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Employee Handbooks

One of the many issues new companies must confront is how to manage new employees and whether to formulate and issue an Employee Handbook. Some companies decide against implementing an Employee Handbook under the mistaken premise that it will give employees a basis to file claims against the employer. Other employers fail to implement Employee Handbooks out of neglect. Yet the failure to invest a relatively small amount of time and money in drafting an Employee Handbook can prove to be a costly mistake.

A well drafted Employee Handbook can eliminate misunderstandings by employees of company policies and procedures, as well as communicate expectations and help ensure positive morale among workers. Having written practices and procedures also helps promote their consistent application. This can eliminate claims of discrimination relating to employment practices.

Although an employer has a choice as to whether to communicate in writing certain employment practices, many are required by law to be in writing. NH RSA 275:49 re-

quires an employer to state in writing its employment practices with regard to vacation pay, sick leave and other fringe benefits. For those employees subject to the Family Medical Leave Act, employees must be provided with written notice of their rights under the Act. This is also the case under state law regarding maternity leave.

A well drafted Employee Handbook will include disclaimers that make clear that the Handbook does not constitute a contract between the employer and employee and that the employment relationship is "at-will." The Handbook should be flexible and allow the employer to change and update its policies at any time. The policies should be written in a clear and concise manner, keeping it as short as possible.

An effective Handbook will avoid certain policies while including others. Most employers should avoid probationary periods as they can compromise the employee at-will relationship. Additionally, language that creates a 'just cause' standard that must be met before the termination of an employee can occur can limit an employer's ability to

manage its workforce.

While some policies should be avoided, others should be made an essential part of a well drafted Handbook. The inclusion of a sexual and other harassment policy can provide an employer with a strong defense to certain discrimination claims. Employers should also include an equal employment opportunity commitment which should cover race, color, religion, sex, national origin, age, disability, veteran status, marital status and sexual orientation, all of which are covered under New Hampshire's human rights statute. Other policies which employers should consider including are an e-mail and computer usage policy, drug and alcohol policy, workplace violence, dress code and solicitation.

With the investment of a small amount of time and resources in the creation of an Employee Handbook, an employer can help reduce the risk of future employee problems. For additional information on this or other employment matters, please contact **Attorney Douglas M. Mansfield**.

New Law on Privacy of Computerized Information



A new law provides greater protections against identity theft for consumers but imposes additional burdens on NH businesses holding or using computerized personal information on their customers.

Significantly, businesses that fail to comply with the new law may be subject to actions for injunctions and/or actual damages, plus attorneys' fees and costs. A willful or knowing violation of the law can subject the business to treble damages. This is a case where an ounce of prevention, both to secure and encrypt computerized personal information and to train staff on compliance with the new law, will be worth a pound of cure.



New Hampshire Laws 2006, Chapter 242, adds new sections to the Right to Privacy Act, RSA Chapter 359-C, requiring NH businesses that own or license computerized data which includes individuals' personal information (i.e. name and one of the following: SSN, driver's license or account, credit or debit card number along with a PIN or

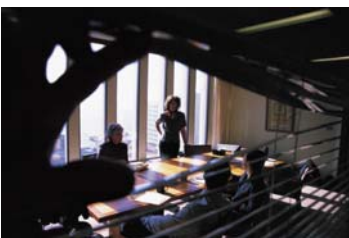
password enabling access to the account) to notify any individuals whose unencrypted personal information is the subject of a security breach (i.e. unauthorized acquisition of the information that compromises its security) if the business determines that the information has been or likely will be misused. The only exception to the notification requirement is if a law enforcement or homeland security agency determines that it would impede a criminal investigation or jeopardize national or homeland security.

Notification must be made "as soon as possible" after a determination is made, or if such a determination cannot be made. The new law also requires specific notification to any state regulators that regulate the business pursuant to RSA 358-A:3 or to the Attorney General if the business is not subject to such regulation. The new law provides for various means for individual notification: written notice, electronic communication (if that is the

business's primary means of communication with the individual), telephonic notice (provided a log is kept) or "substitute notice" if the number of individuals exceeds 1,000 or the cost of notification would exceed \$5,000, including e-mails, posting on the business website or notification to major statewide media. The new law also mandates minimum information that must be included in the notice. If the business must notify more than 1000 consumers, there are reporting requirements to consumer reporting agencies pursuant to 15 U.S.C. §1681a(p).

We recommend that our business clients review their policies on the security of computerized personal information of customers and, in the event of a security breach of such information, make sure that they comply with new RSA 359-C:19-21, effective January 1, 2007. For further information on this, please contact **Attorney Katherine B. Miller**.

Secretary of State Update



The New Hampshire House of Representatives recently passed House Bill 1227 relative to late fees and reinstatement fees paid by business entities. On May 5, 2006, Governor Lynch signed the bill into law, and it became effective upon signing. Effective May 5, 2006, the late fee for annual reports of \$25 per month has been re-

scinded, and the late fee has been returned to its original \$50 flat fee.

HB 1227 requires the Secretary of State to reimburse any business entity that received a notice of administrative dissolution dated September 1, 2005 for any fee paid for a reinstatement application (\$135) plus any late fees paid

in excess of \$50. In addition, the bill requires the Secretary of State to reimburse any business entity which did not need to file for reinstatement but did pay, late fees in excess of \$50 on annual returns from May 1, 2005 through June 30, 2006. If you filed your 2005 or 2006 annual report and paid late fees

Secretary of State Update cont.

greater than \$50, you are due a refund under the terms of HB 1227. If you received a notice of administrative dissolution dated September 1, 2005 and you filed the appropriate documents and paid the fees to reinstate the entity, you are also due a refund of

the reinstatement fee, in addition to late fees greater than \$50.

The Secretary of State has identified all entities which are owed a refund and has automatically processed the refunds. The Secretary of

State has advised that refund checks were mailed out earlier this summer. To determine whether your entity is due a refund, please contact **Elizabeth Wiedmann** or **Gretchen Hayes** at DTC Lawyers at (603) 778-0686, or the Secretary of State at (603) 271-3244.



Avoiding Veil Piercing

The shrewd business person operates her business in such a manner as to minimize liability. She will obtain insurance, perform due diligence and implement safety procedures. She might also



form a legal entity such as a corporation or limited liability company to insulate her personal assets from creditors, should the business be sued.

Incorporating or forming a limited liability company is not the final step to protect a shareholder's or member's personal assets. In appropriate situations, a Court may disregard the entity and reach the personal assets of a shareholder or member to satisfy a judgment against the corporation or LLC. This is known as "piercing the veil". A Court

"assess[es] individual liability when the owner has used the corporate identity to perpetrate injustice or fraud." A Court may also "pierce the veil" where the corporation or LLC is the "alter ego" of the shareholder or member.

The Court will take many factors into account when deciding to pierce the veil. The touchstone analysis is always whether the Court's respect of the corporate fiction will cause an injustice. In determining whether fraud or injustice is present, the Court will examine whether the fact of incorporation is disclosed by the defendant business person. The Court will also look to whether a defendant business person has misled creditors as to the existence or equity in corporate assets, and whether the entity was formed without sufficient assets or capital to meet contemplated or probable debts or obligations. Finally, the Court will determine whether the defendant business person has kept the appropriate "separateness" with his/her personal affairs of business, and that of the corporation. If there is intermingling of property, accounts, records, em-

ployees, or business transactions, a Court is likely to pierce the corporate veil.

Therefore, shareholders of corporations and members of LLCs must be diligent to maintain the separateness of their personal finances and the finances of the entity. If not, a Court may find that the corporation or LLC is merely the alter ego of the shareholder or member, and may pierce the veil to satisfy a judgment.

Shareholders or members should also examine how their business holds itself out to the world. Placards, signs, letterhead, business cards and other logos should clearly tell the reader that the business is a corporation or LLC. Furthermore, representations as to the assets and debts of the corporation or LLC should be carefully made to avoid misleading statements.

Although sometimes laborious and seemingly redundant, corporate formalities need to be followed. Annual meetings need to be appropriately noticed and held, and special meetings need to be held when the corporate charter, bylaws or LLC instrument

calls for the same. Failing to adhere to these formalities may constitute evidence that the corporation is a sham and subject the entity to piercing.

The assets and potential liability of the corporation or LLC also need to be examined. What sort of liabilities are possible in the type of business the corporation or LLC is engaged? Is there insurance available for these types of liabilities? If not, could this corporation or LLC satisfy such an obligation? If the entity is not appropriately capitalized, a Court may look to individual shareholders or members to satisfy a judgment, if the circumstances warrant.

Using corporations and limited liability companies to manage liability is very useful to minimize an individual's exposure. Making use of these entities, however, requires diligence and faithful adherence to formalities. For further information regarding veil piercing and business litigation matters, please contact, **Attorney Christopher T. Hilson.**

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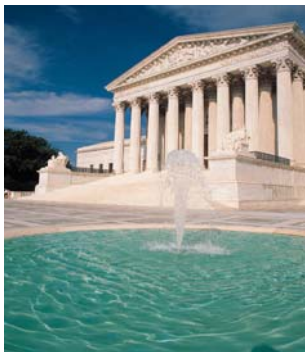
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Established in 1985, DTC Lawyers is one of New Hampshire's leading law firms, with offices in Exeter and Portsmouth. We are a full-service firm with our lawyers offering personalized representation to small businesses, large institutions and individuals. 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 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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