

LEGAL PERSPECTIVES



END OF YEAR Questions to Discuss with Your Business Attorney



By M. Tyler Johnson

2020 was a year of change and challenges. Many small business owners are working harder than ever to keep their businesses running with fewer resources, changing supply chains, higher dependence on technology, and remote workers. As the year comes to a close, it's time to plan for 2021 and beyond. Below are a few questions to consider discussing with your business attorney.

1. Should I incorporate?

Whether you are establishing a brand-new business or you are currently operating as a sole proprietor, one of the primary reasons to incorporate is personal asset protection. When you form either a limited liability company or a corporation, you will enjoy limited liability, which means that subject to certain exceptions, your liability exposure is limited to the amounts you invested or contributed into the business. In other words, you are not personally liable for the debts of the business.

There are several other reasons to consider incorporating. For instance, incorporating will give you the flexibility to designate how your business will be taxed. It can also help restrict or facilitate the transfer of your ownership interest. Lastly, limited liability companies and corporations have perpetual existence, so what you build today can continue well into the future.

You should consult your attorney to determine whether incorporating is right for your business.

2. Do I have an exit strategy or succession plan in place?

As a business owner, you have probably put a significant amount of time and energy into growing your business. If you are approaching retirement, you should consider whether you have a plan in place that will further your long-term goals.

Important questions you will have to answer in your succession plan are: (i) whether you will be selling the business or passing it on to your children, (ii) how to value your business, (iii) whether you will need additional income after transferring your business, (iv) the tax consequences of a transfer, and (v) how you will prepare future management to succeed.

Developing and implementing a succession plan that properly addresses these issues is a process that will take several steps to complete. To prepare, you should review the business's organizational and governance documents, if any, to gain an understanding of your business's structure. You should also look into whether the organizational and governance documents contain provisions relating to the transferability of your ownership interest. If your business does not have organizational or governance documents in place or the documents do not contain provisions relating to the transferability of your ownership interest, your ownership interest will pass through your estate plan. Therefore, you should also review your estate planning documents.

Developing and implementing a plan takes time. There is no better time to start than now.

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NEWSLETTER



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3. Do I need to update any legal agreements to which my business is a party?

As we approach the new year, now is the time to take an inventory of all the outstanding contracts to which your business is a party. Some contracts, such as leases or vendor contracts, are renewed on an annual basis. These contracts should contain instructions on how to notify the other party of your intention to terminate or renew.

Additionally, if you have not already done so, now is a good time to review your form contracts to determine whether they adequately address issues of non-performance, delays in performance, and termination rights in light of the COVID-19 pandemic. Given these uncertain times, you will want to make sure you are in the best possible position should you need to defend yourself or assert a claim that events related to the pandemic have hindered or prevented your performance under the agreement.

4. How do I develop and protect my brand?

Business owners spend a significant amount of time and expense building a name brand, logo, symbol, and slogan that

are used to sell the business's goods and services. These names, logos, symbols, and slogans communicate trustworthiness and a level of quality of the business's goods or services to customers. Over time and through consistent use, a brand develops substantial and valuable goodwill in the marketplace. Thus, it is imperative that business owners understand how to protect their brand and the options they have for doing so.

Generally, the broadest scope of protection comes by way of registering the name, logo, symbol, or slogan that is used in connection with the business's goods or services with the United States Patent & Trademark Office (USPTO) in the form of a trademark. Other options include registering the name, logo, symbol, or slogan with the State of Nebraska as either a trademark, service mark or trade name.

As a business owner, you have invested a lot in building your brand and should take steps to adequately protect your investment.

Abrahams Kaslow and Cassman LLP is always here to help. Contact Tyler Johnson at 402.392.1250.

Does OSHA Regulate Infectious Diseases?



By Julie M. Ryan

A primary purpose of the Occupational Safety and Health Administration ("OSHA") is to ensure safe and healthful working conditions for working men and women by setting and enforcing standards. OSHA aims at establishing practices that

proactively prevent workplace injuries, illnesses, and deaths. Certain employers must comply with OSHA standards imposed as federal regulations. Employers who implement safety and health programs that comply with OSHA standards may realize the following benefits:

- Increased prevention of workplace injuries, illnesses, and deaths
- Increased employee satisfaction and productivity
- Reduction in employee complaints and related OSHA investigations, citations, penalties, workers' compensation claims or other lawsuits

Most private-sector workers within Nebraska are subject to federal OSHA standards. In light of the ongoing pandemic, those employers may wonder about their obligations to protect their workers from exposure to viruses such as COVID-19. While OSHA does not currently have specific standards that employers must follow to protect covered employees from airborne or other infectious diseases, OSHA does impose a general duty on employers to provide their employees a job and workplace that are "free from recognized hazards that are causing or are likely to cause death or serious physical harm" to employees. OSHA may issue a violation if an employer did not take reasonable steps to prevent or mitigate a recognized serious hazard in the employer's workplace. These citations are often challenged because OSHA must prove:

- The employer failed to keep the workplace free of the hazard;
- The hazard was recognized;
- The hazard was causing or was likely to cause death or serious physical harm; and

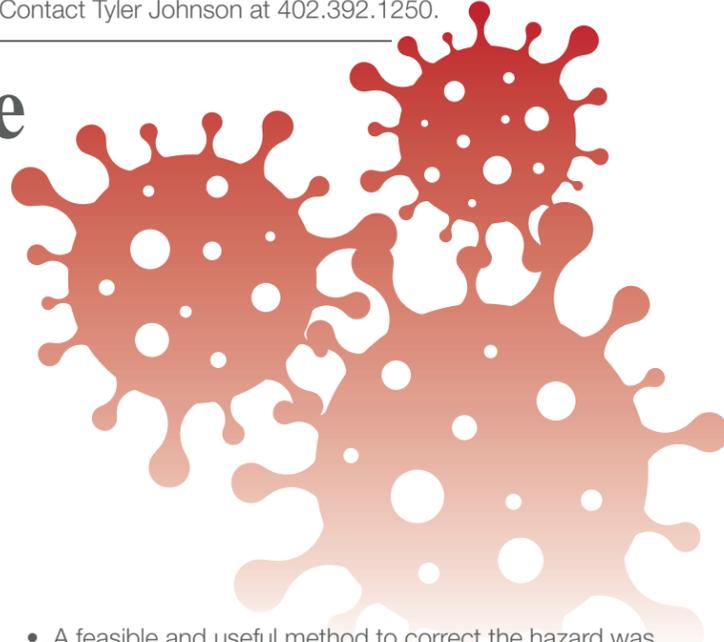
- A feasible and useful method to correct the hazard was available.

OSHA may rely on current recommendations from organizations like the Centers for Disease Control and Prevention ("CDC") when assessing a complaint about hazards allegedly stemming from COVID-19. It is unlikely that OSHA could satisfy those requirements regarding that kind of a complaint. OSHA's guidelines state there would have to be some evidence that an employee was potentially exposed to the virus in the workplace.

OSHA's updated COVID-19 guidance states that an employer's obligations under existing regulations may apply to COVID-19 hazards, but applicability depends on the circumstances of each case. An employer's good faith efforts to comply with applicable OSHA standards during the pandemic will be strongly considered when deciding whether a violation should result in a citation to the employer.

Nebraska employers covered by OSHA should keep an eye out for any guidance or regulations that may be issued by OSHA about infectious disease hazards.

Please contact our employment law or litigation attorneys for help with developing plans or policies to address your particular industry, or for specific guidance or representation regarding any other OSHA-related issue that may be impacting your business.



Take Control of Your Estate Plan



By Andrew P. Deaver

The events of the past eight months have been unexpected and challenging. The world and our lives have changed in ways we would never have imagined when we rang in 2020. It may seem like nearly everyone has more fear and feels less in control than we did a year ago. But there is one area that you can control – your estate plan. And, as we come to the end of 2020, it's an excellent time to take a look at what has changed and adjust your estate plan accordingly.

Some of us have lost businesses or jobs. The change in financial circumstances can require updates to an estate plan regarding specific devises in a Will or succession planning for a company.

Some of us have lost touch with family members or friends. Someone may have listed a sibling as the agent in her Financial Power of Attorney, but, due to quarantine, that relationship is not as close as it once was. That person may need to update her Financial Power of Attorney to remove her brother and to include someone else who is better suited for the responsibility.

Some of us have lost loved ones. Perhaps an older parent who was to serve as a personal representative under a Will has passed away. Or a sibling, who was to be a guardian for a minor child, is no longer able. The survivor's Will now needs to be updated because that person is no longer living.

Some of us are concerned about travel. If an agent or attorney-in-fact listed in a Financial or Health Care Power of Attorney lives out of state, it now may be more difficult for them to act on your behalf if necessary. These documents may need to be updated to list someone who lives closer to home.

But almost all of us have considered our health and our mortality.

We are reminded every day of the danger of being hospitalized, but have we taken steps to prepare for that potentiality?



A Health Care Power of Attorney can ensure a trusted family member or friend has the authority to make health care decisions on your behalf if you cannot.

Similarly, a Living Will document can address the potential end-of-life scenario where you can no longer make your own health care decisions, are only still living due to artificial means (for example, due to a ventilator), and the doctor says you will never recover.

We are reminded every day that death may be around the corner, but have we taken the step to legally prepare for what that might mean for our family? You may have children who need to be cared and provided for, businesses that need to continue to run, assets that need to be transferred, and individuals chosen to see this all happens as it should.

None of these things are straightforward and none of them are easy to think about, but one choice we have control of is to take action when and where we can to protect ourselves, our family, our businesses, and our other assets.

To speak with Andy or another of our Estate Planning attorneys, please call us at 402.392.1250 or visit us on the web at AKCLaw.com

In Memory of R. Craig Fry

August 26, 1955 - July 26, 2020

We are incredibly sad to announce that we lost a dear friend. Ronald Craig Fry (Craig) was a partner at Abrahams Kaslow & Cassman LLP for over 30 years, until his death on July 26, 2020.

Craig's practice focused on general corporate and business law. He said, "My focus has always been on providing my clients with a practical solution to their legal needs and always doing the job right, not just most of the time. This takes effort, focus, and bringing the right skills to the job." For his efforts, Craig was recognized as a "Best Lawyers of America for Corporate Law" each year since 2011.

Craig was a devoted Nebraska Huskers fan. He also enjoyed golfing, tennis, and taking trips to ski in the mountains. He had a love for live music and going to concerts. But Craig's favorite place was his home on Lake Bennington with his wife, Julie. Together, they enjoyed spending time on the water with family and their many friends.

Craig was preceded in death by his parents, Loren and Hope (Parker) Fry. Those left to remember his lively sense of humor, many experimental cocktails and caring nature include his wife, Julie Fry; sons, Tyler of Chicago, IL; Kyle and Matthew Fry of Omaha; stepdaughters, Katlin (David) Ozinga of Pasadena, CA; Lisa Hernandez of Bennington, NE; Rachel Kinnison of Bennington, NE; Nicole Kinnison (Frank Hifferman) of Cowpens, SC; his step-grandchildren include Wyatt, Elle, Benny, and Frances Joy; sister, Deb Bauer of Omaha, NE; and many friends and co-workers.

Memorials may be made to: University of Nebraska-Lincoln College of Law.





New Faces



Attorney **Julie M. Ryan** joined our Litigation Team. She applies her strong skills in persuasion, organization, and research to assist clients with Civil Litigation, Appellate Litigation and Appeals, Insurance Defense, and Medical Malpractice matters.



Attorney **Gregory F. Schreiber** represents businesses and corporations through all stages of litigation, including breach of contract, negligence, insurance disputes, construction disputes, and employment matters. He defends physicians, nurses, hospitals, and healthcare facilities in medical malpractice cases.



Judy Mitchell is a paralegal with over seven years of experience in both Nebraska and Iowa state courts, and federal courts. She joined the AKC Law team in September.



Angela Paasch joined AKC Law as a paralegal in July. She has over twenty years of legal experience in Personal Injury, Medical Malpractice, Insurance Defense and Family Law.

LANDLORDS BEWARE: CDC Order Halts Residential Evictions through 2020



By Samuel R. O'Neill

On September 4th, the Centers for Disease Control and Prevention (CDC) issued an Order under Section 361 of the Public Health Service Act to temporarily halt residential evictions to prevent the further spread of COVID-19. The order is effective September 4, 2020 through December 31, 2020.

The CDC order is different from the Coronavirus Aid, Relief, and Economic Security Act (CARES Act) which expired on July 24th. The CARES Act only applied to tenants and landlords who participated in federal housing assistance programs or who leased property that was encumbered by a federally backed mortgage.

The CDC's Order applies to all tenants that meet the qualifying criteria:

1. The tenant has used best efforts to obtain government assistance for rent or housing;
2. The tenant either (i) expects to earn less than \$99,000 in annual income for 2020, (ii) was not required to report income in 2019 to the IRS, or (iii) received an Economic Income Payment (stimulus check);
3. The tenant is unable to pay rent due to either a substantial loss in household income, a reduction of workable hours, or extraordinary out-of-pocket medical expenses;
4. The tenant is using best efforts to make timely full or partial rent payments;
5. The tenant would likely become homeless, need to move to a homeless shelter, or move into a new residence shared by other people living in close quarters if evicted.

The order expressly does not relieve a tenant of any obligation to pay rent or comply with any other obligation the individual may have under the tenant's tenancy or lease. Nothing in the order precludes a landlord from charging or collecting fees, penalties, or interest because of the failure to pay rent or other lease payment on a timely basis, if provided for in the lease.

Tenants may still be evicted for reasons other than not making payment of rent.

While the order supersedes less restrictive State/local regulations, it does not preempt or impact more expansive State/local moratoriums, which would then apply.

To invoke the protections provided by the CDC's Order, a tenant must sign a declaration asserting that they meet all of the criteria listed above, under penalty of perjury. A tenant must then give a copy of the declaration to the landlord or other person who would otherwise have the right to evict the tenant. Each adult on the lease or rental agreement should sign the declaration and give a copy to the landlord.

Landlords who violate the CDC's Order could receive criminal penalties under 18 USC 3559, 3571; 42 USC 271; and 42 CFR 70.18. Penalties for an individual include a maximum fine of \$100,000 or one year in jail, or both. Penalties for an organization include a maximum fine of \$200,000 per event.

There are many unanswered questions as to whether the CDC has authority to adopt the order and if the CDC complied with applicable procedural and other requirements in doing so. The validity of the CDC's Order has been challenged by the New Civil Liberties Alliance and The National Apartment Association. The lawsuit, Richard Lee Brown, et al. v. Secretary Alex Azar, et al., argues that rental housing providers, especially small mom-and-pop owners, have been irreparably damaged by the CDC order and its overreach because they do not have the ability to absorb delinquent rent and still pay their bills required to keep communities operational and tenants in their apartment homes.

While it appears that a tenant is only obligated to sign the Declaration (under penalty of perjury), courts in different jurisdictions are questioning whether or to what extent a landlord may even challenge the Declaration in an eviction proceeding. Landlords can expect to deal with a wide variety of rulings pending a uniform judicial decision or direction from the CDC, which may be unlikely, particularly because of the short time frame in which the order applies. Regardless, landlords must be cautious when evaluating whether to evict tenants that qualify for protection under the CDC's Order.

If you have questions, please contact Sam or one of our Real Estate Attorneys at 402.392.1250.