Report From Counsel *Summer 2022*

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The Three Ds of Buy-Sell Agreements

by Brian A. Lynch, Esq.

The old adage "Failing to plan is planning to fail" can easily be applied to owning a business. Business owners need to be prepared for the many contingencies that come up during the lifecycle of their business. Much like a person's estate plan, proper planning should be taken to ensure as little disruption as possible to the company's operations should a life changing event occur to one of the owners.

Savvy entrepreneurs choose to enter into what is commonly referred to as a Buy-Sell Agreement, but similar terms can also be found in corporate Shareholder Agreements or a limited liability company's Operating Agreement. These agreements can be used to address the many contingencies co-owners of a business may face. Three of the most significant contingencies to plan for are the three Ds: *Death, Disability, and Divorce.*

The equity a person holds in a company is personal property and as personal property the equity will fall into the person's estate upon their death. That may seem like a logical result, but without proper planning the company will be co-owned by the deceased owner's estate, and presumably the deceased owner's family. For the business and remaining owners, this may result in disruption, distrust, and ultimately a dispute between owners. The new owners may not have the knowledge, desire, or time to manage the company. Conversely, they may indeed be ready, willing, and able to take over the company and push other owners to the side.

The total disability of an owner can also have negative consequences for the business. Should a business owner lose the ability to work or be unable to contribute to the business endeavor, the business may need to seek an alternative candidate to replace the loss of productivity. Additionally, the disabled owner may want their interest in the company to be liquidated to grant them the financial flexibility to cope with the challenges a disability presents.

Divorce may not seem like it should impact a business, but since the owner's interest in the company is personal property, it could also be deemed marital property by a probate court. In the division of marital assets, a former spouse could argue they are entitled to a portion of the divorcing owner's equity in the business. Should the probate court agree, the court may award the former spouse an interest in the company. Much like in the event of a death, the remaining owners may now be in business with someone they never contemplated running a business with.

Buy-Sell Agreements can address many of the contingencies business owners may face but Buy-Sell Agreements are not a one size fits all. The desired outcome of the three Ds and other contingencies will depend on the specific dynamics of the business relationships and the goal of the company. The terms of a Buy-Sell Agreement should be tailored to meet the needs of the owners, which may change over time. Entering into a Buy-Sell Agreement should be a top priority of a new business owner, but seasoned business owners should also revisit existing agreements as the dynamics of the ownership changes.

Employee Cannot be Fired for Exercise of Lawful Right

by George Georgountzos, Esq.

The "at-will" employment relationship is extremely common, offering both the employer and the employee the ability to terminate the relationship on short notice and with no conditions. Despite the flexibility this arrangement offers, there are exceptions to the rule. For example, an employee cannot be fired for reasons that violate public policy (such as discrimination). Employers typically must outline a reason for firing an employee, such as poor

(continued on page 3)

Employee Cannot be Fired for Exercise of Lawful Right

(continued from page 1)

performance or economic business considerations. Also, an employee cannot quit and take proprietary information to a new job. The Massachusetts Supreme Judicial Court recently clarified whether an at-will employee's filing of a rebuttal to be included in his personnel file presented an important public policy for which the at-will employment exception applies. The facts presented in *Meeham v. Meditech* were the following:

In Massachusetts, an employee who disagrees with information placed in his or her personnel file may place a written statement in the file outlining his or her position. See Mass. Gen. L. c. 149, §52C (the Personnel Records Law). After receiving a subpar review and being placed on a probationary plan, an at-will employee submitted a written rebuttal to the employer's statement in his file. The employer fired the employee for doing so.

The employee brought a wrongful termination action in the Superior Court arguing that the employer could not fire him for taking a lawful action. The Superior Court dismissed the case, holding that the Personnel Records Law did not fall within the public policy exception to the at-will doctrine because, in the Court's view, the policy was unimportant, holding that the right only pertained to "matters internal to an employer's operation." A split Massachusetts Appeals Court panel agreed and affirmed the lower court's decision. The Supreme Judicial Court took the case on further appeal and reversed, holding that a statutory right is always an important public policy.

The facts showed that the only reason the employee was fired was because management disagreed with the information the employee submitted in the rebuttal to his being placed on a probationary plan. The employer did not indicate the firing was for any business reason, or because of substandard performance, or any other issue other than management's reaction to the rebuttal. An employer must at least outline a "just cause" for terminating an at-will employee. Disagreeing with an employee's statement in his or her personnel file does not constitute just cause to terminate the employee because the employee is within his right to do so. Rather, exercising a right conferred by law falls within the public policy exception to the at-will employment doctrine. The employee's right to place a rebuttal in his or her file is statutory; the Legislature created a public policy worthy of protection.

An employer seeking to dismiss an at-will employee should be prepared to support its decision with a reasonable business reason and cannot deny the employee a statutorily protected right. To do otherwise is to violate public policy and thus improperly dismiss an at-will employee.

Firm News

Recent Successes

Rudolph Friedmann Successfully Represents Defrauded Real Estate Developer in Complex Employment Litigation Case

Bobby Rudolph recently represented a real estate developer in a civil lawsuit against its former project manager who was accused of stealing nearly $400,000 from his employer by paying fake subcontractor accounts on projects and then converting the funds into his personal bank account. Within days of discovering the theft by the employee, Bobby filed suit on behalf of the employer and obtained a Court order freezing the former employee's bank accounts and attaching his real estate. After nearly three years of contentious litigation and extensive review of records, Bobby settled the matter recovering all of the stolen funds and attorney's fees for the client.

Rudolph Friedmann Wins Bankruptcy Case Involving Commercial Lease

Jon Friedmann recently represented Robert DeVoe as both trustee of R&M Realty Trust and individually in a case tried in the United States Bankruptcy Court for the District of Massachusetts *(Lassman v. DeVoe, No. 18-01192, 2022)*. The case involved a commercial lease between Nouhad B. Bechara and Mona M. Bechara ("the debtors") and R&M Realty Trust, which owned the property that the debtors leased and operated as a convenience store.

The debtors filed a joint petition for relief under chapter 7 of the Bankruptcy Code seeking to liquidate their prepetition claims and those of their wholly-owned corporation against their commercial landlord DeVoe,

(continued on page 4)