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Related Practices

Litigation

Case closed - Follow these steps to help reduce the costs of business litigation

Small Business Times

In today's highly-competitive environment in which profit margins are continually squeezed, cost-conscious businesses can help their bottom lines by reducing the costs of litigation that can arise from everyday business operations.

Following are 10 steps you can take to avoid finding yourself and your business in litigation.

1. Know Your Customer. This is one of the easiest steps to take, yet one of the hardest to have the discipline to do. Perform a credit check on your new customers. You may celebrate when you get a new customer that places a large order. But such elation could end quickly if the payment for delivered product never arrives. Without the payment, you might have to lay off employees, cut administrative staff or even fall behind in your own debt payments. You could prevent such a financial calamity by performing credit checks on new customers.

For a small fee, business owners can purchase credit information on their prospective customers from companies such as Dun & Bradstreet. Alternatively, the Wisconsin Court System has a web site that posts court records of business payment disputes. Go online and find out if your new customer is always being sued for failure to make payment.

2. The Customer is (Almost) Always Right. The old adage "the customer is always right" affects your business more than ever, especially in this service-oriented economy. But the adage must give way to the financial realities of today. If your business wants to avoid litigation, make your terms and conditions for things such as returns, exchanges or refunds perfectly clear. Large signs near the door and language clearly indicated on the sales receipt work best.

3. Don't Oversell Yourself. Businesses often get sued for making promises they can't keep. The law recognizes claims of false advertising. I'm not talking the usual "puffery" you see

in everyday ads, such as "great" or "best." I'm referring to promises such as "you will be guaranteed" or "totally satisfied," or "You'll never need to buy another product like this one."

If you don't plan on guaranteeing the product, don't promise a guarantee. If you know - or should have known - the advertising claim was false when made, you may subject your business to a lawsuit. Don't make promises you can't keep.

4. Win the Battle of the Forms. You can avoid many of the headaches associated with litigation by winning the "battle of the forms." The battle of the forms is the language in small print contained at the bottom or reverse side of your receipts, purchase orders or invoices. You may have hired a lawyer to help you with that language, or just copied it from someone else's form, thinking it would protect you. But what do you do when a dispute arises and the company battling you uses the same thinking, but there is a difference in the language. Which form controls?

Many small businesses get themselves into litigation troubles by not hiring a lawyer to help draft the language of such forms or to even review the other parties' forms. What happens if a placed order is not perfect? What happens if one party must sue the other side for performance? Is one side obligated to pay the other's attorneys' fees?

Where are you agreeing to be sued, Alaska? New York? Every state recognizes the Uniform Commercial Code (UCC) in one manner or another. The UCC identifies which form will win if there is ever a disagreement as to the terms and conditions of a contract (hence, the name - battle of the forms).

If you don't like the language a company has issued on its form, you can write back and disavow the language, or indicate your pre-printed language controls. Whatever you do, take the time and actually read the form.

5. The Company's Bank Account is not Your Bank Account. Small business owners can get themselves into a lot of trouble by using their companies' bank accounts as their own personal checkbooks. Don't use company funds to buy personal items with the understanding that you will pay the company back or put the money in later. If you take money from the company for personal use, you may subject yourself to liability of the company's creditors through a process called "piercing the corporate veil." The law recognizes a personal shield between a business and its owners, regardless of the type of entity (i.e., LLC, LLP, corporation, etc.), if the company obeys corporate formalities. That recognition allows a business owner to operate the company without fear that the company's creditors will come after the owner's personal assets for payment of the company's debts, unless you take money from the company for personal use. If you disregard corporate formality, the law will allow the company's creditors to disregard it as well and come after you personally.

6. Stupid is as Stupid Does A personal mentor at my law firm always tells me to not do or say anything that I wouldn't want my mother to see on the front page of the local paper. For that reason, when a customer business questions the quality of a product or service, don't respond with an angry, lengthy letter.

7. Retain Records and Documents. Faulty memory is a huge cost of litigation. Let's face it, memories fade, and people lie. I can't tell you the number of lawsuits I have to defend where my clients didn't keep their records, but insisted a jury would believe their memories over the parties suing them. Why let your small business end up in court with only your memory as a defense? Create and implement a record-retention policy for all of your business records. Business records don't lie.

Your record-retention policy should reflect your business. For example, the statute of limitations for a suit based on a contract in Wisconsin is six years. If someone wants to file suit against your business over a contract, a debt or something you sold, that party must do so within six years after the contract was created, the debt was incurred or the sale occurred. Thus, keep your records for at least six years.

8. Be Nice to Your Employees. Don't insult an employee in front of other employees or customers. Don't make derogatory, disparaging, sexist or racist remarks to your employees. Give them annual or semi-annual reviews (in writing) so they know how they are performing. Finally, treat them like human beings. If you treat them well, they are less likely to sue you and your business.

9. Get it in Writing. Another adage is that an oral agreement is worth the paper it's written on. Get everything in writing. A handshake is not what it used to be. Documents do not lie, only people do (see Step No. 7).

10. Put Your Lawyer's Number on Your Speed Dial (or at least let him or her regularly know what's going on). It may cost you to contact your attorney, but it might cost you a lot more if you don't keep in contact. Don't neglect to consult your attorney just because an issue at hand seems minor. Small problems turn into big problems. You'll pay more in the long run if you let a small problem become a big one.

I have one client who sends me copies of his collection letters for his worst- or slowest-paying customers. He doesn't send me the letters because he wants me to act on his behalf; he sends them to me so I know what is going on. He knows that what he says in that letter [or telephone conversation] is an admission, and it can, and often is, used against him. If I think he is doing or saying something wrong, I'll let him know so that his little problems don't turn into big ones. Keeping your lawyer up to speed on what you are doing will help lower your litigation costs.