employee has been terminated from employment. From pre-employment inquiries to post-employment references, employers are confronted with a panoply of laws that regulate and restrict their ability to manage personnel. This article addresses what some refer to as the “Big Three,” including the Civil Rights Act, the Family and Medical Leave Act, and the Fair Labor Standards Act.

Title VII of the Civil Rights Act
The most common form of litigation that employers face is employment discrimination. Title VII of the Civil Rights Act of 1964 prohibits discrimination in employment because of race, color, religion, sex or national origin. Title VII applies to all private-sector employers with 15 or more employees. Smaller employers may be subject to state or local laws. For example, New York state’s Human Rights Law applies to employers of four or more persons.

Until 1991, Title VII, although a significant source of litigation, was of less concern to employers from an exposure standpoint because it permitted neither (1) the right to a jury trial, nor (2) the recovery of punitive damages. But in 1991, Congress amended Title VII to provide both remedies. Title VII, though most commonly used in the employment termination context, prohibits discrimination in other employment contexts as well, such as hiring (e.g., the interview and selection process), promotion, work environment and retaliation. In the interview process, employers are precluded from asking applicants questions that not only directly request but could indirectly disclose information about an employee’s age, national origin or other protected classification.

The “hostile work environment” context has become the focus of cases involving sexual harassment suits. Such litigation has probably been the leading factor in prompting employers to establish policies against, and procedures for employees to complain about, discrimination. In several recent decisions, the U.S. Supreme Court held that employers might often avoid liability in hostile work environment cases by maintaining policies and complaint procedures and responding promptly to employee complaints.

Thus, it is essential for an employer to develop, implement and enforce a non-discrimination policy and complaint procedure. This type of procedure will not provide a defense in litigation involving “quid pro quo” sexual harassment, that is, an act of sexual harassment committed by a supervisory or managerial employee against a subordinate, combined with a threat of adverse job action or promise of job benefit. But such a policy and procedure will nonetheless encourage employees to initially use internal complaint procedures rather than turning to external judicial or administrative forums in the first instance.

Family and Medical Leave Act (FMLA)
Similarly, maintenance of a policy and procedure is essential for companies with 50 or more employees in ensuring compliance with the Family and Medical Leave Act (FMLA). FMLA provides that eligible employees are entitled to 12 weeks of unpaid leave per year upon the birth or adoption of a child, or the “serious health condition” of an employee or immediate family member. Eligible employees are those who have worked for an employer for at least 12 months, have worked more than 1,250 hours in the prior one-year period, and work at a location where at least 50 employees are employed within 75 miles.

Because FMLA permits leave in intervals of one hour or more, its application and use has become an administrative nightmare for employers, particularly small-business owners, who must accommodate leaves of varying length, often with little or no notice. Moreover, eligible employees, other than “key employees,” are guaranteed return to their former position upon completion of the leave.

FMLA has particularly affected companies with fixed attendance policies, i.e., companies that terminate employment after 15 absences in a calendar year. Because employers often do not initiate the FMLA process for absences of one or two days (nor inquire as to whether an absence is for an FMLA-qualifying reason), care must be taken, in case a termination is triggered by an employee’s absenteeism, that FMLA-qualifying days of absence are not counted. Although employees must notify the employer that an absence is due to an illness of the employee or an immediate family member for the employer’s obligation under FMLA to be triggered, the employee need not use the term “FMLA” in his or her notification. There has been a marked
increase in the number of employment terminations challenged under FMLA in 2002. Such suits can be blunted successfully by implementing and following FMLA policy and procedure, part of which requires employees to provide medical certification for their absences.

**Fair Labor Standards Act (FLSA)**

A third area of increased litigation activity has been overtime wage claims under the Fair Labor Standards Act (FLSA). FLSA does not have a minimum employee requirement, as applies to all employers engaged in commerce. Under FLSA, employees who work more than 40 hours in a week must be paid time and a half their regular hourly rate for all hours worked past 40.

FLSA exempts from the overtime requirement *bona fide* executive, administrative and professional employees, as well as outside salespersons. A common pitfall in classifying employees as exempt has been a misunderstanding of the significance of the “salary” basis of payment. Although one of the requirements for exempt status is that an employee receives a salary of at least $250 per week, regardless of the number of hours worked, payment of a salary is not sufficient to satisfy the exception. Thus, employers have often classified employees with titles such as assistant manager, administrative assistant or sales manager as exempt, based on receipt of a “salary,” when these employees are not exempt and are entitled to overtime.

This potential problem, which often arises in a suit filed after an employee has been terminated from employment, and/or may become the subject to an investigation by the U.S. Department of Labor or a state labor agency, can be avoided by conducting an internal audit of all job titles deemed exempt to ensure that they satisfy the statutory exemption.

Another more recent source of employee claims under FLSA has involved a failure to pay minimum wage in situations where small companies, particularly start-ups in the technology area, have promised employees stock options and bonuses in exchange for an employee’s agreement to work without pay during the start-up period. Because payment of the minimum wage during each payroll period (usually a week) cannot be waived, such arrangements are unlawful, and employees are entitled to payment for the weeks in which no wages were paid, even if the payment of wages was made later and exceeded the minimum wage payment for all previous periods.

Unfortunately, FLSA provides for little creativity in methods of payment, and has not been modified to meet current economic conditions and changes. In conclusion, although current federal employment laws do pose a minefield for the unwary employer, consulting with a human resources professional or attorney when designing policies and procedures, combined with an internal audit of current practices, can often prevent exposure to litigation under the Civil Rights Act, FMLA and FLSA.

Jerry Goldberg, a labor and employment attorney in the New York office of Greenberg Traurig, wrote the substance of this article. For additional information, call 212-801-9200, email goldbergj@gtlaw.com or visit www.gtlaw.com.

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In addition, the CEO or president of a company is presumed to have authority to enter into most contracts in the ordinary course of business on behalf of the business. It’s called “implied authority,” and an officer or employee in a particular area may have it as well, such as the vice president of marketing or the advertising director.

Since an employee or officer with actual, apparent or implied authority can bind your firm to a contract, you should establish internal controls on contracts above certain dollar amounts. The controls may be in the form of approvals or review by other executives or department heads. Another option is to require two signatures on checks and contracts for large purchases above a certain dollar amount. In addition to educating your staff as to controls in place, you should periodically advise company suppliers in writing of these requirements by including directly on your Purchase Order the approval(s) and/or requirements for valid orders. This can provide meaningful recourse for removing yourself from unauthorized obligations made by employees.
STATISTICAL DATA OF INTEREST

S&P 500 Historical Price to (P/E) Earnings Ratio

Historical S&P 500 Price to Dividends Ratio

Initial Unemployment Claims
Four-Week Average

Purchasing Managers Index

Money Supply (M2)
Percentage Change from 12 Months Earlier

Average Weekly Hours
U.S. Manufacturing Laborers

Source: Standard & Poor’s


Source: Board of Governors of the Federal Reserve System

Production and non-supervisory U.S. manufacturing only
Annual data are average of monthly data for each year.
Tax Credit for Health Insurance Premiums Paid

December 6, 2010

Are your health insurance costs rising? Claim your tax credit for 2010 health insurance premiums paid for your employees. Go to www.IRS.gov to obtain form 8941, Credit for Small Employer Health Insurance Premiums. It has instructions, but Notice 2010-82 provides a more detailed explanation designed to help small employers correctly figure and claim the credit.

In general, the credit is available to small employers that pay at least half of the premiums for single health insurance coverage for their employees. It is specifically targeted to help small businesses and tax-exempt organizations that primarily employ moderate- and lower-income workers.

Small businesses can claim the credit for 2010 through 2013 and for any two years after that. For tax years 2010 to 2013, the maximum credit is 35 percent of premiums paid by eligible small businesses and 25 percent of premiums paid by eligible tax-exempt organizations. Beginning in 2014, the maximum tax credit will increase to 50 percent of premiums paid by eligible small-business employers and 35 percent of premiums paid by eligible tax-exempt organizations.

The maximum credit goes to smaller employers — those with 10 or fewer full-time equivalent (FTE) employees — paying annual average wages of $25,000 or less. The credit is completely phased out for employers that have 25 or more FTEs or that pay average wages of $50,000 or more per year.

Included in the Affordable Care Act enacted in March, the small-business health care tax credit is designed to encourage

Demise of the Annual Employee Pay Raise

December 22, 2010

Do you still give your employees an automatic annual pay raise? Or feel that you should?

Automatic annual pay raises came to be common practice in the 70s and 80s when inflation was, well, automatic. Inflation was a part of the economy every day, month and year. As such, the “real” purchasing power of the dollar eroded constantly. Raising employee wages with inflation was merited, fair, and it did not hurt the company’s bottom line so long as the prices of the goods and services sold by the firm were raised at the same pace.

But times have changed. Inflation is virtually nonexistent today. Certainly, few businesses can raise prices. If you give employees automatic raises today, it may simply constitute a transfer of your profit to your employees. Over time, it could kill your ability to operate profitably. And you know what that means. Soon, employees will have much more to worry about than whether their wages are keeping pace with inflation.

Do you still give annual automatic pay raises? Do your employees still expect them? Employees need to be educated about how and why such became the norm, and more important, why they no longer make sense. Merit increases? Of course. Automatic raises? Not so smart. tbo

both small businesses and small tax-exempt organizations to offer health insurance coverage to their employees for the first time or maintain coverage they already have. tbo

Source: Internal Revenue Service
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What Every Business Seller Should Know

Your competitors are not the best buyers for your business. Although they’re easy to identify, they pose considerable risk and rarely pay the highest price. Risky — because they can and will use the fact that you wish to sell — and the information you share with them — against you. A lower value — because you don’t offer as much value to them in terms of industry knowledge, expertise, processes and methods.

It’s hard work locating better buyers, but the rewards can be considerable. That’s why smart business owners hire Acquisition Advisors. We develop “highest and best buyer profiles” for your business and then use them to sort through a database of every U.S. company, scores of international companies and our proprietary database of more than 3,000 private-equity groups. We then confidentially market your company to the leading candidates. Our goal is to deliver a range of competitive bids and deal structures for you to choose from and then work to complete the deal with your preferred buyer. All of this is done in strict confidence.

Acquisition Advisors complete multimillion-dollar transactions every quarter. Just ask our clients — they offer great references for our work.

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Clear, honest and committed representation for owners of midsize private companies

Free articles, information and case studies at AcquisitionAdvisors.com.
Call us confidentially at 877-525-4321.
Map Guides Business Owners to Maximum Value and Payday

What should you do today to build the value of your business? To maximize the eventual sale price? Acquisition Advisors has put it on paper. A single piece of paper. This amazing map contains all the things that drive value higher and, conversely, sap value — from a business buyer’s perspective.

The Path to Absolute Maximum Sale Price (of a Business) map has four main sections dedicated to how a business owner should go about preparing, packaging and executing the sale to garner absolute maximum. Each section is a phase in the journey that — if the steps are followed — will lead to a sale at absolute maximum:

This is a must-have for every business owner. It clearly displays everything about building value and preparing for a sale at absolute maximum.

Yes, please send me my Best Practice Map:
The Path to Absolute Maximum Sale Price (of a Business)

<table>
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