

Biz-Law Briefing

A Practical Journal for Closely-Held
and Family Businesses

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Special points of interest:

- When buying a business, make a fully informed decision by conducting Due Diligence
- Tax Incentives encourage businesses to increase investments
- Understanding the Federal Laws governing hiring practices

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Buying a Business? Conduct *Due Diligence* By Jason Rittie, Esq.

Once you have decided to purchase an existing business, whether the deal is structured as an asset transaction, a stock transaction, or a merger, it is imperative that you conduct “due diligence.” Due diligence is the process by which the buyer verifies that the business he is buying is consistent with the representations made by the seller. In all transactions, there is typically an informal preliminary due diligence process. However, a more thorough and complete process should occur once there is a signed contract in place. Simply put, buyers must do their “homework” and know precisely what they are buying and the potential risks. It is a relatively painless process, but the buyer must expend some time, energy and costs. The buyer’s advisors must

examine matters related to the corporation, real and personal property, environmental issues, potential litigation, employee matters, intellectual property, service contracts, and any obligations to be assumed by the buyer.

Under the contract, at the conclusion of the due diligence period, the prospective buyer may either terminate the transaction or proceed towards closing. Due diligence gives the buyer an opportunity to investigate all material facts required to make a fully informed decision and to assess potential risks. During this process, a buyer should engage qualified advisors, such as an attorney, accountant, and if real property is involved, engineers or consultants to evaluate the structural and environmental condition of such real property.



The buyer’s attorney conducts searches for liens and judgments and, where real property is being purchased, a title search is typically conducted. These searches will disclose whether any encumbrances exist against the assets, and whether the Seller has “good title” to such assets. When Einhorn Harris is retained by a buyer, we also

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Tax Incentives... By Gary R. Botwinick, Esq.

As you may know, Congress recently passed an economic stimulus package (the Economic Stimulus Act of 2008) to jump-start our economy, in part through tax incentives aimed at encouraging businesses to increase their investments in new equipment by the end of 2008. Under the Act, small businesses will be able to write off up to \$250,000 of qualifying

expenses in 2008. In addition, businesses will be able to deduct an additional 50% of the cost of certain investments in 2008. Here are the details.

Boosted section 179 expensing

Under pre-Act law, taxpayers could expense (i.e., deduct currently, as opposed to taking depreciation deductions over a period of years) up to

\$128,000 for 2008. This annual expensing limit is reduced (but not below zero) by the

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NEWS OF OUR FIRM

We recently changed our name as our esteemed colleague and former Partner, David H. Ironson, took his oath as a Judge of the New Jersey Superior Court this January. The firm continues its long-standing tradition in Personal Injury and Workers' Compensation matters that were formerly handled by Judge Ironson. Andrew S. Berns now Chairs this Department. Our twenty-five lawyers also practice in Commercial Litigation, Employment and Tax Law, Business Planning, Criminal Law, Family Law, Real Estate, Wills, Trusts and Estates, Zoning and Land Use. Our Closely-Held Business Group builds relationships with clients based on the trust earned by consistently exceeding expectations.



The Firm's Closely Held Business Group
Standing l-r: Timothy J. Ford, Jason R. Rittie, Andrew S. Berns;
Sitting: Theodore E.B. Einhorn, Gary R. Botwinick

A Message from the Founding Partner of the Firm Theodore E. B. Einhorn



This year, the changes you will notice in our firm are much more than in our name. We have added a partner and attracted new legal talent in the ranks of our associates. Our partners and staff have re-focused their skills and energies into developing the most thoughtful and innovative solutions to assist you in all the stages of your business growth. We understand the unique aspects of closely-held businesses—your focus on efficiency and cost-effectiveness, and your need for legal advice that is practical. You have many stakeholders to please, including customers, investors, employees, lenders and suppliers. These relationships are often complex and require specific skills in negotiations, transactions, contracts and even litigation. Our experience in multiple practice areas related to your business needs, our dedication to individualized service, our active role in our community and our service on committees dedicated to improving our state's legislation, make us well qualified to add value quickly. We look forward to a continuing dialogue through this newsletter, and hope to meet you in future educational events the firm will host in the months to come.

Estate Planning: A Priceless Solution *by Gary R. Botwinick, Esq.*

A familiar credit card commercial could go something like this...

Starting a new business – \$500 investment

Building the business – countless nights and weekends away from family

Succeeding in business – \$2,000,000+ valuation

Passing a successful business to your children – priceless?

Wait just a minute!!!

The Internal Revenue Service may have something to say about this.

Are you aware that Federal estate taxes are imposed upon estates valued at more than \$2,000,000, where the beneficiary is someone other than a spouse, and that the current Federal estate tax rate is 45%? – yes, that's right 45%!!! Are you aware that New Jersey will impose an estate tax on an estate valued as low as \$675,000?

What is a small business owner to do? The answer is simple – PLAN AHEAD.

With proper planning, it is not difficult for a married couple to pass double the estate tax exemption amount to their children. There is no reason why a husband and wife with combined estates of

up to \$4,000,000 should pay any Federal estate taxes. The key is to implement a successful estate plan to utilize the credit available to each spouse.

For example, assume a husband and wife have a combined estate of \$4,000,000. When the husband dies, he leaves his entire estate to his wife, and when she dies, she leaves the \$4,000,000 to their children. There is no Federal or New Jersey estate tax at the husband's death; everything passes to the surviving spouse. However, at the wife's death, New Jersey estate taxes of approximately \$280,000, and Federal estate taxes of approximately \$774,000 will be due – a combined \$1,054,000. Through proper planning you can eliminate these taxes.

Einhorn, Harris can assist with an estate plan that preserves the estate tax credit on the first spouse's death, while still permitting the surviving spouse to utilize the combined assets of the estate. If the combined estates exceed \$4,000,000, a more sophisticated plan can permit passing even larger amounts to intended beneficiaries—tax free.

Contact Gary R. Botwinick, Esq. to schedule an appointment to discuss your estate planning needs.

Tax Incentives... *Continued from Page 1*

amount by which the cost of qualifying property placed in service during 2008 exceeds \$510,000. Under the Act, however, for tax years beginning in 2008, the \$128,000 expensing limit is increased to \$250,000, and the overall investment limit is increased from \$510,000 to \$800,000.

As a result of this incentive, most small businesses, and even some moderate-sized businesses with moderate capital equipment needs, will be able to obtain a full deduction for the cost of

business machinery and equipment purchased in 2008, thereby reducing their effective cost for those assets. What's more, there is no alternative minimum tax (AMT) adjustment for property expensed under Section 179.

Bonus depreciation makes a comeback

Bonus first year depreciation was first allowed following the terrorist attacks of 2001, but generally isn't available for property acquired after

2004. The Act provides for bonus (accelerated) depreciation by allowing a bonus first-year depreciation deduction of 50% of the adjusted basis of qualified property placed in service after Dec. 31, 2007, and, generally, before Jan. 1, 2009.

For more information about these tax saving opportunities and for specific illustrations about how they may be applied to your situation, contact Gary Botwinick by phone or email.

Buying a Business? *Continued from Page 1*

examine contracts, including employment and service contracts, which may be assumed by the buyer. Frequently, the buyer also hires accountants to evaluate the financial statements and related materials of the selling business. When real property is involved (including the leasing of space), the attorney should work with engineers and environmental consultants to evaluate the condition of

the building and property itself, and should inquire as to the existing conditions of the lease. The due diligence process may also include the manner in which the company is organized and whether the company is in "good standing" with the State. The process may also include an examination of licenses which will be transferred. If due diligence results in a finding that may affect the buyer in the future,

then a renegotiation of the deal will often be required.

Frequently, a complete and thorough due diligence investigation will result in a fair deal for both sides and will reduce the possibility of a surprise down the road. Our firm is experienced in conducting due diligence in a complete, efficient and economically responsible manner. Please feel free to contact our office for more information.

Hiring Practices, Do They Have A Case? *By Andrew S. Berns, Esq., and Timothy Ford, Esq.*

Many employers are surprised to discover that specific Federal laws governing hiring practices focus on the criteria used by employers in selecting candidates to a greater extent than on who they actually hire or promote. Under federal law, an employer cannot base hiring decisions on personal characteristics that aren't job-related, like age, race, sex, religion, national origin or disability. Therefore, in an interview, an employer cannot ask questions relating to any of these

characteristics. Similarly, employers cannot ask if the candidate is married, is planning to get married, has children or is planning to have children. Likewise, an interviewer cannot inquire as to where the applicant was born, their sexual orientation or if the applicant has ever been arrested. However, some of these queries may be appropriate if they are "job-related." If the particular personal characteristic in question is relevant to performance on the job, then the question is permissible.

Such allowable questions may include:

- Have you ever been convicted of a crime?
- Can you prove that you are eligible to work in the U.S.?
- Do you have the right education, training, and skills?
- Can you satisfy the job's requirements or essential functions (describe them to the applicant).
- How much time off did you take in a previous job (but not why).

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Attorney PROFILE

Gary R. Botwinick



Gary holds a Masters of Law Degree in taxation and frequently lectures on tax and estate

matters. Gary chairs the Firm's Tax/Trusts and Estates Practice.

To read a complete profile on Gary, visit www.einhornharris.com and click on "Attorney Profiles." gbotwinick@einhornharris.com

Attorney PROFILE

Jason R. Rittie



Jason practices in the area of business law, including contracts, asset sales and acquisitions,

stock sales and acquisitions, and business formations. For a complete profile on Jason, visit www.einhornharris.com, "Attorney Profiles." jrittie@einhornharris.com

Attorney PROFILE

Andrew S. Berns



Andy is the Chair of the firm's litigation practice. The litigation practice includes Commercial,

Personal Injury and Workers' Compensation cases as well as other forms of business litigation including employment matters. Mr. Berns has tried cases for over twenty years in State, Federal and Administrative Courts. He has participated in litigation resulting in significant settlements and judgments in complex commercial, personal injury and employment matters through arbitration, mediation and trial or as an advocate on behalf of his clients. aberns@einhornharris.com

Hiring Practices *Continued from Page 3*

- Why did you leave a previous job?
- Where it seems likely that an applicant has a disability, you may ask whether the applicant will need an accommodation, and what kind of accommodation is necessary. This is an exception to the usual rule that such questions should come after making a conditional job offer.
- Can you do this job with or without reasonable accommodations?

Generally, an employer may:

- Explain what information the employer needs to know (e.g., the type of impairment, how the impairment limits a major life activity, like sitting, standing, performing manual tasks, or sleeping);
- Request information about how an accommodation would enable the employee to perform job-related tasks, and
- Consider providing the candidate's health care professional with a description of the job's functions to increase the likelihood that accurate information will be provided at the outset.

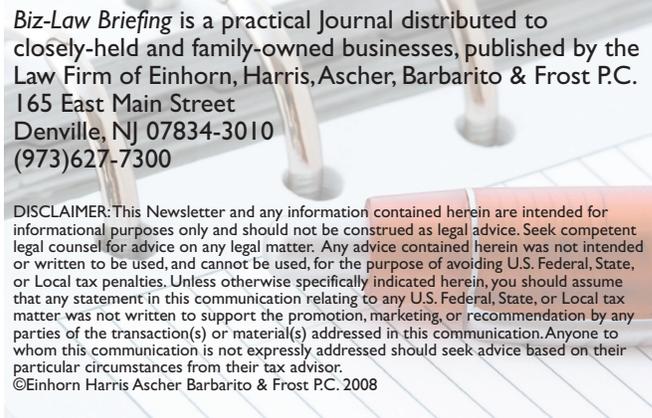
Generally, an employer may not ask questions about an applicant's physical or mental impairment or how the applicant became disabled, an applicant's use of medication, or about an applicant's prior workers' compensation history.

So if a candidate believes an employer discriminated in its hiring practices, what must the employee prove to succeed in a civil action?

In a discrimination case, the employee must establish a "prima facie case"; that is a minimum set of facts to include in a court complaint which, if proven, will result in a successful claim. To be successful, the prospective employee ordinarily needs more than the minimum set of facts to establish the prima facie case. Rarely are the facts to support a discrimination claim clear and unambiguous. If the employer has

stated a policy, for example, that the employer "will hire only females to be receptionists," the employee may have a clear cut case. However, this is rare because employers do not usually say such things verbally or in writing. Alternatively, the candidate can present "circumstantial evidence." The U.S. Supreme Court has held that the plaintiff must show the candidate was a member of a protected class, applied for the job, and the job was open. The plaintiff must also prove that he or she had the minimum qualifications for the job, was not hired, and the job remained open, or a person of another race (or other characteristic) was hired.

The attorneys at our firm have the experience to guide you through the intricacies of employment law. The best way to be proactive in these matters is to consult with an attorney early to understand the laws and regulations to avoid unnecessary litigation.



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