



# Legal Perspectives

from Abrahams Kaslow & Cassman LLP

## Protect Yourself When Going Into Business

by: James A. Tews

Are you thinking about starting or buying a business? Do you currently own and operate a business? If so, have you considered how to best protect yourself and your family from the financial risks related to owning and operating the business? Thoughtful planning now can play a critical role in avoiding devastating losses if the business later suffers a large liability.

There are several ways business owners can protect their personal assets. The primary way should be to obtain insurance coverage (e.g., property, liability, and errors and omissions insurance). Business owners should carefully consider with their insurance agent the appropriate type and amount of insurance coverage for the business. However, because circumstances may arise where there is not enough or no insurance coverage at all for a particular liability, business owners also should consider creating an entity to own and operate the business, such as a limited liability company or a corporation.

A critical feature of using a business entity is that, if such an entity is created and operated correctly, all liability of the business remains trapped in the entity, thereby preventing the business owner's personal assets from exposure to the business' liabilities. To say it another way, a creditor of the entity may not pursue an owner's personal assets to satisfy an entity obligation. Note, however, that the business owner must observe formalities in operating the entity and otherwise treat it as separate from the owner's other financial affairs.

As an example, assume that Sally owns and operates a flower shop as a sole proprietorship. What might happen if a customer slipped and fell on a patch of ice walking up to Sally's flower

shop, which resulted in the customer incurring \$800,000 in medical bills, but Sally only had a liability insurance policy that provided \$250,000 in coverage? Sally's insurance would likely pay the limits of the policy, leaving Sally personally exposed to another \$550,000 of liability. Sally would likely have to use her personal assets to pay the remaining bills, and if she does not have enough assets to do so, she may need to file for personal bankruptcy. In this example, had Sally formed an entity to own and operate her business, then, after applying the limits of the insurance policy, the customer could only pursue the other assets owned by the entity. In other words, Sally's personal liability would have been limited to the amount of her investment in the business. The customer could not pursue Sally's personal assets, even if the entity did not own enough other assets to pay the remaining \$550,000.

Forming an entity can be a fairly quick process and cost a relatively modest sum, often less than \$1,000. Formation of an entity in Nebraska generally requires (1) the filing with the Secretary of State of a short document containing information about the entity, and (2) a document that governs how the entity will operate. There are, however, other considerations when choosing the type of entity to be used, such as payroll and income tax matters.

Operating a business through a business entity can be a prudent way to help ensure that the personal assets of a business owner are protected from the creditors of the business. If you own and operate a business, consider consulting with an attorney about the advantages of forming an entity to determine if this is a wise decision for you.



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## Protect Your Company's Rights In Employee Inventions by: *Harvey B. Cooper and Kathryn A. Kotlik*

Many companies rely on innovation to succeed. As part of that innovation, companies encourage or hire employees to develop ideas or invent new products. Who owns these inventions – the employer or the employee?

As an employer, copyrights and patents can help you protect your company's rights in works created or invented by employees. Copyrights protect original works of authorship, while patents protect inventions or discoveries. Copyright law does not protect ideas and discoveries, although it may protect the way in which they are expressed.

A copyright owner has the exclusive right to control who may "copy" the work for a certain period of time. Under the "work for hire" doctrine in copyright law, an employer owns the copyright on a product created by an employee within the scope of the employee's employment unless a written agreement to the contrary exists.

A patent owner has the exclusive right to prevent others from making, using, selling, or distributing an invention for a certain period of time. Contrary to copyright law, in patent law, the employee inventor

owns the patent rights in an invention even if the employee conceived of or created the invention within the scope of employment. A limited exception to this rule is that if the employee was hired to invent, the employee may be required to give up the patent rights the employee would have otherwise had. Without an express agreement, the employer's rights in such cases are dependent on a court finding the employee impliedly contracted to give up the patent rights to the employer.

Absent an express agreement as to patent rights, an employer generally only has a "shop right" in the invention. A shop right allows the employer to use the invention in its business. A shop right, however, is nonexclusive and nontransferable. An employer cannot sell or license its right to use the invention or prohibit others from using the invention.

To protect your company's rights in employee inventions, you should have your employees sign written agreements in which they expressly give the rights to the company. Contact one of our intellectual property or employment law attorneys for more information.



## Attorney Spotlight

AK&C Successfully Defends City of Alliance, Nebraska in Civil Rights Case

Attorneys Harvey B. Cooper and Ryan M. Kunhart successfully defended the City of Alliance, Nebraska and two Alliance police officers in the United States District Court for the District of Nebraska. The plaintiff brought two federal civil rights claims against the City and police officers alleging violations of her Fourteenth Amendment Rights and two state claims for negligence and intentional infliction of emotional distress.

Cooper and Kunhart regularly represent municipalities in defending them against cases brought under the Nebraska Political Subdivision Tort Claims Act and Federal civil rights laws.

## Firm News

**Marghi Meusey** has retired from the firm. Marghi had been the firm's book keeper since February 1987. Marghi will be greatly missed.

**Nick Dafney** has been selected as Vice Chairman of the Millard Athletic Association.

**Nicole Seckman Jilek** recently attended the Nebraska State Bar Association's Real Estate Institute seminar. The featured topics included tax sale certificates, commercial leasing, partition actions, and the new Real Property Transfer on Death Act.

We are pleased to announce that six attorneys were recognized in The Best Lawyers of America 2013:

R. Craig Fry - *Corporate Law*; Howard J. Kaslow - *Corporate Law*; John W. Herdzina - *Corporate Law and Franchise Law*; Randall C. Hanson - *Energy Law*; Timothy M. Kenny - *Municipal Law and Litigation Municipal Law*; and Thomas J. Malicki - *Trusts and Estates*.

Attorneys Aaron Weiner, Jeff Blumel, Rob Schartz, Harvey Cooper, Tim Kenny, Nicole Seckman Jilek and Ryan Kunhart have been included in Best's Directory of Recommended Insurance Attorneys again for 2013.

Congratulations to attorneys John W. Herdzina and Howard J. Kaslow for being recognized in Super Lawyers Business Edition 2012 for Business and Corporate Law.

**Nicole Seckman Jilek** was selected to the Nebraska State Bar Association's Leadership Academy. The Leadership Academy's mission is to develop the leadership skills of the participants to allow them to make greater contributions to the legal profession and their community.

Congratulations to **Tom Malicki** for being named a 2012 Fellow of the Nebraska State Bar Foundation. This selection is based upon the lawyer's dedication to improving the administration of justice in Nebraska, leadership in the legal profession, civic service, integrity, and Foundation support.

Our firm was ranked in the top tier in Omaha for the 2013 Best Law Firms in *U.S. News and World Report* for Corporate Law and Municipal Law and in the top 2 tier for Franchise Law and Trust & Estate Law.

## Wage and Hour

Under the Nebraska Wage Payment Act all unused accrued vacation is defined as “wages”. Therefore, unused accrued vacation must be paid out at the time an employee is separated from an employer’s payroll. But wages do not include unused accrued sick leave, so an employer is not required to pay unused accrued sick leave at the time of separation.

But what about Personal Time Off (PTO), which is generally one leave consisting of a combination of vacation, sick leave, and personal days? In two conflicting cases the Lancaster County District Court held that PTO does not have to be paid at the time of separation, but the Douglas County District Court held PTO has to be paid at the time of separation. Neither case addresses carry over or use it or lose it leave policies. To address this we suggest implementing a maximum accrual policy.

The Douglas County case has been appealed to the Nebraska Court of Appeals and oral arguments have been set for early December. Although we are hopeful the Court of Appeals will provide guidance on this issue, it is likely the decision will be appealed to the Nebraska Supreme Court. In the meantime, the conservative approach is to pay employees unused accrued PTO at separation of employment to avoid a Wage and Hour lawsuit.

## Healthcare Reform

The Affordable Healthcare for America Act (AHAA) mandates businesses with 50 or more full-time employees must provide at least the minimum level of government defined health insurance coverage. Employers must pay a penalty per employee for each month it does not offer health insurance coverage if it employs 50 or more “full-time” employees.

Contrary to normal practice where a full-time employee works 40 hours a week, under the AHAA, a full-time employee is an employee who works on average at least 30 hours per week. In September the IRS issued a notice (IRS Notice 2012-58) for employers to determine whether employees are full-time or part-time. The notice contains a look-back period to determine each employee’s full-time status. Therefore, employers who planned to employ more part-time workers to avoid the mandate will need to keep in mind the 30-hour threshold and look-back period when determining coverage.

If you have any questions about either of these employment law updates or other employment law issues, please call Harvey Cooper or Ryan Kunhart at 402-392-1250

## Trademark Issues *by John W. Herdzina*

Purchasing a business or franchise involves many legal questions and issues which need to be taken into consideration. However, one key question that is often overlooked is the issue of trademarks (“Mark”). A Mark is a word, symbol or phrase used to distinguish the services of one seller (franchise) from the services of another.

Oftentimes, the franchisor does not have its Mark federally registered. This happens more often with a new franchisor. This is important for a prospective franchisee to research before the purchase of a franchise.

If the prospective franchisee still wishes to proceed with the purchase even though the franchisor does not have its Mark federally registered, there are several questions it should consider, such as: What type of trademark protection, if any, has the franchisor applied for? While the application for the Mark is being processed, is the franchisor likely to encounter opposition from holders of similar Marks? Is the franchisor likely to encounter push back from the federal regulators or does it appear that the application will go through promptly? If a

problem with registering the Mark does take place, does the franchisor have the right under the Federal Disclosure Document to require the franchisee(s) to change the Marks they have been using?

If you are considering purchasing a business or franchise, please contact one of our business attorneys at 402-392-1250 to assist you through the process.

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The Nebraska Rules of Professional Conduct for attorneys require the following statement on newsletters of law firms:

**This is an advertisement.**



Kathryn A. Kotlik

## Introducing Our New Associate

We are pleased to announce that Kathryn A. Kotlik (Katie) has become an associate of the firm. Katie will focus her practice in the areas of corporate and business law, commercial real estate transactions, and business acquisitions.

Katie received her Bachelor of Arts, summa cum laude, from Morningside College in 2008. She was a member of the Omicron Delta Kappa National Leadership Honor Society and received the Dean's Award in Humanities. Katie received her Juris Doctor, magna cum laude, from Creighton University School of Law in 2012. During law school, she served as the Editor in Chief of the Creighton Law Review.

Katie is a member of the Nebraska State Bar Association and the Omaha Bar Association.



## Canvas & Cabernet Women's Networking Event

What a great time our Engage women's group had learning how to paint at Aksarben Village's Canvas & Cabernet. For more pictures of the event, go to our facebook page.

[www.facebook.com/akclaw](http://www.facebook.com/akclaw)