

Table of Contents

Chapter 1:	Introduction to General Business Considerations and Understanding the Role of Legal Counsel.....	1
A.	Chapter Introduction.....	1
B.	Understanding the Difference Between What Is a “Business Decision” and What Is a “Legal Consideration”.....	2
C.	The Business Owner’s Professional Services Team.....	4
1.	Payroll Services.....	4
2.	Retirement Planning and Services.....	5
3.	Bookkeeping and Accounting.....	7
4.	Information Technology.....	8
a.	Email.....	8
b.	Website.....	8
c.	Information Technology.....	8
5.	Insurance.....	9
a.	Business Owner’s Policy (“BOP”).	11
b.	Commercial Property.....	13
c.	Business Income (“BI”).	16
d.	Commercial General Liability (“CGL”).	18
e.	Professional Liability or Errors and Omissions Insurance.....	19
f.	Cyber Liability.....	20
g.	Life Insurance and Key Man Insurance.....	22
h.	Additional Policies.....	22
D.	Chapter Conclusion and Final Thoughts.....	27
Chapter 2:	Choice of Business Entity, Corporate Law Basics, and Initial Tax Considerations.....	29
A.	Chapter Introduction.....	29
B.	General Overview and the Role of the South Carolina Secretary of State.....	30

TABLE OF CONTENTS

C.	Getting Started – An Early Look at Entity Form.....	31
D.	The Concept of Unlimited Personal Liability.....	32
E.	Piercing the Corporate Veil.....	35
F.	Alter-Ego Theory and Amalgamation.....	40
G.	Forming a South Carolina Business Entity: Organizing or Incorporating Your Business with the South Carolina Secretary of State.....	42
1.	Sole Proprietorships.....	43
2.	South Carolina General Partnerships.....	44
3.	Limited Partnerships.....	45
4.	Limited Liability Partnerships.....	47
5.	Corporations.....	48
a.	Tax Treatment of Corporations.....	50
b.	Statutory Close Corporations.....	51
c.	Professional Corporations.....	52
6.	Limited Liability Companies.....	53
a.	Tax Considerations for LLCs.....	54
b.	Governance Structure and Relationship of Members: The LLC Act and Operating Agreements.....	55
H.	General Corporate Q&A.....	58
I.	What Should I Name the Business? Considerations for the Selection of a Name for Your Company.....	59
J.	Foreign Filings and Qualification.....	63
K.	Obtaining a Federal Employer Identification Number or “FEIN”.....	65
L.	Tax Elections for Your Newly Formed Entity.....	67
M.	Federal Corporate Income Tax Basics.....	68
1.	Subchapter C.....	68
a.	Perceived Advantages.....	68
b.	Perceived Disadvantages.....	70

TABLE OF CONTENTS

2.	Subchapter S.....	70
a.	Perceived Advantages.....	70
b.	Perceived Disadvantages.....	71
N.	2017 Tax Cuts and Jobs Act.....	71
O.	Chapter Conclusion and Final Thoughts.....	72
Chapter 3:	Corporate Governance.....	73
A.	Chapter Introduction.....	73
B.	General Overview.....	74
C.	Shareholder Agreements and Bylaws for Corporations.....	74
1.	Bylaws.....	75
2.	Shareholder Agreements.....	76
a.	Buy-Sell Provisions.....	76
b.	Transfer Restrictions.....	77
c.	Director/Officer Indemnification.....	79
D.	Fiduciary Duties of Directors and Officers of Corporations.....	80
1.	Duty of Care.....	81
2.	Duty of Loyalty.....	82
3.	Minority Oppression.....	82
4.	Methods for Avoiding Breach.....	83
E.	Operating Agreements for LLCs.....	85
1.	Statutory Basis.....	85
2.	Basic Framework and Structure.....	86
3.	Financial Rights and Obligations.....	87
a.	Allocations.....	87
b.	Distributions.....	88
c.	Capital Contributions.....	91
4.	Management Rights.....	93
a.	Two-Level Management Structure and Approval Threshold.....	94
b.	Multi-Class Membership Interest.....	95

TABLE OF CONTENTS

	c.	Action Taken in Contravention of the Terms of the Operating Agreement.....	95
	5.	Dissociation and Admittance of New Members.....	96
	a.	Tax-Election Considerations.....	97
	b.	Notice of Intent to Transfer.....	98
	6.	Redemption of Member's Interest.....	99
	a.	Valuation Considerations.....	99
	7.	Capital Transactions and Dissolution/ Termination of the LLC.....	101
	a.	Distributions of Company Assets.....	102
F.		Authorizing Resolutions: Approving Corporate Actions of Corporations and LLCs.....	103
G.		General Corporate Governance Q&A.....	105
H.		Chapter Conclusion.....	108
Chapter 4:		Business Licenses in South Carolina.....	109
A.		Chapter Introduction and General Overview.....	109
B.		South Carolina Business License Tax Standardization Act.....	111
C.		Chapter Conclusion and Final Thoughts.....	115
Chapter 5:		What Business Owners Need to Know About Workers' Compensation Insurance.....	117
A.		The Basic Question: What Is Workers' Compensation Insurance?.....	117
B.		Special Rules for Maritime Workers.....	119
C.		General Workers' Compensation Q&A.....	120
D.		Deviation from Employment Duties.....	128
E.		Incident Procedures.....	129
F.		Workers' Compensation Forms.....	131
G.		During the Claim Process.....	132
H.		Mandatory Mediation.....	136
I.		Informal Conferences.....	136
J.		Formal Hearings.....	137

TABLE OF CONTENTS

K.	Settlements.....	137
L.	Legal and Financial Consequences for the Employer of a Workers' Compensation Claim.....	137
N.	Retaliation.....	138
O.	Chapter Conclusion and Final Thoughts.....	138
Chapter 6:	Selected Topics in South Carolina and Federal Employment Law.....	141
A.	Chapter Introduction.....	141
B.	Employee vs. Independent Contractor.....	141
C.	Employment Contracts and Terms of Employment.....	145
D.	Employee Handbooks.....	148
E.	Restrictive Covenants.....	152
F.	Confidentiality and Non-Disclosure Agreements.....	156
G.	"Work Made for Hire" Doctrine.....	157
H.	Unemployment Insurance.....	159
I.	Health Insurance Requirements.....	161
J.	Overview of Federal Employment Laws Affecting Businesses...	163
1.	Fair Labor Standards Act ("FLSA").....	163
2.	Equal Pay Act ("EPA").....	164
3.	Family and Medical Leave Act ("FMLA").....	164
4.	Anti-Discrimination Statutes: Age Discrimination in Employment Act ("ADEA"); Americans with Disabilities Act ("ADA"); and Title VII of the Civil Rights Act of 1964 ("Title VII").....	165
5.	Employee Retirement Income Security Act ("ERISA")..	167
6.	National Labor Relations Act ("NLRA").....	167
7.	Worker Adjustment and Retraining Notification Act ("WARN").....	168
K.	Incentive Compensation for Employees/ Independent Contractors.....	168

TABLE OF CONTENTS

L.	Traps for the Weary Business Owner Relating to Severance Pay.....	171
1.	Employees Age 40 Years and Older.....	171
2.	Covenant Not to Sue Provisions in Settlement Agreements.....	172
3.	Non-Disparagement Clauses.....	173
4.	409A Trap for Severance Obligations Paid in Installments.....	173
M.	Tips for Hiring/Firing.....	174
1.	New Hire Reporting Requirements.....	174
2.	Background Checks.....	175
3.	Remote/Out-of-State Workers.....	177
4.	Unpaid Wages/Commissions Upon Termination.....	178
N.	Chapter Conclusion and Final Thoughts.....	178
Chapter 7:	Real Estate Considerations for Business Owners.....	181
A.	To Lease or to Own – An Array of Considerations.....	181
B.	Leasing as a Business Owner.....	182
C.	Common Elements of a Commercial Lease.....	183
1.	General Lease Elements.....	183
2.	Rent.....	183
3.	Security Deposit.....	186
4.	Term and Renewal Periods.....	186
5.	Permitted Use.....	187
6.	Environmental Liability.....	187
7.	Allocation of Responsibility (Including Financial).....	187
8.	Indemnification Provisions.....	188
9.	Hold-Over Provision.....	189
10.	Tenant’s Permitted Improvements.....	190
11.	Improvements Required to Be Made by Landlord (if any), Tenant Improvement Allowance and “Free-Rent” Period.....	190

TABLE OF CONTENTS

12.	Default Provisions and Remedies of Non-Defaulting Party.....	191
13.	Rights of Tenant in the Event of Sale of Leased Premises.....	193
14.	Rights of First Refusal and Purchase Options.....	193
15.	Tenant/Landlord Obligations After Termination of Lease.....	194
16.	Personal Guaranty Considerations for Principals of Tenant.....	194
D.	Basic Tax Considerations for Leases.....	195
1.	General Tax Treatment Rental Payments.....	195
2.	Tenant Improvements.....	196
a.	Improvements Paid by Tenant.....	196
b.	Improvements Made by Tenant but Paid for by Landlord.....	196
E.	Purchasing and Owning Real Property – A Permanent Home for Your Business.....	197
1.	Perceived Advantages to Owning Commercial Property.....	197
a.	Property Improvement.....	197
b.	Unlimited Period of Use.....	198
c.	Accumulation of Wealth.....	198
d.	Loan Term vs. Lease Term.....	199
2.	Perceived Risks to Owning Commercial Property.....	200
a.	Commercial Loan Terms.....	201
b.	Illiiquid Asset.....	202
c.	Maintenance Obligations.....	203
d.	Lending Limitations and Impact on Business.....	203
F.	Acquisition and Divestment; Brokerage Services.....	204
G.	Purchase and Sale Agreement – The “Contract”.....	206
1.	Basic Closing Terms.....	208
a.	Purchase Price.....	208

TABLE OF CONTENTS

b.	Earnest Money Requirement.....	208
c.	Identification of Property.....	208
2.	Due Diligence Period.....	209
3.	Closing Timeline; Conditions Precedent.....	210
4.	Default.....	210
5.	Risk of Loss Prior to Closing.....	210
6.	Environmental Representations.....	210
7.	Notice Provisions.....	211
8.	Seller Representations and Deliverables/ Buyer Representations.....	211
9.	Closing.....	212
H.	Basic Tax Considerations for Real Estate Ownership.....	212
1.	Depreciation.....	212
I.	Chapter Conclusion and Final Thoughts.....	214
Chapter 8:	Intellectual Property Basics for Attorneys and Entrepreneurs.....	215
A.	Chapter Objectives and Introduction.....	215
B.	General Overview of Forms of Intellectual Property.....	215
1.	Patents.....	215
2.	Trademarks.....	216
3.	Copyrights.....	216
4.	Trade Secrets.....	217
C.	General Patent Q&A.....	218
D.	General Trademark Q&A.....	220
E.	General Copyright Q&A.....	223
F.	General Trade Secret Q&A.....	224
G.	Common Intellectual Property Mistakes.....	226
1.	Patents.....	226
2.	Trademarks.....	229
3.	Copyrights.....	231
4.	Trade Secrets.....	232

TABLE OF CONTENTS

H.	Other Common Questions About Intellectual Property.....	233
I.	Artificial Intelligence.....	235
J.	Chapter Conclusion and Final Thoughts with Disclaimer and Qualifier.....	236
Chapter 9:	State Income, Business Personal Property, Sales and Use Tax, and Other Select Taxation Topics in South Carolina.....	237
A.	Introduction.....	237
B.	South Carolina Basic Income Tax on Business Income.....	238
C.	Codified Income Tax Rates.....	240
D.	Multi-State Business Activity.....	242
E.	Corporate Annual License Fee.....	242
F.	State Income Taxation of Disregarded Entities.....	243
G.	State Income Taxation of Pass-Through Entities Subchapter S and Subchapter K.....	243
H.	Retail License.....	244
I.	Sales Tax.....	245
J.	Use Tax.....	246
K.	Business Personal Property Tax.....	247
L.	Accommodations Tax.....	250
M.	Chapter Summary and Final Thoughts.....	251
Chapter 10:	Securities Considerations.....	253
A.	What Is a Security?.....	253
B.	Do I Really Need to Worry About This?.....	254
C.	How Do I Know if I am Selling a Security?.....	254
	A Brief History of the Securities Laws.....	255
D.	The <i>Howey</i> Test – United States Supreme Court’s Definition of a “Security”.....	256
1.	“Investment of Money”.....	256
2.	Expectation of “Profits”.....	256
3.	“Solely” from the Efforts of Others.....	256
4.	Common Enterprise.....	258

TABLE OF CONTENTS

	5.	Substance over Form.....	259
E.		Sample Issues.....	260
F.		Compliance with Securities Laws.....	261
	1.	Failing to Register or Perfect an Exemption.....	261
	2.	Securities Fraud.....	263
	3.	Public Offerings; Reporting Requirements.....	264
	4.	Private Offerings.....	266
	5.	“Accredited Investors”.....	268
	a.	For Natural Persons.....	268
	b.	Other Common Criteria.....	268
	6.	Effect on Disclosures.....	269
G.		Securities Exemptions.....	272
	1.	Federal Exemptions – Private Offerings.....	272
	2.	Regulation D.....	272
	3.	Other Common Federal Exemptions.....	274
H.		State Blue Sky Laws and Notice Filings.....	275
		CHART 1: Common Exemptions from Federal Registration.....	276
I.		Round After Round... Not So Fast! Beware of the Integration Doctrine.....	277
J.		South Carolina Specific Exemptions.....	278
K.		Broker Considerations.....	279
L.		Chapter Conclusion and Final Thoughts.....	280
Chapter 11:		Estate Planning and Your Business.....	283
A.		Introduction.....	283
B.		Overriding Principles to Successful Estate and Business Succession Planning.....	283
C.		Marketability and Value Distinctions of Business Assets as Compared to Other Personal Assets of a Business Owner.....	285
D.		Federal and State Estate Tax Considerations.....	299
E.		Basis Step-Up Rules.....	302

TABLE OF CONTENTS

F.	Chapter Conclusion and Final Thoughts.....	305
	Disclaimer and Qualifier.....	306
Chapter 12:	Buying and Selling a South Carolina Business.....	307
A.	Introduction.....	307
B.	Preliminary Discussions: Confidentiality and Letters of Intent... 1. Letters of Intent..... a. Common Provisions in an LOI.....	307 308 308
C.	Due Diligence.....	311
D.	Equity Sales vs. Asset Sales..... 1. Asset Sales..... 2. Equity Sales.....	312 312 313
E.	The Purchase Agreement..... 1. Purchase Price Considerations..... 2. Representations and Warranties..... a. Representations of Buyer..... b. Representations of Seller..... 3. Covenants..... 4. Conditions to Closing..... 5. Indemnification..... a. Limitations on Indemnity..... b. Insurance Indemnity.....	313 314 317 317 321 323 324 325 327
F.	Ancillary Documents..... 1. Bill of Sale..... 2. Assignment and Assumption Agreement..... 3. Non-Compete Agreement..... 4. Authorizing Resolutions..... 5. Closing or “Bring Down” Certificates..... 6. Funds Flow Statement..... 7. Promissory Note..... 8. Employment or Consulting Agreements.....	328 328 329 329 329 330 330 330

TABLE OF CONTENTS

9.	Escrow Agreement.....	330
G.	Chapter Conclusion and Final Thoughts.....	330
Chapter 13: Termination of Business: Concepts and Strategies.....		333
A.	Introduction.....	333
B.	Voluntary Terminations – An Overview.....	334
C.	Requisite Approval and Events Prompting Dissolution.....	335
1.	For Corporations.....	335
2.	For LLCs.....	335
D.	Required State Filings: Corporations.....	338
E.	Required State Filings: LLCs.....	339
F.	General “Winding Up” Process.....	339
G.	The “Winding Up” Process for Corporations.....	341
H.	The “Winding Up” Process for LLCs.....	341
I.	Notifying Creditors and Settling Claims of the Business.....	342
J.	Liquidating and Distributing Assets.....	345
K.	Cancellation of Licenses and Permits.....	346
L.	Final Tax Filings and Notifications.....	346
1.	Federal Payroll Withholdings.....	347
2.	State Income Withholdings and Sales Tax.....	347
3.	Final Income Returns.....	348
a.	Federal Return Filing Requirements for Winding Up and Dissolution.....	349
b.	State Return Filing Requirements for Winding Up and Dissolution.....	350
4.	Report of Asset Sales.....	350
5.	Issued Statements of Employer.....	351
a.	Employer Returns.....	351
b.	Withholding Statement to Employees.....	351
c.	Independent Contractor Statements.....	351
d.	Pension Plans.....	352

TABLE OF CONTENTS

6.	Discontinuing the Federal Employment Identification Number (“FEIN”).....	352
M.	What About Bankruptcy?.....	353
N.	Chapter Conclusion and Final Thoughts.....	353
Chapter 14: Practical Considerations and Legal Risks When Businesses Encounter Personal Injury Claims.....		355
A.	Introduction.....	355
B.	Understanding How Cases Are Evaluated and How That Affects Your Business.....	356
C.	Insurance Coverage Is Often Directly Related to Evaluating Risk.....	361
D.	Insurance and the <i>Tyger River</i> Doctrine.....	364
E.	What Is an Excess Verdict.....	368
F.	Chapter Conclusion and Final Thoughts.....	369
Table of Authorities.....		371
Index.....		393

TABLE OF CONTENTS
