SNSFE QUARTERLY REVIEW

Fourth Quarter 2007- ISSUE 5 A newsletter for our clients and friends

We have arrived at that time of the calendar year during which employers find themselves compelled to consider reductions in force. What follows is a discussion of the Federal and Illinois statutes which may affect plant closures and layoffs...

From the President

The Worker Adjustment and Retraining Notification Act ("WARN"), 29 USC 2101, requires employers to provide notice of a plant closing or mass layoff to all affected employees. In January 2005, Illinois adopted a similar statute, the Illinois Worker Adjustment and Retraining Notification Act ("I-WARN"). I-WARN provides that it is to be interpreted in a manner consistent with WARN and the federal regulations and court decisions interpreting WARN, to the extent that the provisions of the federal and state law are the same. To know what action is needed to comply with both state and federal legislation it is first necessary to know the requirements of WARN and related regulation and then look to I-WARN to satisfy any additional or differing state law requirements.

WARN: General Requirements. WARN (with limited exceptions) requires employers to provide 60 days advance notice of a plant closing or mass layoff to all affected employees. An affected employee is defined as any employee who may reasonably be expected to experience an employment loss as a consequence of a proposed plant closing or mass layoff. An employer is defined as any business enterprise that employs 100 or more employees, excluding part-time employees; or, 100 or more employees who in the aggregate work at least 4,000 hours per week.

A plant closing, in a nutshell, is defined as a permanent or temporary shut down at a single site which results in an employment loss during any 30 day period for 50 or more full time employees. A mass lay off is defined as an employment loss at a single site during any 30 day period which is not the result of a plant closing but which results in the loss of at least 50 employees where they constitute at least 33% of full time employees, or at least 500 full time employees. An employer who employs less than 100 employees would not be subject to the notification requirements of WARN. If an employer has 100 or more employees, advance notice of a plant closing or mass lay off must be provided to (1) the State or entity designated by the State to carry out rapid response activities under 29 USC 2864(a)(2)(A), and (2) each representative of the affected employees as of the time of notice or, if there is no representative, to each affected employee.

Notice Requirements. Pursuant to WARN, the United States Secretary of Labor issued regulations that outline information the WARN notice must contain and how notice can be given. Notice to affected employees who do not have a representative is to be written in language understandable to such employees and is to contain: (1) a statement whether the planned action is expected to be permanent or temporary and, if the entire plant is to be closed, a statement to that effect; (2) the expected date when the plant closing or mass layoff will commence and the expected date when the individual employee will be separated; (3) an indication whether or not bumping rights exist; and, (4) the name and telephone number of a company official to contact for further information.

Required notice provided to the State must contain: (1) the name and address of the employment site where the plant closing or mass layoff will occur, and the name and telephone number of a company official to contact for further information; (2) a statement as to whether the planned action is expected to be permanent or temporary and, if the entire plant is closing a statement to that effect; (3) the expected date of the first separation, and the anticipated schedule for making separations; (4) the job titles of positions to be affected, and the number of affected employees in each job classification; (5) an indication as to whether bumping rights exist; and (6) the name of each union representing affected employees, and the name and address of the chief elected officer of each union.

The WARN regulations further provide that any reasonable method of delivery which is designed to ensure receipt of notice at least 60 days before separation is acceptable. While the regulation does not mandate specific method of delivery, it does provide an illustrative list of acceptable methods. More specifically, first class mail, personal delivery with optional signed receipt, and insertion of notice into pay envelopes are listed as options that meet the requirements of the Act. However, a ticketed notice, i.e., preprinted notice regularly included in each employee's pay check envelope, does not meet the requirements of the Act.

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Jack L. Haan

Failing To Follow Formalities:

The Business Owner's Risk of Personal Loss for Corporate Liabilities

If business owners do not set up and operate their corporate businesses properly, the corporate entity may not protect them, and the risk of losing personal assets remains.

Most business owners believe that once they set up a corporation or a limited liability company, they have absolute protection against corporate liabilities and that their own personal assets are safe from corporate creditors. By establishing a business entity to conduct business, a business owner believes he or she can engage in running a business without worrying about losing personal assets. While in general that tenet is correct, that is not always the case. If business owners do not set up and operate their corporate businesses properly, the corporate entity may not protect them, and the risk of losing personal assets remains.

One of the exceptions to the general tenet is that a plaintiff creditor may "pierce the corporate veil" when a business acts as the "alter ego" for the individual business owner. In other words, if a court believes that the individual owner and the business have such a strong unity of interest and ownership that they are essentially the same entity, and that adhering to a separate existence between the entity and the individual would promote injustice or fraud, then the court may pierce the corporate veil and allow a plaintiff to seek the personal assets of that individual.

In determining whether to "pierce the corporate veil," a court will look at a number of factors relating to whether the corporation is being operated as a real corporation and following "corporate formalities." Essentially, the court will review both the manner in which the business owner set up the corporation and the manner in which the owner is operating the corporation to determine whether the owner is treating the corporation as a separate entity.

Every corporation must prepare bylaws, prepare and keep shareholder and director resolutions, prepare resolutions for critical business decisions, and document other business decisions and events during the corporation's existence.

Some of the critical factors that a court looks at are as follows:

- **Failing to adequately capitalize the corporation.** The courts recognize that it is unfair to a corporation's creditors for an owner to set up a corporation without providing the initial funding necessary for that corporation to pay its bills. The company simply cannot be a shell company with no capital to support its operations. Thus, an owner must risk an initial amount of money sufficient to meet the corporation's initial expenses and liabilities.

- **Failure to issue stock.** Every corporation at its creation must have stock authorized and issued. If the owner has failed to issue stock, this factor can be rectified with the assistance of counsel.

- **Failure to keep corporate records.** Simply establishing the corporate entity is not enough to ensure protection from personal liability for the owners. Every corporation must prepare bylaws, prepare and keep shareholder and director resolutions, prepare resolutions for critical business decisions, and document other business decisions and events during the corporation's existence. The failure to document important business events in the life of the entity reflects the owner's disregard for a separate corporate existence. The business owner should address the obligation to keep the proper corporate records by providing ongoing attention to corporate details and by recording such events with counsel as a matter of habit.

- **Commingling of accounts.** If an owner utilizes the business account as if it were his own funds, then the court is much more likely to find that monies between the corporation and the owner were commingled, and that a separate entity does not exist. The same conclusion may occur if an owner pays the corporation's expenses from a personal account. Clients need to know the proper manner to document and treat any monies which may cross accounts between an entity and an individual.

- **Diversion of corporate assets to shareholders.** When a corporation is suffering financial problems, a business owner sometimes re-pays a loan made by the owner or related entity of the corporation before paying other creditors of the corporation. A preferential payment such as this has a strong, negative bearing on proving that there is a separate existence of the corporation and an owner.

If your business has failed to follow some of the above "corporate formalities," we can assist you in not only rectifying any errors in the setup of your corporation and any shortcomings in record-keeping, but also in establishing proactive measures in ensuring that your corporation follows the necessary corporate formalities in the future. In this way, you can be assured that your personal assets are protected in the best manner possible.

Jack Haan heads the Firm's Commercial Litigation and Appeals practice group. He handles a wide range of commercial litigation matters, including breach of contract, fraud, breach of fiduciary duty, injunctive relief and collections. For more information, Jack can be reached at 312.621.4400 or JHaan@SNSFE-law.com.

The Securities and Exchange Commission (SEC) conducts periodic routine audits of investment advisers. Frequently, SEC staff discuss these examinations and provide helpful guidance to investment advisers. That happened recently in a speech given in March 2007 by Lori Richards, the SEC's Director of Office of Compliance Inspections and Examinations. Let's review the guidance that she provides. Let's also highlight why the new compliance rules, especially those regarding risk identification and mitigation, present challenges for investment advisers...

SEC Details Deficiencies Most Commonly Found During Examinations Of Investment Advisers

James J. Eccleston

Preliminarily, Ms. Richards revealed that, in 2006, the SEC conducted 1,300 examinations of investment advisers. 81% of those examinations found deficiencies, identifying problems and asking for corrective action. According to Ms. Richards, the "vast majority" of advisory firms take corrective action. However, in about 6% of the examinations, the SEC finds "indications of very serious violations - mostly fraud of some type." The SEC refers those cases to its enforcement staff for further investigation. Ms. Richards shared with her audience the five most common deficiencies that the SEC had found during its examinations conducted in 2006:

The SEC found five common deficiencies during its examinations of investment advisers.

1) Deficiencies in information disclosure, reporting and filings. This category includes documents being untimely filed, inaccurate and incomplete, and relates to conflicts of interest, compensation arrangements, solicitation arrangements, fee structures and brokerage/soft dollar arrangements.

2) Deficiencies regarding the personal trading by advisory firm personnel. This category covers an adviser's failure to report or review trading by personnel, as well as improper allocations of securities to accounts.

3) Problems in performance advertising and marketing. Advisers have failed to disclose relevant information, causing the advertisement to be misleading. Additionally, advisers have not accurately reported their performance in advertisements.

4) Problems in information processing and the protection of customer information. The SEC has noted "weaknesses" in business continuity plans, Regulation S-P procedures, and the creation and compilation of certain books and records.

5) Deficiencies regarding the new compliance rules. The SEC has found, for example, that "firms' compliance manuals did not address firms' risks, listed risks that did not exist at firms, or established procedures that firms did not follow." Let's further explore that common deficiency, as the new compliance rules present challenges for investment advisers.

From materials that our investment adviser clients share with us in connection with their SEC examinations, we know that the SEC is serious about enforcing an effective "compliance culture" at investment advisory firms. That means that investment advisers who purchase "off the shelf" compliance materials and fail to customize them to the needs of their firms - likely much of what the fifth common deficiency noted above concerns - will not pass muster. The SEC cautions that "procedures and compliance manuals represent a useful starting point; these manuals do not, however, provide information about how compliance policies and procedures are being applied in practice or how effective such policies and procedures may be in preventing, detecting and correcting compliance problems."

Indeed, investment advisers face a new era of intense regulatory scrutiny, which began in 2002 and culminated in April, 2006, the effective date for each firm to conduct its own annual internal compliance review. Law firms like mine and others have rushed to the assistance of investment advisers, for example by conducting on-site mock SEC compliance audits of operations to satisfy the new SEC requirements. Even small investment advisers have had to earmark funds to hire outside compliance help. According to the Financial Planning Association, investment advisers spend between $7,500 and $15,000 annually for outside help.

Investment advisers face a new era of intense regulatory scrutiny.

During its examinations, the SEC now requests investment advisers to provide the following documents:

- Standard Operating Procedures for the risk identification and assessment process;
- A current inventory of compliance risks;
- Any document, such as a matrix or a spreadsheet, that maps the adviser's inventory of risks identified in the inventory of compliance risks to its written policies and procedures;
- All annual and interim reports regarding the review of the adviser's compliance program;
- Access to the adviser's budgets or financial plans for compliance activities during the inspection period; and,
- If the adviser has performed any forensic tests (i.e., compliance tests that analyze information over time in order to identify unusual patterns) during the inspection period, perhaps as a component of its annual review of its compliance program, a list of the forensic tests performed, and the corresponding objectives and result of each forensic test.

As one can see, the SEC is serious! Investment advisers need to be equally serious to avoid deficiencies in their SEC examinations.

James Eccleston heads the Firm's Securities Law practice group. Contact Jim at 312.621.4400 or at JEccleston@snsfe-law.com for information on how SNSFE securities attorneys work with investment advisers, brokers and other financial services professionals in regulatory, compliance and disciplinary matters, and in customer disputes and employment matters.

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From the President CONTINUED FROM PAGE 1:

I-WARN: General Requirements. I-WARN is nearly identical to WARN. I-WARN defines "employer" as any business enterprise that employs 75 or more employees, excluding part-time employees, or 75 or more employees who in the aggregate work at least 4,000 hours per week. I-WARN requires notice to be provided to (1) the Department of Commerce and Economic Opportunity and the chief elected official of each municipal and county government within which the employment loss, relocation or mass layoff occurs, (2) representatives of affected employees, and (3) affected employees. (WARN requires notice be provided to affected employees only when there is no employee representative.)

If you have any questions regarding WARN requirements or if you need assistance with planning a reduction in force or with any employment relations problem, give us a call.

Steven C. Filipowski

SNSFE news and upcoming events

Call 312.621.4400 for more information.

See a full listing of upcoming events on our website at www.snsfe-law.com

JACK HAAN will be presenting a webinar in November. Information will be available on our website soon. Read Jack's article on page 2: ***"Failing To Follow Formalities: The Business Owner's Risk of Personal Loss for Corporate Liabilities."***

JAMES ECCLESTON appeared on First Business Morning News in August to discuss how the new SEC rules could impact the market and investors; and in May to discuss one of the latest stock scams - putting "China" in a company name hoping to attract the attention of investors. Read Jim's article on page 3: ***"SEC Details Deficiencies Most Commonly Found During Examinations of Investment Advisers."***

CHRISTOPHER MOYEN recently joined the Firm as an Associate in our Securities Law practice concentrating in the representation of investment advisers and other financial services professionals. His webinar, *"The Top 10 Current Compliance Issues For Investment Advisers"* scheduled for Sept. 25 will be available for replay on our website.