

When a business owner dies

Keeping the company alive—or not

Let's say that a loved one who owns and runs a successful small business dies suddenly. You are the person responsible to deal with the person's affairs, either because you have been appointed as the executor of the decedent's estate or the trustee of the decedent's trust, or because you will be adversely affected if the decedent's affairs regarding the business are not handled correctly and in a timely manner.

This article shares some thoughts from our experience in handling such situations. It does not consider numerous tasks that are required to handle the personal affairs of the deceased owner and, of course, each situation will be different depending upon the type of business and the particular circumstances involved in each case.

A first challenge is to determine whether the business can successfully be continued or whether it should be sold as a going concern or closed and liquidated as quickly and efficiently as possible for the benefit deceased owner's heirs or other beneficiaries. Making this decision will likely require some combination of the following steps: (1) determining who has sufficient knowledge about the business or professional experience to help you; (2) gathering essential information and documents; (3) reviewing and analyzing the information and documents; (4) determining the course of action and prioritizing essential tasks; and (5) performing the essential tasks in the appropriate order.

It is critical to perform the first four tasks above as quickly as possible, on parallel tracks. If you do not have time to tackle these steps yourself within the first days and weeks following the business owner's death, then you should get help.

THE TEAM

If you are not familiar with the business, it will be necessary to delegate to others the critical tasks and responsibilities of running the company. In that case, you should immediately assess the responsibilities and leadership skills of the remaining employees of the business to determine if current staff can fill the management void left by the death of the owner. If not, advisors with relevant industry experience often are available for hire on a temporary basis. You also should also determine whether any of the current employees would be essential for continued operations, and you should consider offering any such essential employee a retention bonus to ensure that he or she remains at the company during the period of transition. Keep in mind that the sudden death of a business owner can be very stressful on employees and you should take pains to keep the employees closely informed regarding the decision whether to continue the business.

You should assume that you will be required to run the business at least for an interim period of time until either a new management team can be put into place, ownership can be transferred, or an orderly liquidation of the business's assets and winding down of its affairs may be accomplished.

You also should assemble a team of professionals as quickly as possible, giving due consideration to those currently retained by the business who may be able to provide invaluable "institutional memory" about the company. Such professionals will often include an attorney experienced in estate and trust administration, a business/corporate attorney, an accountant and an insurance professional.

It is important to immediately obtain advice from an experienced estate/trust attorney because you may have to comply with probate court rules and deadlines concerning such matters as the appraisal of the deceased owner's interest in the business, the disposition of that ownership interest through the probate court, if required, and other requirements for administering the estate as it affects the business. If, on the other hand, ownership interests are held in trust, the trustee will face statutory requirements for notifying and making periodic reports to beneficiaries, and often will need expert assistance in interpreting the terms of the trust documents. Similarly, it is essential to have accountants who are experienced with the required business tax filings as well as the tax returns required of estates and trusts.

ESSENTIAL INFORMATION AND DOCUMENTS

When it comes to collecting important documents and information, we often find it helpful to set up a single repository, which can either be a traditional paper file system or an internet-based document management program such as DropBox or ShareFile. An obvious advantage of an internet-based system is that a number of users in different locations can have access to the documents at the same time. In addition, if it becomes necessary to sell the business, the document repository may easily be converted into a virtual due diligence data room.

The document repository should contain complete copies of all of the documents and information that you may need to consult. These often will include:

- **An enterprise calendar** containing critical dates and deadlines of importance to the business (e.g., tax filing dates, lease renewal deadlines, loan payment dates, contract performance milestones, etc.).
- **A list of contacts** for key parties, such as customers, suppliers, lenders, professionals and key management and operational employees. Also consider making a single record of all the deceased owner's user names and passwords for any online accounts (but obviously do not make this generally available to others).



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- **The will and/or trust agreement**, including all codicils and amendments to such documents. The deceased owner's estate plan may specifically direct the disposition of the deceased owner's interest in the business. Typically, the attorney that prepared the estate plan will have originals of such documents or know where they might be.
- **Company internal records**, such as the original share ledger and the deceased owner's share certificates, if the business is a corporation; or, the original operating agreement and all amendments, if the business is a limited liability company. The company records should be reviewed to determine the current ownership of the company; whether there are any other owners and, if so, whether they have the right or obligation to acquire the deceased owner's interest; who has the authority to participate in the management of the affairs of the company; and the tax attributes of the company, such as whether a corporation is a "S corporation" under federal and state tax laws. Formal company action should be taken as quickly as possible to replace the deceased owner as a director, a manager and/or an officer of the company, as the case may be.
- **Business records**, including all loan documents, bank account and credit card records, employment agreements, significant contracts with vendors, suppliers and customers, building leases, vehicle titles and insurance policies. The death of an owner or principal of a business is typically an "event of default" under material contracts or commercial loan documents, particularly if that person also has personally guaranteed the loan. Regardless of whether the death results in a technical contract default, it is important to notify all lenders, customers, suppliers, landlords, and contract counterparties of the death, and the steps that you are taking to maintain the business operations and minimize the negative effects of the death of the business owner.

CONCLUSION

The unexpected loss of the owner of a business can have a catastrophic effect on the business. A well-conceived plan of action, informed by a team of experienced advisors and the relevant documents and information, can be invaluable in the preservation of the value of the business.

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