

Strategies for Navigating Real Estate Issues in Implementing a Business Succession Plan

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In working with closely-held businesses to develop and implement their business succession plans to create a smooth transition from the company founders to successor owners, we find that real estate issues are of crucial importance. This is well demonstrated by our recent representation of a client in a \$15 million leveraged recapitalization and corporate restructuring transaction.

The transaction was triggered when the company's founding shareholder notified the company of his desire to retire as a shareholder and board member. At the same time, the company desired to elevate two senior executives by admitting them as shareholders and as board members. Working with our client's accounting firm, we assisted in structuring the retirement and buy-out of the founding shareholder and the simultaneous buy-in of the two senior executives.

Although at first glance these may appear to be purely corporate transactions, the examples below illustrate a number of critical real estate issues that we negotiated in connection with this matter.

Loan Agreement Covenants. The recapitalization transaction was financed by a \$15 million loan which was documented by an extensive credit agreement. Credit agreements often contain provisions restricting the borrower's ability to purchase and lease real estate. As our client intended to move its leased headquarters to a new location in the near future, we negotiated an exception in the loan agreement allowing the client to enter into a new lease for its headquarters without the lender's approval. We were also aware of the company's growth plans; therefore, we negotiated a provision allowing the company to enter into new leases (other than its headquarters) without the lender's consent, to the extent the client determines the new locations are required for its continued business operations.

Ownership of Real Estate. We advised our client that as to any real estate owned by the company, the mortgages encumbering each parcel of real estate must be reviewed to determine whether they contain "due on sale" clauses stating that the mortgage holder's consent is required whenever shares are transferred or upon the change in the company's board or management.

Lease of Real Estate. Our client leased offices in multiple states throughout the east coast. Although our client did not intend to assign any of its leases to other companies, we analyzed the real estate leases to determine whether they state that transfers of shares within the company is deemed to be an assignment of the lease which requires the landlord's prior approval. Many leases were silent on this issue, and in these cases, we advised the client whether under each state's law, a transfer of shares is deemed to be an

assignment of the lease which requires the landlord's consent. We further advised that leases for any new offices should expressly state that transfers of shares in the company will not be deemed to be assignments of the leases.

Landlord Lien Waivers. The loan was secured in part by a lien on the client's equipment, which was located in several of the leased locations. The lender required our client to provide landlord lien waivers which would allow the lender to enter the leased locations and access the collateral in the event of a default under the loan. We advised the client not to agree to any covenant in the loan agreement that guarantees the client will obtain landlord lien waivers, since our client did not have control over the landlords' actions. Instead, we negotiated language in the credit agreement providing that the client will use reasonable efforts to obtain landlord lien waivers. Therefore, a landlord's failure to provide a lien waiver would not result in a default under the loan.

As many closely-held businesses are currently in the process of transitioning ownership of their companies to the next generation of leaders, we anticipate that these and other real estate issues will continue to arise. Our multi-disciplinary approach to business succession matters enables us to assist clients in giving careful consideration to all aspects of the law that are implicated in connection with their business succession plans.