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GENERAL BUSINESS UPDATE

January 22, 2009

Gardner, Willis, Sweat & Handelmann, LLP hopes you find the information in this newsletter helpful. This information is intended to be general in nature and is not a substitute for competent legal advice. Because every issue is unique, we do not recommend that you apply the information in this newsletter without first seeking appropriate legal advice.

We publish various newsletters regarding other areas of law as well. Please call us for more information.

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Reminder to Business Owners of Their Personal Liability for Unpaid Withholding Taxes

We are sending this newsletter to remind you of the importance of paying the IRS taxes that are withheld from your employees' wages. As an officer/owner of your business, you are the first person the IRS will seek to collect any unpaid withholdings from. We cannot over emphasize this point: If found to be the person responsible for withholding, collecting, and paying these taxes over to the IRS, you will be personally liable for any nonpayment that is considered to be willful. This means that you will have to pay the taxes out of your own pocket. A brief explanation follows.

Under the system established for withholding taxes, your employees are credited for any taxes withheld from their wages. Your company is deemed to hold the withheld taxes "in trust" for the federal government. This is why withholding taxes are referred to as "trust fund taxes." Often times, businesses that experience financial troubles will use taxes withheld from employees' wages to pay creditors and suppliers in order to keep the business afloat during troubled times. However, if the business eventually fails, the employees are not liable for the unpaid taxes, and the business probably will not have sufficient funds to satisfy the trust fund tax liability.

By enacting Section 6672 of the Internal Revenue Code, Congress made sure that the government would have the means to recover trust fund taxes if, for whatever reason, they are not paid. Section 6672 imposes personal liability on any person who is required to collect, truthfully account for, and pay over trust fund taxes but who willfully fails to do so. In the past, this has been referred to as the "100% Penalty" because the amount of liability is equal to 100% of the taxes withheld from the employees' wages. More recently, the IRS calls this the "Trust Fund Recovery Penalty."

Let us look at the elements for liability under Section 6672. First, to be liable, a person must be a "responsible person." There is no one factor that makes an individual a responsible person. Generally, a responsible person is the one who has the power and authority to control the decision-making process regarding the payment of creditors. In most cases, the IRS looks to officers and owners of a business as responsible persons because they are the ones who make the decision concerning which creditors to pay and which ones not to pay. Courts have found stockholders, directors, managers, bookkeepers, and people outside the business to be responsible persons because they had the ultimate authority over the disbursements of the funds. More than one person can be held liable.

Still, there is a second element without which a responsible person is not liable for the Section 6672 penalty: willfulness. Willfulness does not mean that there is some bad motive or intent. Rather, for these purposes, willfulness can be established if there is evidence that the responsible person(s) knew that payments were being made to other creditors or suppliers at a time when withheld taxes were not being paid to the IRS. In some cases, the responsible person does not actually have to be aware that the taxes are not being paid if there is a history of non-payment of trust fund taxes at times of financial crisis.

You can see from this brief discussion that it is not difficult for the IRS to impose personal liability for unpaid trust fund taxes on the person responsible for making the financial decisions in a business. Moreover, this liability never goes away. For instance, it would survive a personal bankruptcy. Yet, there are ways to structure business holdings to protect individual assets and homes. Please let us know if you have any questions by calling Glenn Booker at 883-2441 or emailing him at glenn.booker@gwsh-law.com.

Seminars Available

If you and your employees are interested in learning more about a particular legal topic, we would be happy to provide a seminar on such topic at no charge. The seminar can be at your business location or at our firm's location in Albany. It is your choice; just let us know.

Examples of seminars:

- General Banking Law
- Legal Issues in Agriculture
- Workers' Comp Overview
- Return to Work in Workers' Comp
- Sexual Harassment
- Americans with Disabilities Act
- Family and Medical Leave Act
- Negligent Hiring
- Estate Planning

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Glenn Booker's practice centers around estate planning for property transfers and estate/trust administration. He also specializes in appraising closely-held business interests. Glenn advises clients on complex accounting and finance issues, yet his conversational approach enables him to explain such issues in simple and understandable terms. Glenn and his wife, Debbie, enjoy jazz music, Cajun food, and camping with their children.



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