



THE LEGAL PAD

A NEWSLETTER OF CURRENT BUSINESS AND LEGAL MATTERS

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WINDS OF CHANGE: GREEN BUSINESS OPPORTUNITIES ON THE HORIZON

- BY CHAD COCHRAN



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A movement is underway, and there is money to be made. The trends are undeniable. A “green economy” is rapidly developing in North Carolina:

Public utilities are investing in wind, solar, and nuclear resources. Green businesses are opening as we speak (e.g., biofuel production in Charlotte; solar hot water heater facilities in Black Mountain; and new age home insulation in Asheboro). The State of North Carolina is constructing a massive 80,000 square foot “Nature Research Center” in downtown Raleigh to spur scientific research. The talk among government and business leaders of massive wind power projects in North Carolina’s coastal counties is flourishing. And construction projects around North Carolina are realizing an increasing demand for sustainable design practices such as the use of recycled construction materials, Energy Star ranked products, and LEED certified buildings.

Regardless of your politics, your business can benefit from green projects throughout North Carolina.

Federal and state entities are directing billions of dollars into business grants, tax breaks, and public projects. By identifying several such governmental practices, this article seeks to provide a little “food for thought” of ways in which your business might insert itself into green business opportunities throughout our state:

Federal 1603 Grants: As of January 2010, the federal government directed \$2.3 billion to energy producing properties utilizing technologies such as solar power, wind power, or fuel cells. North Carolina has received less than .003% of such grants to date. The opportunities are ripe for picking.

Federal Investment Tax Credit (“ITC”): The ITC offers a 30% tax credit for the purchase of “energy property” which includes land, buildings, and even equipment.

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SO, YOU'RE GROWING YOUR BUSINESS? (WHAT TO KNOW ABOUT EMPLOYEE HIRING AND HANDBOOK POLICIES)



- BY CODY LOUGHRIDGE

While it may seem to make the most “business sense” for an employer to select a potential employee based on the employee’s qualifications alone, the employer is not required by law to do so. For the most part, an employer is permitted to hire any potential employee they desire, regardless of whether other applicants are more qualified for the position. There are, however, certain personal characteristics that an employer is not permitted to take into consideration when evaluating a potential employee. Most frequently, these characteristics include age, sex, race, religion or disability. In addition to the aforementioned characteristics, an employer may not evaluate a potential employees’ marital status, whether or not they

have children, or whether they have ever been arrested. It is, however, permissible to inquire whether the applicant has ever been convicted of a crime or whether they are legally permitted to work in the United States.

Once the employer has selected the new employee, it is recommended (though not required), that the employer furnishes the new employee with an employee handbook. The employee handbook is one of the most important communication tools between the employer and employee. A well written employee handbook should be a simplified and centralized record of the employer’s expectations for the employee, as well as the employer’s policies, benefits and procedures. At the very least, an employee

handbook should include a statement of the employee’s “at-will” status, an equal opportunity statement, statements regarding harassment in the workplace, and reference to the Family Medical Leave Act.

Because of the complex nature of employee benefits and handbooks, it is highly recommended that you contact a licensed North Carolina attorney to assist you in developing sound hiring procedures and your employee handbook. Additional information regarding hiring procedures and employee handbooks can also be found on the North Carolina Department of Labor’s website (www.nclabor.com).



FILING ANNUAL REPORTS WITH THE N.C. SECRETARY OF STATE’S OFFICE

- BY JAMES VANN

The North Carolina Secretary of State’s Office recently mailed out “Notices of Grounds of Administrative Dissolution” to businesses which lacked one or more filed annual reports. As you are probably aware, business corporations and limited liability companies which are approved to conduct business in the State by the N.C. Secretary of State are required to file annual reports with the Secretary of State. Being delinquent on filing the annual reports is grounds for administrative dissolution. If a business is administratively dissolved, the business no longer has what is referred to as the “corporate

shell” which could create personal liability for the owners, board of directors and officers of the business.

The Secretary of State’s Office is required by law to notify businesses of the grounds for administrative dissolution and provide the businesses sixty (60) days to correct each ground for dissolution or demonstrate to the reasonable satisfaction of the Secretary of State that each ground does not exist.

There is continuing confusion of what actually is required to be filed with the Secretary of State and when it is to be filed. Unfortunately, the law which outlines the requirements

creates some of the confusion. The easiest tip to remember is that each business corporation is required to file an annual report by the 15th day of March of each year. Many businesses may fail to make their initial filing or a later filing and think everything is fine until they receive a notice later.

If your business received a Notice recently from the N.C. Secretary of State’s Office or if you have questions regarding what and when to file, please feel free to contact us. We will be happy to help answer your questions.



THE JUNK FAX PROTECTION ACT: A POTENTIAL TRAP FOR THE UNWARY

– BY RICHARD PROSSER

Fax, facsimile, telefax, telecopier . . . no matter how you refer to it, the once ubiquitous office technology is being fast replaced by e-mail. So, what do you need to know about a technology at the end of its life cycle?

The “Junk Fax Prevention Act” has been in effect in one form or another since 1991. The name stems from the latest iteration, but the original law was enacted as part of the same legislation that brought the beloved “do-not-call list” – the law that established the national do-not-call registry.

The fax component is lesser known, but the objective is the same: eliminating unsolicited advertisements. Under the Act, “unsolicited advertisements” are “any material advertising the commercial availability or quality of any property, goods, or services which is transmitted to any person without that person’s prior express invitation or permission, in writing or otherwise.”

So, we’re not just talking about the familiar advertisements for the free vacation or “opportunity to make \$1,000,000.00 while working from home.” The scope is much broader, potentially extending to *price quotations, unsolicited bids, information on sales events*, and, yes, even company *newsletters* like this one.

If you are in business, chances are you have sent or send faxes subject to the Act. But before you get concerned, know that there is an exception that may insulate you from liability.

The exception is for faxes to

parties with whom you maintain an “existing business relationship.” and within which you include a specific “opt-out notice.” An “existing business relationship” or “EBR” is:

“a prior or existing relationship formed by a voluntary two-way

The penalties for a violation are steep, starting at \$500.00 per broadcast. That’s right: \$500.00 per fax transmission.

communication between a person or entity and a business or residential subscriber with or without an exchange of consideration [payment], on the basis of an inquiry, application, purchase or transaction by the business or residential subscriber regarding products or services offered by such person or entity, which relationship has not been previously terminated by either party.”

Simply put: an EBR is a continued business relationship based on a past transaction or inquiry. As a general guideline, if you cannot document the past transaction or inquiry (e.g., an invoice, an application, an internal note for a phone call), do not send the fax.

The second requirement, the “opt-out” notice, is equally important. The notice must:

- be clear and conspicuous and on the first page of the advertisement;
- state that the recipient can opt-out of any future faxes and that failure to comply with the request within 30 days is unlawful; and
- include a telephone number,

fax number, and cost-free mechanism (including a toll-free telephone number, local number for local recipients, toll-free fax number, website address, or e-mail address) to opt-out of faxes. These numbers and cost-free mechanism must permit consumers to make opt-out requests 24 hours a day, seven days a week.

If any of the foregoing is omitted, the fax is deficient, rendering you subject to fines and penalties. In other words, if the notice falls short, a fax to even your best customer/client constitutes a violation.

And the penalties for a violation are steep, starting at \$500.00 per broadcast. That’s right: \$500.00 per fax transmission. Further, if your fax is sent in “knowing disregard of the law” – if you’re reading this article, this would apply to you – the fine is tripled.

As technology continues to evolve, the likelihood is that the fax machine will be gradually phased out of use. In fact, most of us have already shifted our attention from the unsolicited fax to the far more irksome spam that targets our inboxes. Until this transition occurs, however, it is important to remember that the fax is equally loathed in the eyes of the law.

If you have questions regarding the application of the Junk Fax Protection Act, or if you receive a demand or notice of an alleged violation, please feel free to call or contact us for advice.



WINDS OF CHANGE: GREEN BUSINESS OPPORTUNITIES ON THE HORIZON:

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North Carolina Green Business Fund Grants: Funded by the stimulus package, North Carolina is in the process of awarding \$8 million in 2010 grants (\$2.3 million in 2009) for “green and alternative energy technologies, products and services.”

North Carolina Business and Energy Tax Credit: Our state offers a

35% tax credit to businesses and individuals for qualifying renewable energy projects. The credit is available to large business projects as well as small scale residential projects.

Federal Loan Guarantees and Bonds: Loan Guarantees for Renewable Energy Projects, Qualified Tax Credit Bonds, New Clean Renewable

Energy Bond, and Qualified Energy Conservation Bonds are available.

These government incentives will foster more and more green projects in the coming years. The secret is identifying these profitable opportunities and seizing them



FEDERAL COURTS AND THE CONSTRUCTION INDUSTRY

- BY NAN HANNAH

For the construction industry, the federal courts continue making it more difficult to provide positive customer service. On March 16, 2010, the United States District Court for the Eastern District of North Carolina affirmed a decision of the Bankruptcy Court for the same district in Kiddco v. Callaway. The Kiddco decision, following closely on the heels of the United Rentals decision, bolsters the longstanding Precision Walls decision by affirming that the failure to actually assert a lien or payment bond claim prior to receiving a payment leaves a party vulnerable to a preference claim.

Recognizing that the previous paragraph may be a bit intimidating with all those case cites, let's make this easier by explaining what happened in Kiddco.

The Cast: Kiddco – grading subcontractor; Jacobsen – general contractor; Wake Tech – owner.

Kiddco provides invoices for

roughly \$193,000.00. Kiddco receives \$35,000.00 (which is paid outside the fateful 90-day window); Kiddco stops work and threatens (but does not formally assert) a payment bond claim. Kiddco receives approximately \$55,000.00 (if my math is correct, about 85-days pre-petition) and goes back to work. Kiddco, post-petition, settles with the surety for less than 100% of what its invoices totaled for the project. The Trustee initially sought to recover over \$111,000.00, but ultimately dismissed all claims except for the \$55,000.00 payment.

The court provided two fundamental bases for finding that the \$55,000.00 payment was preferential.

First, the Trustee is allowed to recover funds the debtor has paid out in the magic time period above what a creditor would have received in a pro rata distribution of assets to an unsecured creditor in the Chapter 7. The fact that Kiddco could possibly recover from a third-party is irrelevant –

the issue is the money out of Jacobsen's pocket. This position is in line with the United Rentals decision.

The second basis – new value – may be called the “woulda, coulda, shoulda” defense. Unless you can prove your company “always” (consistently) files bond claims or that you did file a bond claim, the “but for the payment we would have filed a claim” defense fails. And worse here, since Kiddco ultimately reached a settlement with the surety for less than 100% of its claim, the court says “you lose because your own actions belie the argument that you would have been paid in full.”

These are strange times, but it appears that the only sound legal advice is “file your claim (lien or bond) first, then take a check” if there is any possibility of a bankruptcy (and probably even if there is not a hint of bankruptcy).

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