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CONVERTING LLCs AND CORPORATIONS TO LLPs TO SAVE NEW HAMPSHIRE WORKERS' COMP PREMIUMS: IS THE ADDED LIABILITY RISK WORTH THE SAVINGS?

EXECUTIVE SUMMARY. Corporate and LLC liability shields are stronger than the LLP shield. However, for most owners of New Hampshire corporations and LLCs that convert to limited liability partnerships ("LLPs") to avoid the new workers' comp premiums imposed on their owners, the differences among these shields won't be significant.

DISCUSSION. As many readers will know, the New Hampshire Legislature has recently amended New Hampshire workers' comp law to provide that corporations and LLCs whose owners work at construction sites must pay workers' comp premiums on these owners. As readers may also know, these companies can avoid the effect of the amendment by converting to general or limited partnerships. In addition, by registering with the New Hampshire Secretary of State as LLPs, these general and limited partnerships can obtain liability shields that, like corporate and LLC shields, will protect the personal assets of partners from claims against their business.

However, in deciding whether to make these conversions, owners of New Hampshire corporations and LLCs should be aware that the protection afforded by the LLP liability shield is inferior in certain respects to that provided by corporate and LLC shields. Corporate and LLC shields protect business owners from *every* type of claim against their company—except, of course, claims arising from the negligence or misconduct of the owners themselves as individuals.

The LLP shield protects the partners of general partnerships and the general partners of limited partnerships that register as LLPs from *most* types of claims against their partnerships, including negligence and other misconduct by the other partners, by the LLP's employees, and, with one exception discussed below, by the LLP's independent contractors. (The liability shield of limited partners of limited partnerships is just as strong as the liability shield afforded to shareholders by the corporate shield and to members by the LLC shield. Thus, an LLP registration is not necessary in order to protect limited partners.)

However, there are three specific types of claims from which the LLP shield will *not* protect the partners of New Hampshire general partnerships or the general partners of New Hampshire limited partnerships:

1. Contract claims. The LLP shield will not protect these partners from *contract claims* against their partnerships. These include claims under real property lease agreements, equipment lease agreements, supply agreements and all other types of written and oral agreements. (However, it is probable that they *will* protect these partners from claims

that *appear* to be pure contract claims if these claims are actually based on the alleged contractual duty of the LLPs in question to avoid negligence.)

> EXAMPLE. Under a commercial real estate lease agreement, ABC, a general partnership registered as an LLP, leases its business premises from Realty Corporation. The partners of ABC are not personal guarantors of the lease under this agreement. ABC becomes insolvent and can't pay the rent it owes to Realty Corporation. Realty Corporation can sue ABC for unpaid rent; but it can also sue ABC's partners as individuals.

2. Statutory claims. The LLP shield will not protect partners from claims based on *federal or state statutes*. These include the federal bankruptcy statute and federal and state environmental statutes, civil rights and anti-discrimination statutes. Significantly, they also include the New Hampshire workers' comp statute. Thus, for example, although, under this statute, LLPs do not have to pay workers' comp premiums on their partners, the New Hampshire Department of Labor can sue these partners as individuals if their LLP fails to pay premiums on its *employees* (i.e., people who work for the LLP, and whom it controls, but who are not included among its partners).

3. Claims relating to misconduct by independent contractors performing work that is "peculiarly risky." In general, LLPs and other businesses are not liable for claims based on the negligence or other misconduct of their independent contractors. However, not only LLPs but also their partners as individuals (except limited partners) will be liable for claims arising from negligence or other misconduct by independent contractors whom they hire to do work for them if this work is "*peculiarly risky*."

   Examples of "peculiarly risky" work include blasting; demolition work involving public sidewalks and other public areas (but not demolition where the public is not nearby); gas installation; excavation beyond foundations causing failure of support walls; inspection and maintenance of elevators; use of acetylene torches; and construction of sewer trenches.

As indicated above, I suspect that if the owners of most New Hampshire corporations and LLCs engaged in building or construction trades consider the risks posed to them by the above three gaps in the LLP liability shield, they will conclude that as a practical matter, these risks are minor and are not significant impediments to their converting to LLPs to avoid workers' comp premiums. However, before they make these conversions, they should consider these risks with great care.

If you have comments on this column or wish to contact me for any other reason, please send me an e-mail at lawjmc@comcast.net or give me a call at (603) 228-0125. If you'd like to visit my website, the link is www.llcformations.com.

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