

# BUSINESS LAW E-LETTER

A legal newsletter for clients and friends of DTC.

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"It is wiser to find out than suppose." Mark Twain

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## Restrictive Covenants.

There are several "restrictive" or "negative" covenants that come up in the employment field. Each serves their own purpose and offers different benefits to an employer. These include non-compete agreements, non-solicitation agreements and non-disclosure or confidentiality agreements. Non-competition agreements are enforceable in New Hampshire, but must be reasonable. Generally, a non-compete will prohibit a former employee from working for a competitor. The courts, in determining if it is reasonable, will look at the scope (e.g. geographic area) and time period.

Non-solicitation agreements preclude an ex-

employee from soliciting the former employer's customers and/or employees. The former employee is still free to work for a competitor and solicit other potential customers and employees. Non-solicitation agreements are less onerous on an employee and, therefore, courts are more likely to enforce them even if not restricted in time and scope. Non-disclosure or confidentiality agreements limit a former employee's ability to use or disclose information designated as "confidential" or "trade secrets." This is even less restrictive on the ex-employee and courts are more apt to enforce such a covenant. Although certain protections apply to an employee even if

he or she has not signed an agreement, having a written agreement is more likely to be enforced as it will show the employee was aware of the restrictions, the confidential



nature of the information, and that disclosure could be harmful to the former employer.

These types of negative covenants can be placed in employment contracts or separate agreements.

## Employment At-will.

New Hampshire is considered an employment at-will state, absent an employment contract between the employer and employee. The "at-will" relationship means in general terms an employer may discharge an at-will employee at any time for any reason not

prohibited by law and that the



employee may quit at any time for any reason.

New Hampshire has recognized an exception to the at-will relationship. This involves what is known as an implied covenant of good faith which requires the employer



## Employment At-will continued...

and employee to carry out their obligations in the employment relationship in good faith.



Under this exception a wrongful termination of an employee

could be shown if the termination was motivated by bad faith, or malice, or based on retaliation and the termination was contrary to public policy. As way of examples this would include the termination of an employee who refused to violate a law, refused sexual advances of an employer, filed a worker's compensation claim or accepted jury duty.

Another exception to the at-will doctrine involves employee handbooks or personnel manuals. A poorly

drafted personnel manual can create an express or implied contract with employees which will transform the at-will employment relationship into a contractual relationship under which the employer no longer has the ability to discharge at-will. If an employer wishes to define the at-will employment relationship, personnel manuals should be carefully drafted to ensure no express or implied contract is made.



*...swifter  
dissolutions of  
entities that fail to  
file annual  
reports...*

## Secretary of State—Legal Entity Update

The New Hampshire Secretary of State is working diligently on automating the Corporation Division's systems. This means that internet users will have increased capability to file corporate documents on-line and see near-immediate results, versus waiting for filings to be processed by hand.

The first step toward the Corporation Division's goal of increased automation was the ability to file annual reports on-line, starting January 2004. On-line annual report filing was a success, according to the Secretary of State. The volume of annual reports mailed in to the Corporation Div. for processing was vastly reduced due to the number of entities taking advantage of on-line filing. As a result, the Secretary of State was able to provide current information after April 1, 2004 regarding the good standing status of a given entity. In addition, for those entities that filed annual reports on-line, future annual

reports will be pre-populated with the information provided in the 2004 annual report.

Increased efficiency in one area leads to increased efficiency in other areas. In the case of annual reports, this means that administrative dissolution (also called involuntary dissolution) will be processed earlier than in previous years. Administrative dissolution occurs when the Secretary of State dissolves an entity (or, in the case of a foreign entity, revokes its authority to do business in New Hampshire). The Secretary of State may dissolve a New Hampshire entity for, among other reasons, failure to file an annual report and/or failure to pay appropriate fees and/or late fees for two (2) consecutive years (NH RSA 293-A:14.20 and 304-C:52). For foreign entities authorized to do business in New Hampshire, the Secretary of State may administratively dissolve or revoke the certificate of authority for, among other reasons, failure to

file an annual report and/or failure to pay appropriate fees and/or late fees for one (1) year (NH RSA 293-A:15.3 and 304-C:72).

In addition to administrative dissolution for failure to timely file annual reports, an entity may also be administratively dissolved for failure to maintain a registered agent, *even though* the entity may otherwise be in good standing with the New Hampshire Secretary of State (*i.e.*, has filed annual reports and paid fees timely).

The NH Secretary of State advises that administrative dissolution for foreign entities is scheduled for August 1, 2004. Administrative dissolution for NH entities is scheduled for September 1, 2004. Once an entity has been dissolved, it can be reinstated; however, this can be a time-consuming and expensive process.

Please do not hesitate to call our offices if you have any questions.

## Recent Zoning Law Change Impacts Business Owners.

Many business owners either own their own facility, through an affiliated entity, or are considering doing so in the future. Local zoning limitations are a substantial consideration and can also affect the decision to identify a property to lease for business use. Recently, the NH Supreme Court made it easier to obtain zoning relief, which is often required because of the more stringent local zoning amendments passed in recent years which impact existing properties as well as undeveloped land.

Until its decision in Simplex v. Town of Newington in 2001, New Hampshire had a difficult requirement for a property owner to surmount in order to obtain a variance, as

you were required to demonstrate, among other factors, that an unnecessary hardship existed which prevented the property owner from making any reasonable use of his property. In Simplex, the NH Supreme Court relaxed the hardship requirement to focus more generally on reasonable use considering the unique setting of the property in its environment, the impact of the variance on the rights of the public and abutters, and whether the specific provision from which relief is sought as applied to the property truly advances the purposes of the zoning ordinance.

In a case (Boccia v. City of Portsmouth) just decided on May 25<sup>th</sup> involving a

hotel site in Portsmouth where only dimensional variances were sought, the Supreme Court went further and enunciated a separate hardship test applicable to dimensional variances which appears to be easier to meet than even the relaxed Simplex test.

While the impact of the changes remains to be seen as they are implemented on a case by case basis by each community's Zoning Board of Adjustment, it is apparent that the Supreme Court is moving New Hampshire's law closer to the national norm which will facilitate the re-use of existing parcels and properties.

For the business owner it is important to in-

clude a zoning analysis in any evaluation of a proposed property purchase or relocation. Though the zoning relief process has become increasingly contentious with significant participation by abutter groups, a competently advised business owner now has a better opportunity to achieve zoning relief if required for a particular project. DTC's Development Practice Group of seven experienced attorneys and two legal assistants stands ready to guide business owners in this process.

## Non-Profit Notes.

Our communities and many of our businesses support non-profit, charitable organizations, large and small. Whether a non-profit group has a budget of millions of dollars or a few thousand, those who volunteer as

forms.

*Limitation on Liability in the Articles of Agreement.* Non-profit, charitable organizations should include a paragraph in their Articles of Agreement, limiting liability of those who act as officers and directors, to the extent allowed under New Hampshire and federal law. New Hampshire law also provides some protection to volunteers for charitable organizations carrying out their duties. Out-right fraud, however, is never protected.

*Insurance.* Non-profit, charitable organizations should purchase a range of insurance products that cover their needs, just as for-profit businesses would. This should include both a general, comprehensive liability insurance policy, property damage insurance for any property the organization has, as well as "Director and Officer" ("D &

O") insurance. D & O insurance can provide coverage for both the individual officers



*"...officers and directors should be protected from liability...."*

and directors and for the organization itself, if it must indemnify and defend its officers or directors from legal claims. This is important to protect the charitable assets of the organization so they are used for their given purpose, rather than for legal claims or defenses.



officers and directors should be protected from liability. This protection takes two

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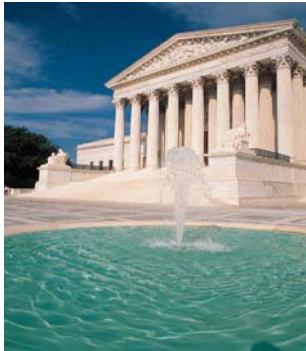
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Established in 1985, Donahue, Tucker & Ciandella, PLLC is one of New Hampshire's leading law firms, with offices in Exeter and Portsmouth. We are a full-service firm with our lawyers offering personalized representation to small businesses, large institutions and individuals. We represent and advise our clients in the areas which include general business and commercial law, municipal, development and real estate law, telecommunications, utility and internet law, employment and labor law, family law, environmental law, appellate, litigation, bankruptcy, and probate/estate planning.

Our attorneys provide affordable, quality legal services and personal attention to small and large businesses, agencies, boards, municipalities and individuals. Our focus on the client has enabled DTC firm to provide general counsel services, as well as, special representation on specific matters to our clients. It allows us to be trusted counselors and advisors as well as advocates.

While situated on New Hampshire's seacoast, our clients come from throughout New England. We represent many firms and individuals relocating to New Hampshire from across the nation.

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