



SubStance



summer 2014



Jim Rohlfing,
IMSCA President

Message from the President

Associations must periodically assess how they're doing and figure out how to do better to achieve their objectives for their members. Two years ago, a report was issued by IMSCA's Planning Committee discussing the state of IMSCA's communication efforts and those of its member associations. The report was based, in part, on a survey of IMSCA's members conducted by Lingo Studios, a communications firm retained by IMSCA. The report surveyed the means and methods of communication by IMSCA to its member associations, and how its member associations were, in turn, communicating IMSCA news to their individual members. Not surprisingly, there was a great disparity among how our members did this. Some of IMSCA's association members

【“He Not Busy Being Born
Is Busy Dying” - Bob Dylan】

had a great deal of IMSCA related information on their websites and some had none. The survey also noted that some members employed other social media to communicate with their individual members. The members were asked what they found helpful from IMSCA and what additional information they would like to receive. The report was helpful for IMSCA to understand what it might improve and what things members enjoyed about its methods at that time. Also, IMSCA's members could use the report to consider employing tools utilized by other IMSCA members, some of whom had effective communication ideas.

The survey also asked IMSCA's members to comment on IMSCA's communications to its members. Of course, the two are related. By learning the types of governmental information that IMSCA's members pass along to their members demonstrates for IMSCA what its members find useful. Further,

by inquiring what type of information its members would like to receive, and how they prefer to receive it helps IMSCA communicate more effectively with its members. Among the recommendations made by the Planning Committee were:

1. Provide more Legislative Updates each year to IMSCA members describing the bills of most interest to IMSCA members in an easily readable form for distribution by IMSCA members to their respective members.
2. Make periodic updates to the IMSCA website.
3. Electronic publication of Substance magazine at least twice per year.
4. Identify a few prospective new members and compile a plan for marketing to them.
5. Utilize Dropbox to distribute documents to members.
6. Prepare marketing plans for IMSCA events such as PAC fundraisers.

Let us know how you believe IMSCA is doing in following these suggestions and whether you have different or additional suggestions for how IMSCA can better meet its goals. I strongly encourage you to contact me or IMSCA's other officers or IMSCA staff with your comments and questions. Though my own opinion is that IMSCA has continued to improve its communication methods and it has seen some impressive successes since the Planning Committee report, the opinions of IMSCA's members is the vital component to IMSCA's success in fulfilling its mission. IMSCA exists to serve its members, and it can only do that well if its members give feedback to the officers and staff. Like the old sign on the restaurant wall says: “If you like our food, tell your friends. If you don't like it, tell us.”

We look forward to hearing from you.

*Legislative
Representation
for over 2,000
Construction
Employers*



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IMSCA
Illinois Mechanical & Specialty Contractors Association

Featured Story



James is a principal in the law firm of James T. Rohlfig & Associates, P.C. in the Loop. He and his firm represent subcontractors. Please direct your inquiries to jrohlfig@rolaw.net, or call 312-923-7100.

Is it still safe to be a safety service company in Illinois?

by James T. Rohlfig

New Law Changes Exemption for Safety Companies

On June 5, 2014, Governor Pat Quinn signed SB 3287 into law and it became Public Act 98-633, which is effective immediately. It modifies section 5 of the Illinois Worker's Compensation Act (820 ILCS 305/5) to remove from the Act the limitation of liability for companies that provide safety consulting and other safety services— unless those companies are wholly-owned by the employer, insurer or insurance broker. Despite strong opposition from the business community, the bill hastily passed along party lines in both chambers of the legislature and was swiftly signed by Governor Quinn. The

politically potent Illinois Trial Lawyers Association was the

principal proponent of the bill.

Illinois business groups, including construction industry associations and, specifically, the Illinois Mechanical & Specialty Contractors Association or IMSCA are concerned about the impact of the new law on insurance rates and workplace safety. Because safety consultants are now exposed to greater liability in the event of a workplace accident, it is predicted that insurance rates for those companies will increase and, therefore, they will charge considerably higher fees for their work. In addition, some of those service companies may now be

unable or unwilling to provide consulting services and, therefore, the use of safety consultants by businesses may decline. Smaller companies especially use consulting firms to provide this expertise and to assist in keeping their business compliant with OSHA standards. Some have opined that the new law will especially hurt small employers who typically cannot afford and do not require a full-time safety professional on their staff to address safety issues. There is a concern about what consequences will arise from the unavailability of affordable safety consultants. Still others in the construction industry are concerned with the impact the new law will have on safety seminars and the giving of advice related to safety issues in an educational context.

The Role of Safety Service Companies in the Workers Compensation System

As a general matter, the workers compensation laws in Illinois and elsewhere hold employers liable for work related injuries of their employees without requiring the employee to prove any fault by the employer or its agents. What the employer gets in return for this benefit to its employees is a limitation on the amount it must pay to compensate an injured employee. Section 5 of the Illinois Workers Compensation Law provided that the limitation of liability enjoyed by employers was also extended to safety service companies whom the employer hired. The new law takes that

“The safety of the people shall be the highest law.”

— Marcus Tullius Cicero

liability limitation away, except if the safety company is owned by the employer, its insurer or broker. Most are not.

SB 3287 was promoted as a means of legislatively overturning an Illinois Appellate Court decision which dismissed third party service and maintenance companies from a negligence lawsuit by an injured employee. In the case of *Mockbee v. Humphrey Manlift Co., Inc.*, 973 N.E.2d 376 (1st Dist. 2012), Brenda Mockbee sued Harris (two related companies) and Humphrey Manlift Company after she was injured in a fall through a floor opening in a manlift platform system at Quaker Oats Company plant in Danville, Illinois, where she worked. There was no guardrail at the floor opening of the manlift. The severe injuries rendered Ms. Mockbee a paraplegic. The workers compensation case reportedly settled for \$200,000, not including payment for medical treatment and lost time. Ms. Mockbee sought additional compensation in the Circuit Court for her injuries from Harris and Humphrey, who were responsible for safety inspection and maintenance of the manlift. Ms. Mockbee contended Harris and Humphrey owed her an independent duty of care and breached that duty when their inspections failed to note the need for a safety guardrail required by OSHA.

The Appellate Court agreed with the Circuit Court that Harris and Humphrey were both immune from liability for injuries sustained by Mockbee under section 5(a) of the Illinois Workers Compensation Act, as providers of safety services to the employer. The Mockbee case held that a safety engineer or inspector stood in the shoes of an employer when it provided safety services or maintenance and, therefore, it would be entitled to the same limitation of liability as the employer. It is important to note that another recent case involving a paraplegic that went to a jury trial in Illinois resulted in a verdict of \$64 million. So, obviously, the limitation of liability in the workers compensation system to a settlement of \$200,000 was greatly significant.

Concerns with the New Law

With the new changes to the Workers Compensation Act, concerns have been expressed that there will be a “flood of new lawsuits” or a “cottage industry of new litigation” for all significant injuries in the workplace. Some warn that safety consultants and safety inspectors will likely get sued anytime they have been consulted by an employer prior to a significant injury. Of course, it is unavoidable that some injuries will occur, even if the services provided by safety consultants and inspectors are perfect, and they will not always be perfect. So there will be some suits.

Those who opposed the law pointed out that an exemption for safety companies promoted workplace safety and that Illinois has seen some success in reducing workplace injuries. The Illinois’ injury rate is 16% lower than the national median, according to the Illinois Workers’ Compensation Commission 2012 Annual Report. The injury rate in Illinois is lower than most states, declining significantly since 2009. The new law likely will make it more expensive for Illinois employers to utilize the services of safety companies. If that occurs, it will result in decreased workplace safety, resulting in more workers’ injuries. Many businesses are right to be concerned that the added cost of this change could cripple some small businesses and result in unnecessary and unproductive litigation. Both proponents and opponents of the change to the Act should agree that there will be more litigation against safety consultants and inspectors in the wake of this change to the Workers Compensation Act.

Plaintiffs’ lawyers would argue that holding negligent safety service companies responsible for severe injuries to Illinois workers is a worthy goal for our legal system. Arguably, making people and organizations responsible for their own deficient behavior is a principle with which there can be little disagreement. Further, making service companies responsible for their own carelessness may cause them to perform their duties more

carefully, and that will, in turn, result in safer, not less safe, workplaces.

What Can be Done to Minimize Exposure?

To remedy the harmful effects of this change in the law, some companies might want to hire a full or part time safety consultant as an employee rather than an independent contractor. Of course, just calling the consultant an employee will not make him one. It will be necessary to consider the attributes of the relationship between the consultant and the employer to assure it is truly an employment relationship. Another possible outcome is that some safety companies might require indemnification agreements from the companies to which they provide services, obligating the employer to pay any damages incurred by the safety company if it is sued by one of the employer’s employees. Unfortunately, for the employer, this will have the same financially disastrous outcome caused by the so called “Kotecki” debacle, which arises when an employer indemnifies third parties against claims by its own employees. In both situations, the employer is contractually sacrificing its liability limitation under the Workers Compensation Act and risking financial ruin in doing so. The loss likely would not be covered under many commercial liability policies purchased by employers.

A Chilling Effect on Safety Training and Education

To the extent that the new law makes it possible to sue providers of safety training and education courses, it has gone too far. The construction industry heavily relies for safety compliance education and training on the Joint Apprentice Training Committees and The Chicago Construction Safety Council and other organizations offering safety training. These not-for-profit groups provide training in such areas as OSHA certifications, first aid, CPR, fall protection, working in confined

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Jessica Newbold,
Legislative Consultant,
IMSCA

IMSCA-PAC: An Investment in Your Business

IMSCA has successfully served as the voice of the sub-contracting industry since 1967 by effectively influencing legislation and playing a key role in the public policy making process. Often times, lawmakers introduce legislation that has a direct impact on your business – without even thinking what the consequences for small business owners like you might be. That is where the voice of IMSCA comes to play – to educate members of the Illinois General Assembly on issues that directly impact you and your business. As a member of IMSCA, you are represented by two lobbyists in Springfield who work hard to personalize and discuss issues facing Illinois sub-contractors. These conversations are an important and necessary part of the public policy making process – and are made possible with the help of IMSCA-PAC.

IMSCA-PAC provides your lobbying team with the necessary tools to establish and maintain relationships with elected officials. With your financial contributions to IMSCA-PAC, IMSCA is able to maintain an important presence on your behalf in Springfield. Through IMSCA-PAC, we are able to make direct contributions to the campaigns of elected officials who understand the challenges faced by the Illinois construction industry. In addition, during election season, IMSCA is able to endorse candidates who wish to be elected to the Illinois General Assembly. IMSCA has remained legislatively successful – and this success is due to the package of your IMSCA lobbying team and the financial contributions we are able to make with IMSCA-PAC.

Here are some recent examples of how your business has benefitted by IMSCA and IMSCA-PAC:

- **PASSED** legislation preventing subordination of mechanic's liens. Subordination is now prohibited as a condition of a loan contract or subcontract. (SB 3023)
- **PASSED** legislation amending the Public Construction Bond Act to require sureties to meet certain qualifications including: bonds must have a certificate of authority from the Department of Insurance, the company must have a financial rating of at least an A-. (HB 4769)
- **STOPPED** legislation that would allow a bond to take the place of your mechanics liens. (HB 4657)
- **STOPPED** legislation that would have required a written and executed contract in order for you to file a mechanics lien. (HB 5663)
- **STOPPED** legislation that would have allowed out of state contractors to enter Illinois during a state of emergency to provide disaster relief services WITHOUT meeting licensing requirements, or register, file or remit state and local taxes on disaster related work. (HB 5595)

Imagine for a moment the impact any of these bills would have had on your business if IMSCA had not been there to represent your interests. Would your business be able to thrive if you gave up your mechanics lien rights to a bank as a condition to receive a construction loan, or if a bond could take the place of your lien? What if out of state contractors had the ability to come to our state, compete



Enter to WIN your chance to TRAVEL!

IMSCA-PAC is selling raffle tickets for a \$500 gift card to American Airlines and a \$500 gift card to Hilton Hotels! This raffle is for anyone who travels for business or leisure. These gift cards don't expire – and can be used when YOU are ready for some downtime.

IMSCA-PAC provides financial contributions to candidates who are supportive of issues facing the Illinois construction industry. IMSCA-PAC provides your IMSCA lobbying team with the necessary tools to fight for legislation that is important to YOU as a contractor. By contributing to IMSCA-PAC, you are making your voice heard on issues that affect you and your business!

Join your colleagues in supporting IMSCA-PAC!

The winning ticket will be drawn on September 19, 2014 at IMSCA's Board Meeting. You do not need to be present to win.

IMSCA PAC

YES! I would like to support IMSCA-PAC!

I want to purchase _____ tickets at \$50.00 each. Please make check payable to IMSCA-PAC.
Under State Law, IMSCA-PAC can accept both corporate and personal checks. Your support is appreciated.

Name: _____

Address: _____

Company: _____

Phone: _____

A copy of our report filed with the State Board of Elections is available on the Board's official website www.elections.il.gov or for purchase from the State Board of Elections, Springfield, IL. Contributions are not tax deductible.

Please return this form to: IMSCA, 519 South Grand Ave., Springfield, IL 62704

If you have additional questions regarding IMSCA-PAC, please contact Jessica Newbold at 217.523.4361 or JNewbold@gcsconsult.com

against you for business, and not have to pay state or local taxes? These victories would not have been made possible without our ability to keep and maintain relationships with lawmakers who supported our positions on these issues. Having a strong IMSCA-PAC helps us cultivate relationships with elected officials who are supportive of keeping construction strong in Illinois.

You are encouraged to support IMSCA-PAC to help us continue fighting

for you on these important issues and more. IMSCA-PAC is currently holding a raffle for a chance to win a \$500 gift card to American Airlines and \$500 to Hilton Hotels. The winning ticket will be drawn on September 19, 2014 at IMSCA's quarterly board meeting. Tickets are \$50.00 each – and remember, under Illinois State Law, IMSCA-PAC can accept both corporate and personal checks. More information, including the raffle form, can be found at www.imsca.org.

org, or feel free to contact IMSCA staff with your questions.

IMSCA staff would like to thank everyone for their continued IMSCA-PAC support. We hope we can continue to count on you to help keep IMSCA legislatively competitive, and to provide your lobbying team with the tools needed to remain successful on issues that affect your business. Your business is worth protecting – and an investment in IMSCA-PAC helps you do that.



Tom is an attorney who focuses his practice on various aspects of business law. He can be reached at (217) 544-2703 or at www.delanolaw.com.

Getting the Most Protection Out of Your Entity

By Thomas C. Pavlik, Jr.

Owning and operating a business is not without its share of hazards. In an attempt to protect assets, most business owners elect to operate as some sort of entity – usually as a corporation or as a limited liability company. The general rule is that a shareholder or member cannot be held liable for the entity's debts or obligations. That is, creditors can reach the entity's assets, but once those assets are exhausted they usually can't reach the personal assets of the owners or shareholders of the entity. However, in a worst-case scenario, don't think that you can simply walk away from a mess without any personal liability. The general rule of no personal liability can be disregarded by a concept known as "piercing the corporate veil."

Piercing the corporate veil means that a court will impose liability on an individual for an entity's liabilities when the entity has been operated as a dummy or sham. Or, as lawyers say, the veil of limited liability may be pierced where the entity is merely the alter ego or business conduit of another person or entity.

A recent case, involving the construction industry, helps shed some light on this issue. In that case, a property owner contracted with a builder to construct improvements. The builder was a corporation. Although 100 percent owned by the wife, the corporation was actually operated by the husband. Unfortunately, the builder's work was so shoddy that the entire structure had to be demolished. The

court ultimately awarded the property owner a multi-million dollar judgment. The property owner, faced with the prospect of collecting that judgment against a corporation with no assets, sought to hold the builder's president (but not shareholder) liable.

The court agreed. Yes, that's right - a non-shareholder officer was held liable for the entire judgment. The court's rationale was that although the wife was the sole shareholder, her involvement in the company was minimal. The husband, on the other hand, was solely responsible for running the corporation. In other words, the court found that the corporate structure was a sham.

Under what circumstances, then, can a court pierce the corporate veil? Entire books have been written on the topic, but it's important that you know the basic concepts so that you can avoid personal liability. Two prongs must be met. First, a court will analyze whether there was "unity of interest and ownership."

Essentially, the court will determine whether separate personalities for the entity and individual(s) exist. A court will examine the following factors: (1) was the entity adequately capitalized, (2) was stock ever issued, (3) were "corporate" formalities observed (such as annual meetings and minutes of those meetings), (4) were dividends or distributions ever paid, (5) was the entity insolvent, (6) did officers, managers and/or directors actually perform duties, (7)

were records kept, (8) were individual and entity funds commingled, (9) were funds diverted from the entity at the expense of creditors, (10) were there arm's length transactions between related entities, and (11) was the entity a mere façade for the dominant owner.

As a business owner or officer, these should be on your laundry list of things not to do. Failure to meet one of the elements doesn't mean that personal liability will be imposed – instead it's a totality of the circumstances test. Nonetheless, prudent business owners will want to review their operations to make sure they don't run afoul of these guidelines.

Another fertile ground for piercing the corporate veil involves single member limited liability companies or single shareholder corporations. Often, individuals setting up those entities may use an operating agreement or corporate bylaws designed for a multi party entities and which call for meetings, special voting rules and a host of other procedures. Rarely, if ever, will the single owner entity follow such rules – but rules they are, and failure to follow them may well constitute failure to follow corporate formalities. Even if an attempt to pierce the veil on this basis is defeated,

valuable resources in terms of time and money have been lost in the process.

The second prong analyzes whether refusing to pierce the corporate veil will sanction fraud or otherwise promote injustice. This is a somewhat amorphous test, and there's no hard and fast rule. In the case described above, purported loans owed by the husband to the wife were paid by the corporation during the litigation process – resulting in an empty shell of a corporation. Moreover, once the litigation started, the husband and wife began other construction work under a newly formed corporation such that profits from those endeavors would not go to the "old" corporation. The court found this was sufficient evidence. In short, if it smells fishy a court will probably find that the second prong has been satisfied.

Another area of concern regarding this second prong involves thinly capitalized entities. Courts will often look at whether the entity's capital was reasonable given the possible liabilities. Since most entities are founded on debt, this appears troubling at first blush. However, most courts will take into account whether your entity had insurance. For example, if you have \$1,000,000.00 of liability insurance, a

court may well see that you made that amount available to certain types of creditors.

Selecting and setting up your entity is only the first step. Failure to follow through on good intentions thereafter can cause real harm. The lessons are simple:

- Form your entity correctly and keep it in good standing with the Secretary of State;
- Adopt bylaws or an appropriate operating agreement;
- Keep your entity's books and records separate from yours, never commingle company and personal assets, and get a separate business credit card and checking account;
- Properly document all major business decisions and hold your annual meeting if required; and
- Follow prudent accounting procedures and don't take actions with the intent to defraud creditors or to allow fraudulent activity.

These general principles aren't exhaustive, so contact your legal counsel if you are at all worried. Better to be prepared now than to face the possibility of massive personal liability.

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Featured Story

Is it still safe...

spaces and more. A trade association conducting a general safety seminar for its member companies to explain how to maintain safety standards and comply with OSHA requirements is a long way from the fact scenario in the Mockbee case that the new law was intended to address. Safety training and education should be promoted, not curtailed with the threat of liability from lawsuits. The not-for-profit groups are understandably alarmed that they now must be concerned about liability if a seminar attendee has a workplace accident following a training session. The chilling effect of this presumably unintended consequence is a troubling turn that does

not promote positive public policy.

One possible remedy to curb the new law's potential overreach would be an amendment to clarify that merely providing safety education services or training seminars would not result in liability beyond the limitations in the Workers Compensation Act. The proponents of SB-3287 presumably did not intend to discourage safety training or education seminars. Further, it would be difficult to argue that a seminar sponsored by a union group or a trade association at its offices should not be encouraged as a means of helping companies and their workers reduce accidents in the workplace. The amendment could be accomplished by adding a phrase to section 5 of the Workers Compensation Act to include among those exempted from liability outside of the Act "... organizations that provide safety training or

safety education ...". Trial Lawyers, the business community and other interested parties might all find such a modest change acceptable.

Conclusion

In conclusion, the business community is right to be concerned about the elimination of this exemption for safety companies, especially given how quickly it became law without significant deliberative consideration by the legislature. However, it is too early to predict that the change will be financially catastrophic to large numbers of Illinois businesses. The impact of the new law will only be determined after assessing the reaction of Illinois insurers, safety service firms and the courts. Meanwhile, a modest amendment to the law that assures education and training seminars are exempt would be advisable.



Mary is a Partner at Sikich and specializes in business valuation and the appraisal of tangible and intangible assets for litigation.

She can be reached at 312-648-6652 or www.sikich.com.

Reduce Risk of Fraud In Your Construction Company by Segregating Key Duties

By Mary O'Conner

A construction company's talent and marketability is often represented by the skilled designers, engineers, architects and craftsmen at the forefront of company projects. In the background, informed business managers, mindful of essential internal controls including segregation of duties, can help the company manage risk and limit its exposure to fraud and errors.

Construction companies struggle for work in a highly competitive arena; bids can be won or lost by just a few dollars. Companies expend a great deal of time and effort responding to solicitations and preparing

internal controls, like the segregation of duties, these processes can be efficient and effective, allowing frontline designers, engineers and craftsmen the freedom to perform unrestrained by the risks from a poorly managed business.

Cost Benefit Analysis

Construction company owners may think their critical human capital is the frontline representatives with unique design skills, sound engineering practices and unparalleled craftsmanship. They sometimes hope that a few trusted employees in the back office can handle all the paperwork and keep the company running. Unfortunately, stories of employee embezzlement and other frauds are all too commonplace.

Segregation of duties is a vital internal control principle calling for the sharing of key responsibilities in the critical functions and processes of the business resulting in the reduced risk of error and fraud. When duties are not segregated, fraud and error risks are far less manageable. A business can be ruined when it neglects this essential operational element. The cost benefit analysis should include an assessment of trusted best practices versus the risk of substantial financial and reputational loss.

“When duties are not segregated, fraud and error risks are far less manageable.”

bids, designing projects, staffing to meet project needs, and presenting their proficiency and expertise to prospective clients. After being awarded a job, the demands of the construction professionals increase exponentially. In the meantime, the construction company churns along making payroll, acquiring goods and services, paying bills and managing personnel. How many employees are involved in these essential functions? When a company embraces critical



Assess Key Functions and Processes

Assessing key functions and processes is an essential first step for a company when evaluating internal controls. A risk assessment or internal control consultant can help, but the first step should include mapping employee responsibilities for the business processes in which the company regularly engages, including procurement, receiving, invoicing, check writing, bank deposits, billing, general ledger entries, payroll, timekeeping, managing inventory and even handling petty cash.

Identify Conflicts

Segregation of duties mandates that certain functions should not be handled by the same employee. When multiple employees have responsibility for a series of key business functions, and understand the elements of the transactions, duties have been effectively segregated. Reduce risk by segregating the timekeeping and payroll functions. Separate the accounts receivable, accounts payable and general ledger tasks. The approver of a purchase should

not be the one who requisitions the goods, and the employee receiving an invoice should not be the one paying that bill or verifying receipt of the goods or services. The process of collecting or receiving funds, preparing receipts, approving deposits and reconciling deposits should be divided among well trained employees. Eliminate signature stamps if at all practicable and force a person in authority to actually review the transaction and sign checks.

Common Sense Preventative Measures

Despite a company's efforts to implement best practices and enact effective controls, the risk of fraud or error, although substantially reduced, can still exist. There are other, common sense, practices to further reduce the risk of suffering a financial loss. Consider forcing employees to use their vacation time. Too often, the embezzlers are the "trusted employee" who always showed up for work. Occasionally, rotate duties and responsibilities. This will yield a better-trained workforce and reduce the risk of a long-running theft scheme.

Prevent the sharing of passwords to access business and enterprise software applications. Invite an independent review of your business practices, outside the construction arena, and implement the recommendations to improve controls.

It is essential for all businesses to manage risk and reduce exposure to financial and reputational loss. Construction company owners may not focus on the necessary management and accounting functions of the business while they bid projects and hire and manage critical frontline craftsmen. The implementation of best practices, including segregating duties of those involved in key business functions and processes, allows the construction professionals to move the business forward, market the company's skills and manage a steady flow of projects.

To learn more about reducing risk in your construction company, visit the Sikich website at www.sikich.com. Our fraud experts are well-versed in topics such as valuation, dispute resolution and fraud investigation.



Sarah is an attorney who focuses on estate planning and closely held businesses. She is licensed in Illinois and Texas, is Board Certified in Estate Planning and Probate Law by the Texas Board of Legal Specialization and is an Illinois Registered CPA. She can be reached at 217-544-2703 or www.delanolaw.com.

You're A Success, But Who Will Succeed You?

By: Sarah Delano Pavlik

If you're a successful contractor, you've likely devoted yourself to your business, and you may not be able to even think about leaving. But you will leave one day (whether because of a sale of the business, death or disability), and your departure could destroy your business if you don't plan for it.

Succession planning is one of the most difficult tasks for most business owners because of the emotional issues involved. The business and the owner often seem like one, and the owner may refuse to relinquish any control. If the owner fails to properly train a successor, the business may flounder.

The first step in creating a succession plan can be the most difficult, and, unfortunately, can cause business owners to avoid the process altogether. You must decide what you want to happen to your business in the event of your death, disability or retirement. Threshold questions are: (1) Who should own the business? (2) Who should run the business? and (3) How should the new owners acquire the business, e.g., gift, purchase or both?

Answers to these questions can be very difficult and will likely change over time. If you are married, you may want your spouse to receive the business at your death. If you have partners, are they willing to be

partners with your spouse? What if your spouse dies or becomes disabled before you do? You may want one or more of your children to take over the business. Again, if you have partners, is that acceptable to them? Are your children old enough to run the business now, or would someone else need to run it until they are older or have graduated from school? Is only one of your children in the business? If so, should he receive the entire business or should the others receive a share as well? Should the child in the business purchase the business or should you leave it to him in your will?

Once the emotional issues have been addressed and a successor or successors have been identified, there are complex legal and financial issues. The problems and solutions can be very different depending upon whether the successors are family members or unrelated parties.

If the successors are unrelated parties, such as key employees, the first step is generally a buy-sell agreement. This agreement will specify when the successors can acquire the business and at what price. The buy-sell agreement can be triggered at the owner's death, disability or retirement. The price can be stated as a set amount, as a formula, or as determined by an appraisal at the time of the sale.

After the price has been

determined, you must address funding. How will the successors pay to acquire the business? Will they be allowed to pay over time or must they pay all at once? Should the successors purchase life insurance on the life of the owner which they can use to purchase the business at the owner's death? Should the company own the insurance or should the successors?

The owner may also need to consider estate tax issues. The federal estate tax exemption amount is currently \$5,340,000 and the estate tax rate is 40%. The Illinois estate tax exemption amount is \$4,000,000, and the rate is progressive with a maximum of 16%. If the owner allows the successors to purchase the business over time, will his estate have sufficient liquidity to pay estate taxes? Should the owner purchase additional life insurance to pay estate taxes? If so, the insurance should be held in a life insurance trust or it will only increase the estate tax liability of the owner.

Although estate tax can be daunting, most closely held businesses do not fail because of estate taxes. They fail because of fighting among family members or because no one who remains has the ability or the vision of the owner.

If there are multiple owners, there are multiple options. If one owner dies, the business can buy back his interest, or the other owners can buy the interest from the deceased owner's estate. Each of these options will have different income tax consequences depending on the type of entity of the

business, such as an S corporation, a C corporation or a partnership.

The owner may wish to transfer an ownership interest in the business now to the successors without giving up control of the business. This can be accomplished in several ways. If the business is a corporation, the corporation can be re-capitalized into voting and non-voting shares. Non-voting shares can be transferred to the successors giving them an ownership interest in the business but keeping control in the owner.

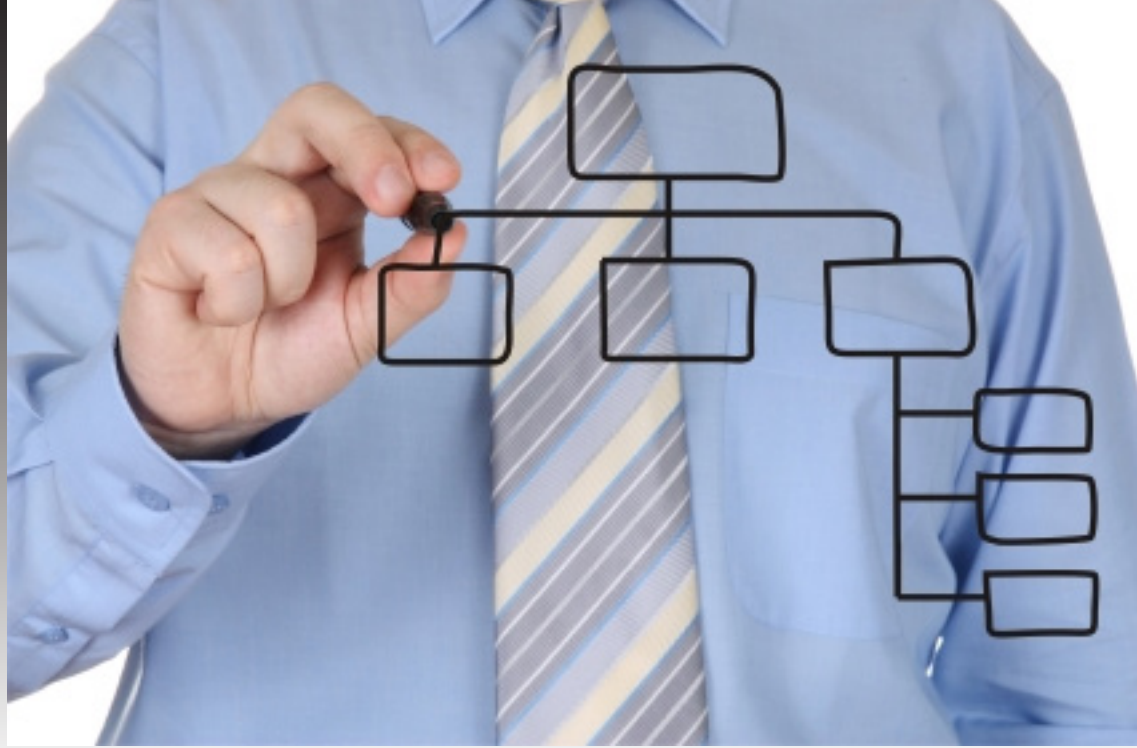
If the successors are family members such as children, the owner may wish to transfer an interest in the business to the children in trust. The owner cannot serve as trustee of the trust, however, the owner's spouse can serve as trustee. In this way, the owner can transfer ownership for the benefit of his family but know that control remains in the hands of someone he trusts.

A buy-sell agreement can also be used in family situations. If the owner has several children but only one is active in the business, he may wish to sell the business to that child rather than give it to him. In that case, a buy-sell agreement can require the owner's estate to sell to the child and specify the terms of the sale. The

purchase price can be for less than fair market value, but such a price will not be binding for estate tax purposes. For example, if the owner and his son execute a buy-sell agreement specifying a purchase price of \$5,000,000, that price will be binding on the owner's estate. However, if the fair market value of the business is \$10,000,000 at the time of the owner's death, estate taxes will be owed on the entire \$10,000,000.

The owner's estate planning documents must also be coordinated with the succession plan. The owner's will must direct the disposition of the business, and the owner should have a trust or power of attorney to provide for control of the business in the event of his incapacity.

Ultimately, succession planning is a comprehensive task involving business, financial, tax and family issues. A successful plan will probably require the input of an attorney, an accountant and a financial planner or insurance agent. It may also require a consultant to deal with personal and emotional issues. If properly implemented, however, the succession plan can allow a business to survive the departure of the founder and to flourish, rather than to disintegrate.





Louis Giordano,
Executive Vice President,
IMSCA

Decision 2014: Electing Illinois Leaders

Illinois' General Election will be held on November 4, 2014. Candidates vying for office have already hit the airwaves with hard hitting TV and radio ads – and you have probably already received your fair share of mail pieces from candidates. The office for Governor of Illinois will be on the November ballot and is shaping up to be a highly contested race.

Governor Quinn is hoping to keep his position of Governor. Quinn is widely recognized as one of the most vulnerable governors facing re-election in the 2014 electoral cycle. Quinn narrowly edged out Senator Bill Brady in 2010, and venture capitalist Bruce Rauner emerged from the March Republican Primary Election as tough competition for Quinn. Both candidates are engaging in back and forth negative campaign tactics that include Quinn slamming Rauner as a tax dodger who keeps part of his fortune in overseas bank accounts, while Rauner consistently refers to Quinn as “Quinnocchio”.

So far, both campaigns have omitted details of what exactly they plan to do to get our state back on track. These negative tactics flooding the media make it difficult for voters to educate themselves and make a decision on who is the best person to run our state. The sad truth is; whoever is elected as our next Governor has a difficult job ahead of him. Illinois has an extremely high unemployment rate, staggering debt and a real fix to our

pension crisis hasn't been accomplished. These issues and many more need to be addressed – and will require our next Governor to have the necessary skills to work with House Speaker Michael Madigan and Illinois Senate President John Cullerton.

In an effort to help IMSCA members make an informed decision before casting your vote in November – IMSCA will host a Gubernatorial Candidate Meet and Greet event on September 18th from 4:30 p.m. – 8:00 p.m. at the Hyatt Lodge / Hamburger University Building in Oak Brook. Bruce Rauner has agreed to speak to attendees, and will answer your questions about his plan for Illinois. Governor Quinn has been invited but has not confirmed attendance. This is a unique opportunity to learn more about the candidates running for Governor. You can voice your concerns and learn what they have to say about the difficult issues facing our state. This event is free to all IMSCA members, and I hope to see you there.

In addition to the Governor's race, all constitutional officers, some members of the Illinois Senate and all members of the Illinois House of Representatives are seeking re-election. IMSCA sent a candidate questionnaire to all candidates seeking a seat in the Illinois General Assembly. We asked these candidates their positions on issues important to the Illinois construction industry. IMSCA staff, along with members of our legislative committee, will carefully

Construction Industry Gubernatorial Candidate Forum

Thursday, Sept. 18, 2014

The Hyatt Lodge

Hamburger University Building
Auditorium 226

2715 Jorie Blvd., Oak Brook, IL 60523

4:30-8:00PM

Hors d'oeuvres and refreshments will be served.
Attire is Business Casual (no jeans)

Please RSVP

to Jessica Newbold,
IMSCA Legislative Consultant
by email JNewbold@gcsconsult.com
or by calling 217-523-4361

You are invited to attend the Illinois Construction Industry Gubernatorial Candidate Meet and Greet. This is a unique opportunity to learn more about the candidates running for Governor in the General Election on November 4, 2014.



Ask these candidates YOUR questions, and find out what they have to say about the issues facing our state including Illinois' financial condition, improving Illinois' credit rating, balancing the state budget, improving our business climate, and repairing and building of Illinois' infrastructure.



Governor Pat Quinn

(invited)



Mr. Bruce Rauner

(will be present promptly at 5pm)

Hosted by Illinois Mechanical and Specialty Contractors Association (IMSCA) and Builders Association of Chicago,
Co-hosted with Illinois Construction Industry Committee (ICIC) and the Women Construction Owners and Executives (WCOE)



review candidate responses, and endorse candidates who understand our industry. Endorsing candidates is an important aspect of IMSCA's legislative success. It's important to support candidates who will support us in our public policy making endeavors. IMSCA's endorsement decisions will be made by October. We will publish our selections in an effort to let you know what candidates are supportive of small

business owners and sub-contractors like yourself.

In closing, let me remind you that your vote is important. Many feel that their "one" vote doesn't matter, but you must look back to the 1982 election when James R. Thompson beat Adlai Stevenson by only 5,074 votes. That number is less than 1 vote per precinct in Illinois. One vote does matter. I encourage all members of the

construction industry to participate in the upcoming General Election. It is your right as a citizen to vote, and I hope you exercise that right. Choosing a strong and capable leader of our state is not only important to your business as a sub-contractor, but also for the future of our state. If you are currently not registered to vote, please contact IMSCA staff and we will help you get registered.



Schedule & Registration Deadlines

General Election..... *November 4, 2014*

Last day to register to vote *October 7, 2014*

Grace Period Registration & Voting

First Day *October 8, 2014*

Last Day..... *November 1, 2014*

Early Voting for Election

First Day *October 20, 2014*

Last Day..... *November 1, 2014*