

BUSINESS LAW NOTES

A Brief Summary of Rights and Responsibilities

UNIFORMED SERVICES EMPLOYMENT AND REEMPLOYMENT RIGHTS ACT (“USERRA”)

By F. Stephen Glass*

More than half of the Americans in uniform are members of the National Guard or Reserve (“Reservists”). The Uniformed Services Employment and Reemployment Rights Act of 1994 (“USERRA”) governs specific rights and responsibilities of Reservists about which all employers should be aware. The following are some general provisions:

- ▲ Requiring Reservists to give written or verbal notice to their employer prior to departure for military service;
- ▲ Establishing time limits for reporting back to work, based on the length of time in the uniformed service, rather than on the type of service, and requiring documentation of such service;
- ▲ Providing for the continuation of employer provided health insurance (at the Reservist's request) for an 18-month period, with payment of up to 102 percent of the full premium by the Reservist;
- ▲ Requiring that an employee's military service not be considered a break in employment for pension benefit purposes, and providing that the person's military service must be considered service with an employer for vesting and benefit accrual purposes;

There is no longer any differentiation between voluntary and involuntary military service. An employee cannot be required to use earned vacation or similar leave days for military leave of absence. Military service will not be counted as time away from the employer for retirement purposes.

USERRA seeks to ensure that Reservists are entitled to return to their civilian employment upon completion of their service. They should be reinstated with the seniority, status, and rate of pay they would have obtained had they remained continuously employed by their civilian employer. The law also protects Reservists from discrimination in hiring, promotion, and retention on the basis of present and future membership in the armed services.

Employers should prepare for Reservists call to active duty by:

- ☐ Take steps to ensure that health care benefits and insurance continuation are extended in compliance with the law;
- ☐ Review all employment forms, policy manuals and procedures to assure compliance with USERRA.

- ☐ Inform supervisors and managers about USERRA;

WHAT'S IN A NAME: d/b/a FILING REQUIREMENTS

by Shawn D. Mercer*

Many North Carolina business entities choose to conduct business publicly under a name other than their formal corporate name. In order to do so, businesses are required to file a Certificate of Assumed Name with the Register of Deeds in the county in North Carolina where they conduct business under any name other than the true corporate name. Failure to abide by this requirement could lead to personal liability and sanctions on the part of the businesses' principals.

AVOID COMMON BUSINESS SCAMS

By M. Blen Gee, Jr.*

Businesses are the frequent targets of fraudulent schemes, great and small. Here are some of the more common scams practiced on businesses and some tips on how to prevent them.

The Advanced Fee Scheme

In an advanced fee scheme, a victim pays in advance a finder's fee or commission to someone who claims that he can arrange a loan, a lucrative contract, or investment opportunity. The money disappears and the loan or other business opportunity never materializes.¹ A business that has fallen into financial difficulty and is desperate for refinancing is especially susceptible to this type of scam. Attempting a workout with creditors or filing a Chapter 11 Bankruptcy are much safer and more effective alternatives for a business in financial distress.

Letter of Credit Fraud

Letters of credit are a common method for securing payment in international transactions and many other commercial situations. Some letter of credit frauds are perpetrated on banks by presenting false documentation. Another type of fraud is when a letter of credit is offered as an investment, with the promise of high financial return. Legitimate letters of credit are never sold or offered as investments.

Prime Bank Note Fraud

In one common scam, the con artist tells the victim that he has access to certain "bank guarantees" which can be bought at a discount and sold at a premium. The legal documents may contain non-disclosure and non-circumvention provisions. The usual goal of the con artist is to encourage the victim to send money to a foreign bank.

"Ponzi" Schemes

In a typical Ponzi scheme, the investor is promised high returns on his investment and, in the early stages of the scheme, the investor will receive "dividends." The dividends are actually

paid from a portion of the proceeds from other new investors. The victim does not know he has been duped until his "dividends" suddenly stop.

Office Supply Schemes

The con artist usually tries to target an employee who is unfamiliar with purchasing procedures. The office supplies that are delivered are of inferior quality, greatly overpriced or much greater quantity than the amount actually ordered. If you object to the order, the con artist may attempt bullying, negotiating or requesting payment for a "restocking fee" in order to accept the returned merchandise.

Phony Invoice Scams

These types of scams take many different forms, frequently as simple as submitting a phony invoice for a small amount of money. Another common scam is a phony Yellow Pages invoice scam. The business receives a legitimate looking invoice concerning the "Yellow Pages" which may include the "walking fingers logo." Sometimes the invoice it is actually a solicitation for an alternative Yellow Pages directory that is not widely distributed and is of little or no value; other times there is no directory at all.

Identity Theft

This is a common type of fraud for consumers, but businesses can also be victims. Con artists seek key pieces of the victim's identity, name, address, date of birth, Social Security number and mother's maiden name. Businesses should avoid collecting unnecessary information; when it is necessary to obtain such personal information, the information should be maintained in locked files or under other secure procedures.

Some Common Sense Tips

Know who you are dealing with – legitimate businesses understand that you want information about their companies and they are happy to provide it.

Examine carefully any deal that requires you to sign non-disclosure or non-circumvention agreements that are designed to keep you from investigating the company or people that you are dealing with.

Verify all invoices with the persons who would normally have authorized them. At least two people should approve an invoice before it is paid.

Educate your staff about possible frauds.

¹In North Carolina, legitimate loan brokers must file a disclosure statement with the North Carolina Secretary of State and are prohibited from accepting a fee prior to closing the loan.

And finally, as we all know, if an offer seems too good to be true, *it probably is!*

PAYING REASONABLE COMPENSATION TO THE S-CORPORATION SHAREHOLDER-EMPLOYEE

By F. Stephen Glass*

An S Corporation must pay reasonable compensation (subject to employment taxes) to shareholder-employee(s) in return for the services that the employee provides to the corporation, before a non-wage distributions may be made to that shareholder-employee.

The IRS and the courts have made it increasingly clear that distributions to an actively employed S Corporation shareholder may be recharacterized as wages subject to payroll taxes if the distributions are actually disguised compensation. The IRS is screening Forms 1120S looking for abuses in this area that have the following profile:

- A business code that indicates a service business (i.e., a business that implicitly requires significant services from employees to produce revenue).
- Significant distributions to the S shareholders.
- Zero or nominal compensation, particularly to officers/shareholders.

Unlike a partnership, flow-through income from an S corporation is not subject to self-employment tax. In direct contrast, a partnership's flow-through ordinary income is generally subject to self-employment tax. On the surface, this appears to be a clear tax advantage of an S corporation vs. a partnership. However, in terms of "shareholder-employees" of an S corporation, the analysis does not end here.

If a shareholder-employee of an S corporation provides services to that S corporation, then reasonable compensation (subject to employment taxes) generally needs to be paid in return before any non-wage distributions may be made to that shareholder-employee. Several court cases support the authority of the IRS to reclassify other forms of payments made to the shareholder-employee as a wage expense. In addition, several court cases have reinforced and clarified the IRS position as to the employee status of S corporation shareholders who perform services for the S corporation.

Provided an S corporation shareholder is an employee and has received an actual distribution, the only remaining area of question is what amount is considered "reasonable" for that particular shareholder-employee. Whether the amount paid for the services provided constitute "reasonable compensation" is based upon all the relevant facts and circumstances.

**About the authors:*

M. Blen Gee, Jr., is an honors graduate of the University of North Carolina School of Law. His areas of concentration include business and corporate law, including sales of businesses; business litigation, including arbitration and mediation; franchise law; automobile dealer law; and insurance company insolvency.

Shawn D. Mercer represents a variety of businesses with an emphasis on general automobile dealership law, litigation and manufacturer/dealer disputes. He regularly practices in state and federal courts, in arbitration and mediation proceedings, and before administrative bodies, including the Commissioner of Motor Vehicles.

F. Stephen Glass is the author of *The Legal Handbook for North Carolina Businesses*, and *Your Estate Planning Handbook*. His practice is concentrated in the areas of business, employment and corporate law, business litigation, business succession planning and estate planning. He serves on the Cary board of Capital Bank.

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INTRODUCING JEAN WINBORNE BOYLES, ESQ.

We are happy to announce that Jean Winborne Boyles, Esq., has become associated with our law firm. She has 29 years legal experience including employment as in-house counsel with a major teaching hospital and medical school, appointment to the NC Attorney General's staff, local government attorney and most recently in private practice concentrating in health law, corporate law, bankruptcy and creditors' rights, commercial leasing, antitrust and state administrative law. She is a certified Superior Court mediator. Ms. Boyles brings superb legal talent and experience to our firm.

OSHA “GENERAL DUTY CLAUSE”

By F. Stephen Glass*

The “General Duty Clause” is the backbone of the U.S. Occupational Safety and Health Act (OSHA) compliance standards.

It states that each employer covered by the Act has the general duty to furnish each employee with employment and places of employment that are free from recognized hazards “causing or likely to cause” death or serious physical harm.

“Causing or likely to cause” is a broad, open-ended requirement that is designed to protect employees in situations where there are no established standards. Thus, the employer’s potential liability under OSHA is also open-ended.

An employer may be found to be in violation of the General Duty Clause if it can be shown that:

- ❖ a hazard existed of which the employer had knowledge or should have had knowledge;
- ❖ the hazard was likely to cause death or serious physical harm;
- ❖ the hazard was foreseeable; and
- ❖ employees were exposed to the hazard.



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❖ OSHA “General Duty Clause”

Office automation and workplace violence are targets for general duty violations.

The N. C. Department of Labor administers and implements the Occupational Safety and Health Act of North Carolina that applies to most private sector employment in the State.

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