

March/April 2003

contractor



WATCH OUT!

EEOC increases scrutiny of
SEXUAL HARASSMENT *claims*

SUCCESSION TIPS

for family-owned companies

*Protect your estate
and your business
with a **VALUATION***

PLUS!

FREE report on the ins
and outs of Roth IRAs
(see response form inside)

Smith & Gesteland^{LLP}

Innovative Strategies. Exceptional Results.

target: sexual harassment

EEOC Takes Aim at Contractors for Increased Violations

In recent years, sexual harassment claims have dramatically increased in many industries. But construction has been especially hard hit. In response, the Equal Employment Opportunity Commission (EEOC), a federal agency that enforces federal employment discrimination laws, has chosen to target the construction industry for sexual harassment violations. It wants to send a strong message to construction company owners and their employees that the EEOC will not tolerate such workplace harassment.

Your first reaction to sexual harassment may be to put your head in the sand and hope none of your employees ever files a claim. After all, it's an issue wrought with awkwardness, ambiguity and animosity. But don't take this risk. Let's review the definitions of sexual harassment and how to protect your company from it.

2 PRIMARY TYPES

Knowledge is indeed power when trying to avoid sexual harassment liability. To that end, you need to understand the two types of harassment as defined by the courts:

1. Quid pro quo. This is sexual harassment in which a "power" relationship exists and the perpetrator demands sexual advances or favors that the victim neither wants nor welcomes. Along with these demands, threats of detrimental job-related consequences may also occur. Bear in mind, the threat of adverse consequences needn't actually be carried out, nor does any direct threat of physical harm. Quid pro quo harassment poses the greatest liability risk. If a victimized employee can prove these claims true, the courts will always hold the employer liable.

2. Hostile work environment.

Here the environment in which the employee works is intimidating, hostile or offensive because of sexually explicit or other bad behavior. Unlike quid pro quo harassment, the offensive actions needn't come from a supervisor or someone in a powerful position. And this type of harassment isn't necessarily intended to discriminate against or harm the employee. In fact, some accused harassers don't believe their actions are harmful, but rather cute and funny. Nonetheless, under today's legal standards, what the harasser thinks, believes or intends is irrelevant. The

ruling matter is the victim's reasonable belief that the offensive conduct is severe and pervasive enough to create a hostile environment.

Recently, within the hostile or offensive working environment area, a new subtype of liability known as "third-party harassment" has arisen. Here the harasser is an outside party, such as a vendor, supplier, customer or any other person who routinely interacts with a company's employees. Because construction businesses routinely deal with a variety of such third parties, accusations of this form of harassment are becoming particularly prevalent in your industry.

The courts have ruled that if an outsider uses sexually explicit physical or verbal behavior that would constitute a hostile environment were he or she a co-worker, the employer must intervene to stop it. In other words, you're fully responsible for your business's work environment. So if you or a supervisor becomes reasonably aware of a third party's inappropriate behavior, and you do nothing to stop it, you could become legally liable for that harassment.

THE COST OF HARASSMENT: A CASE IN POINT

A recent court case, *Equal Employment Opportunity Commission (EEOC) v. Foster Wheeler Constructors Inc.*, demonstrates the increasing number of sexual harassment claims in the construction industry. This lawsuit arose from a Foster Wheeler employee's complaints to the EEOC alleging racial and sexual harassment on a job site, including racist and sexual graffiti written in portable toilets.

As a result of the lawsuit, the construction company agreed to pay a \$1.33 million settlement to 100 African-American and female former workers affected by the incidents. The company was also required to create and implement an anti-harassment policy, provide training to its managers and work force, and immediately report any racial or sexual harassment job-site complaints to the EEOC for the following two years.

HOW LIABILITY IS DETERMINED

The U.S. Supreme Court has ruled that the two primary harassment types — quid pro quo and hostile work environment — aren't the only factors determining liability. The law still requires proof that severe and pervasive conduct exists. And even if proof exists, employers aren't always liable in hostile work environment cases. (Again, employers *are* automatically liable in quid pro quo cases.)

On the other hand, the court has ruled that an employer can be liable for a supervisor's or employee's bad behavior if the victim can show that he or she suffered from "tangible employment action" because of the accused's actions. Examples of tangible employment action include:

- Termination or demotion,
- Pay decreases,
- Withheld raises or promotions,
- Significant changes to or elimination of benefits, and
- Reassignment of the employee's responsibilities to ones significantly different from previous duties.

If no tangible employment action was taken, but conduct still defined as sexual harassment occurred, you must be able to prove that: 1) You exercised reasonable care to prevent and promptly correct any sexually harassing behavior, and 2) The employee "unreasonably failed to take advantage of any preventive or corrective opportunities provided by the employer or to otherwise avoid harm." If you can't prove both of these two elements, a court will hold you liable.

WHAT YOU SHOULD DO

To ensure you're exercising reasonable care, the Supreme Court and other legal bodies recommend you immediately:

- Create (if necessary), review and revise your sexual harassment policy, making sure you've distributed it to employees,
- Require each employee to sign an acceptance form, acknowledging that he or she received the policy and understands its contents, and
- Provide mandatory sexual harassment prevention training for every level of worker and for all new hires.

You also need to develop reporting procedures so employees can report and register complaints. These procedures should ensure confidentiality as well as an alternate measure, outside the normal channels, to report harassment by supervisors. Immediately and seriously investigate each complaint. If you discover harassment has occurred, act quickly to resolve the situation.

To limit the litigation that often springs from harassment-related disciplinary measures, establish a system of checks and balances for any decisions affecting a tangible aspect of an employee's job — such as terminations, demotions and salary reductions. For example, before you impose punishment, hold a meeting with the perpetrator to explain the reasons behind your actions.



Have a female and male present, and ask the employee in question to sign a form agreeing or disagreeing with your decision. If the worker refuses to cooperate, note this in his or her employment record.

WHY PREPARATION COUNTS

Recent court cases arising from sexual harassment have created great difficulty for many contractors. Sadly, they could have avoided or resolved these incidents had they established and followed clearly stated policies and procedures regarding employee behavior. And even when a company is held liable, having anti-harassment measures in place can minimize the financial and public relations damage.

Quid pro quo harassment poses the greatest liability risk. If a victimized employee can prove these claims true, the courts will always hold the employer liable.

How safe is your construction company from a sexual harassment claim? With more of these cases going to court, and the EEOC bearing down specifically on the construction industry, it's critical you act to protect your company from this costly problem. Please call us; we'd be happy to help you revise — or create — an anti-harassment policy. 🍀

who's taking over after you?

Business Succession Tips for Family-Owned Construction Companies

Construction businesses are often family owned and operated. Sadly, many such owners fail to plan for business succession. This is one of the main reasons why recent statistics show that 70% of family-owned businesses fail to reach the second generation, and only 13% continue to the third.

Avoiding this dire fate comes down to three simple words: business succession planning. Whether you wish to keep your construction business in the family or sell it to an outsider, you need to ensure a secure retirement for yourself and a prosperous future for your company. And doing so calls for a careful, methodical business succession plan.

ASK THE TOUGH QUESTIONS

Ironically, the close family relationship that builds and sustains a construction business often leads to its demise. How? The company's identity is usually linked to its owner's personal and professional relationships. Succession planning will probably change these connections, leading to potentially controversial situations — especially with family members — if not handled properly. That's why having a formal process that includes everyone's opinions and concerns is vital. Some questions you'll want to consider as you formulate your succession plan include:

- Do I want my business to be a lasting legacy for me?
- Should I sell the business to an outsider or let my children take over?
- Should I turn over the company's reins to a family member regardless of his or her work history, or should I require that person to have some construction experience?
- How will I fund my retirement, and how can I ensure that this method will guarantee my financial security?

These are not unusual concerns. As owner, you likely started your construction company and built it from the ground up. And even if you aren't your business's founder, you surely contributed greatly to its present state. So instead of seeing retirement as a sudden end, think of it as a natural progression of your on-going success.

CONSIDER YOUR FAMILY

Some of the smoothest transitions occur when family members who have worked within the company assume control. In other cases, the younger generation, which has previously worked outside the family construction business, joins the company. Whichever situation applies, clarify and adhere to your policy regarding family workers to prevent contentious issues from arising. Moreover, inform family members that performance — not heredity — determines a successful business transition.

Of course, everyone in your family may not qualify to work for, much less run, your construction company. Yet excluding people with a stake in the transition's final outcome may trigger resentment, because they may feel you're not giving them what they deserve. The solution: Communicate to uninvolved family members why you've not included them and how the overall plan will equitably compensate them.



A BOARD OF DIRECTORS CAN EASE OWNERSHIP TRANSITIONS

Most family-owned construction companies don't have a board of directors. Yet they can greatly benefit you — especially when planning for business succession. To create one, you need to assemble a team of experienced nonfamily business leaders. Then empower the board with decision-making abilities, so it can act as a buffer between conflicting family members and offer impartial opinions on business matters.

A board of directors can also help identify a successor or ease the selection process if more than one younger family member is competing for a leadership role. This impartial entity will prevent emotions from clouding the succession process, which in turn will lead to better business decisions. Please let us know if you need advice about forming a board of directors for your construction company.

As this important process works itself out, you may encounter some surprising revelations from both the older and younger generations. For instance, your children may not want to take over the business. Such a circumstance may seem obvious to some, but many contractors assume their kids wish to follow in their footsteps. Only later do they learn their mistake, as they watch helplessly while their businesses either collapse or are sold.

Thus, it's better to get issues on the table before your retirement or, worse yet, death. That way, you can achieve your goals as well as those of major stakeholders and family members. Also, relationships will remain intact and the business will safely and smoothly shift to the next generation.

Design a job description that specifies your successor's leadership qualifications. Spell out critical elements, such as educational and experience requirements.

DESIGN A PLAN

By now, we hope you're sold on the benefits of a well-built succession plan. How do you create this roadmap for your construction company's future? Well, first you need to write a mission statement outlining your family's personal and business goals. It should feature the retirement strategies you'll use to allow the next generation

to take over the business while creating an income stream for yourself. Fortunately, you have many options — including buy-sell agreements, profit-sharing plans and trusts.

A well-trained successor is the surest way to guarantee your construction company's future. So, secondly, design a job description that specifies your successor's leadership qualifications. Spell out critical elements, such as educational and experience requirements. And don't hesitate to suggest goals or duties — such as implementing better technology and expanding into new markets — that you believe will prolong the business's future.


If you don't know where your construction company is headed, long-term decisions become even more troublesome. Therefore, next integrate a comprehensive written business strategy into your succession plan.

It should clarify business goals and growth plans for the next five to 10 years. Make sure your successor (and his or her management team) understands it — doing so will go a long way toward creating peace of mind and easing the transition.

Last, devise a time line for the transition process that allows your successor to take over gradually. As the owner, this may be the most difficult time for you, because you're accustomed to having control and may understandably feel uncomfortable giving it up. That's why having a specific transition date is important — you'll have plenty of time to prepare for your departure while still lending your professional advice, when needed. Just be prepared to indeed step aside for good when that final day arrives.

PLAN SOONER, RATHER THAN LATER

The longer you wait to design a succession plan, the greater the risks to yourself and your construction company. In a worst-case scenario, you may die still involved in your business's daily operations without a succession plan in place. The ramifications here can be devastating: Your company's value may plummet, and the government could become your estate's largest beneficiary. So the sooner you begin planning, the better.

By planning for succession today, you'll retain control over the planning process. And getting your "house in order" early will make it easier for you to enjoy your retirement later. Fortunately, working with financial professionals like us can go a long way toward providing this peace of mind. Please call today. 

business valuations aren't just for retirement anymore

Too often, construction business owners become concerned with their companies' values only when they're ready to retire. And then their mentality is simply: "How much money do I need to have in the bank earning 5% a year to maintain the lifestyle I'm used to?" Little do they realize that this kind of shortsightedness actually diminishes their companies' potential worth.

Ideally, you need to monitor your business's value throughout your working life — always trying to figure out not only where you stand today, but also where you'll be in five or 10 years. By doing so, you'll have infinitely more options than an owner who just begins to evaluate his or her position only when retirement is imminent.

REASONS AND METHODS

So, besides retirement, why else should you consider a business valuation? Well, some other typical reasons for one include when:

- Selling the business or acquiring a new one,
- Planning for gifts and estate taxes,
- Buying out a shareholder,
- Converting to an S corporation,
- Updating a buy-sell agreement,
- Responding to regulatory compliance,
- Divorcing a spouse, and
- Experiencing virtually any kind of general litigation.

Depending on which of these purposes (or others) apply, the values for the same construction business could significantly differ. That's why a valuator will tailor his or her approach to adhere to a specific standard of value.

For instance, the income approach relies on the capitalized and discounted earnings methods, which derive value primarily based on earnings. Meanwhile, the market approach attempts to develop a direct pricing mechanism by looking at benchmark companies (public and private). When a solid financial performance history exists and is expected to continue, the valuator will likely use the income and market approaches. Alternatively,

when a valuator can't reasonably ascertain low reported earnings or estimate future operations, he or she will generally turn to an asset-based approach.

KEY VALUE DRIVERS

As with most industries, the construction business has specific "key value drivers" that determine how much a company is worth. These include:

Management depth. A business is only as good as its leaders. So management depth is an important valuation consideration. A prospective successor or buyer will definitely want to know whether your staff's stability and market base would suffer if you left.

History of strong earnings, new contracts and order backlogs. Earnings are as important as leadership. Buyers typically want to buy the "history," while sellers want to sell the "potential." And, again, looking into this information regularly will give you a good idea of what's working — and what's not.

Bidding success rates and consistent revenue sources. The ability to complete projects on time with adequate cost control translates into consistency and predictability of earnings. Also, being able to schedule and implement projects and control labor costs is key to staying profitable.

These drivers influence the associated business risk (reflected in terms of the multiple applicable to the cash flow or some other economic measure) and expected future net cash flow (the amount owners may take from the business after leaving enough for capital expenditures and working capital for future operations). Low business risk and high cash flow translate into superior business value.

A CRITICAL PROCESS

Even if retirement or a business sale is the furthest thing from your mind, you need to be constantly aware of your construction company's realized and potential value. A little bit of planning can go a long way — so please call us to learn more about the business valuation process and succession planning. 🍷

See other side to order your FREE report on the ins and outs of Roth IRAs ...

As specialists in the construction industry, Smith & Gesteland has developed the expertise needed to address the challenges faced by today's contractors. Why not find out what we can do for you? Call us at (608) 836-7500 or (800) 655-5123.

- Profitability Improvement
- Cash Flow Projections
- Quality & Productivity Improvement
- Estimating/Bidding Improvement
- Maximizing Bonding Capacity
- Lease vs. Purchase Analysis
- Tax Reduction Strategies
- Business Valuations
- Managing Growth
- Financing Assistance
- Litigation & Claims Support
- Minimizing Workers Compensation Costs
- Project Management & Accounting Systems
- Computer Software & System Selection

If you know of someone who would benefit from *The Contractor* newsletter, please contact us:

Smith & Gesteland, LLP

8383 Greenway Blvd., Suite 400 • PO Box 1764 Madison, WI 53701-1764

Phone 608.836.7500 or 800.655.5123 • Fax 608.836.7505 • mail@sgcpa.com

www.sgcpa.com

Smith & Gesteland_{LLP}

Innovative Strategies. Exceptional Results.

PO Box 1764

Madison, WI 53701-1764

PRSR STD
U.S. POSTAGE
PAID
Madison, WI
Permit No. 252

PLEASE FAX OR MAIL THIS TO:

Smith & Gesteland, LLP, Fax 608.836.7505
Post Office Box 1764, Madison, WI 53701-1764



Is worrying you'll have enough for retirement giving you a headache?

You may find some relief in the form of a Roth IRA, which allows you to put money away today and never pay tax on any growth. *To learn more about Roth IRAs, just complete this form and fax or mail it back — or CALL US today!*

EXPRESS RESPONSE FORM

- Yes!** Please send me a copy of your informative report, “Building a Larger Nest Egg With a Roth IRA: Tax-Free Growth and Other Advantages Provide a Powerful Savings Opportunity.”

Name _____		Title _____	
Company _____			
Address _____		City _____	State _____ ZIP _____
Telephone _____	Fax _____	E-mail _____	CON.3/4.03