

# Business and Employment Law Update

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## Featured Transaction

Kirsten Barron and Sallye Quinn represented clients Chuck and Dee Robinson, owners of Village Books in Fairhaven, with the sale-leaseback of the Robinsons' Fairhaven property. The transaction involved the Robinsons' sale of their raw land, which is adjacent to the building where they currently operate Village Books, to developer Dave Ebenal. In conjunction with the sale, the Robinsons were able to negotiate a lease with Ebenal in the building Ebenal is currently building as the site for their Village Books operation, as well as the purchase of one of the building's condominium units.

This transaction illustrates some key components clients need to be aware of in negotiating a complex transaction. First, know what it is you ultimately want out of the deal. In this case, the Robinsons knew they wanted to sell their property while still retaining the ability to operate Village Books in the same, but improved location and ideally use the transaction to obtain a living space that worked for them. Second, make sure you have confidence that the individual on the other side of the transaction understands and shares your vision. Crucial to the success of the transaction was the Robinsons' faith in Ebenal as a developer who would work with them even after the transaction was finalized. Finally, be comfortable knowing that counsel understands the intricacies of the transaction and puts together documents and engages in follow-up that ensure that the client's vision is made into a reality.

## Arbitration Clauses in Employment Contracts

Employers often like to use arbitration clauses in employment agreements to avoid the cost and delay of state and federal court litigation. Washington employers have not been certain of the enforceability of these clauses. Until recently, the Ninth Circuit (which includes Washington, California, Oregon, Idaho, Montana, Nevada, Alaska and Hawaii) was one of the few federal jurisdictions whose courts refused to recognize

mandatory arbitration clauses, as they applied to discrimination claims. Following a series of U.S. Supreme Court decisions on the subject, the Ninth Circuit finally decided to revisit the issue.

Now, the Ninth Circuit is aligned with the majority of federal courts who recognize arbitration clauses even in the context of federal employment discrimination claims, provided they meet certain procedural guidelines. *EEOC v. Luce, Forward, Hamilton & Scripps*, 345 F.3d 742 (9<sup>th</sup> Ct. App. 2003). To withstand judicial scrutiny, arbitration clauses should follow the following guidelines:

- The provision should provide for a neutral arbitrator.
- The selected procedure should clearly provide for adequate discovery.
- The selected procedure must provide for a written award.
- The selected procedure must allow for recovery of statutory remedies.
- The provision should address mutual claims, and not bind only the employee.
- The employer must bear the cost.

This option may not be available to employers who operate purely local or intrastate business enterprises, however. A recent Washington Court of Appeals decision held that Washington employers wishing to compel arbitration pursuant to a written agreement must be prepared to make a threshold showing that the employment agreement at issue involves interstate commerce. *Walters v. A.A.A. Waterproofing Inc.*, 85 P.3d 389 (Wash. App. Div. 1 2004). There, the court found it sufficient that the agreement clearly referenced the employer's efforts to expand "into northwest states, not merely within Washington, and thus evidence[d] a transaction that substantially affects interstate commerce." *Walters*, at 392. In addition, the decision held the arbitration clause's reference to "any dispute" applied equally to wage claims. *Id.*

Although employers who wish to use arbitration clauses are now treading on much more solid ground, please proceed with caution. If you are thinking of adding an arbitration clause to an existing employment contract, or considering the need for employment contracts for your

employees in general, you will want to ensure that the option you select can withstand judicial scrutiny. Likewise, if you have existing arbitration agreements, you may want to review them to be sure they comply with the necessary guidelines. As you consider these important business decisions, here are a few things to consider:

***What are the potential benefits?***

- Reduced litigation expenses
- Faster resolution of disputes
- Confidentiality
- Decreased risk of excessive awards

***What are the risks?***

- Reduced employee morale
- Compromise v. clear victory or defeat
- Finality of the decision

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## Corporate Maintenance

One of the primary benefits of choosing a corporate structure is the protection it gives the business owner(s) from personal liability from ordinary creditors. We refer to this as a “shield” that generally protects owners from such liability. One of the most important functions in managing a corporation and maintaining “the shield” is keeping accurate and current records, a mundane and often neglected function, yet one of the most vital keys to protecting the liability shield and the assets of the company.

For example, a corporation can be subject to audits by both the Internal Revenue Service and Department of Revenue. Accurate record keeping can ensure that these audits go smoothly. For instance, one of our clients accumulated retained earnings for a number of years to reserve for a large project. The company recorded the plans, the decisions and the changes in that project in its annual minutes. As a result of accurate record keeping, the client was able to avoid significant tax liability.

Additionally, if corporate formalities are not followed, a court may pierce through the shield of liability protection and go after the assets of the owners. For this reason alone it is vital that

corporate records are kept current and well organized in a corporate record book.

A corporation is governed by (1) statutory requirements, Revised Code of Washington (“RCW”), Section 23B; (2) corporate articles; and (3) corporate bylaws. It is important to be familiar with these guidelines and to understand and abide by the roles of the shareholders, directors and officers of the corporation, to ensure that the corporation is complying with its statutory requirements and corporate formalities (i.e. annual and/or special meetings and annual filings with the State of Washington). It is also important to keep business transactions (i.e. buy-sell agreements, lease agreements, employment agreements, shareholder agreements, etc.) well organized and documented in the corporation’s record book, providing guidance as to the corporation’s obligations and restrictions regarding the day-to-day operations of the corporation. An up-to-date and accurate corporate record book is an important part of the due diligence process when buying and selling a business.

It is worth your time to make sure that your corporation is in compliance with statutory requirements and corporate formalities. This simple record keeping work can be an enormous benefit to the corporation.

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### **Next Issue**

- Changes to the Fair Labor Standards Act
- Considerations on a Commercial Real Estate Refinancing

We are here to help you achieve the business solution that works best for you. Please do not hesitate to call on us!

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Kirsten Barron, Jack Grant, Sallye Quinn and Amy Robinson are attorneys in Brett & Daugert’s Business Department. We provide business, corporate, employment and real estate legal advice to our clients.

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