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Proactive Through the Pause: Evaluating Contracts to Avoid Litigation

The government-issued shutdown has everyone, especially small businesses, managing unprecedented levels of stress. Instead of "hunkering down" and waiting for the pandemic to pass, this pause can be an opportunity to proactively improve your business practices. Over the next several weeks, Yankwitt LLP will be providing a series of articles, "**Proactive Through the Pause: A Litigator's Guide to Mitigate Risk for Small Businesses.**"

Today, we present the first of these, focused on litigation avoidance considerations when evaluating contracts and preparing new form agreements. Careful drafting now can reap tremendous rewards later including improved employee and customer satisfaction and reduced litigation risk.

Commercial Contracts

- Are terms well-defined and consistent?
- Are termination and default provisions clear? Do termination provisions address both for cause and without cause scenarios? Do both provisions include adequate written notice and cure periods?
- Have you chosen a litigation forum (e.g., Westchester County or the Southern District of New York) that is convenient for you and your attorneys?
- Do you want to include a fee-shifting provision, which can discourage frivolous litigation?
- Given our current situation, should you add a force majeure clause to mitigate performance risks?
- Is arbitration or traditional litigation a preferable dispute resolution forum? While arbitration can be more streamlined, costs can be significant, and it is not always faster. If you decide to go with arbitration, what provider is best suited to your business?
- Would you benefit from mediation as a dispute resolution mechanism? It is cost-effective and can be successful when both parties are willing to negotiate.

Employment Contracts

- Are the compensation and benefit structures clear? For example, disputes often arise when the bonus provisions are poorly delineated or structured.
- Does your company need restrictive covenants such as non-compete and non-solicitation clauses? They can be a source of expensive litigation.

- If you do need the aforementioned restrictive covenants, are they are narrowly tailored, and do they comport with applicable state laws?
- Do you have form severance agreements, so you don't have to recreate the wheel each time?
- If you want departing employees to sign a release of all claims against your company, are your form releases compliant with applicable federal and state laws?

The attorneys at Yankwitt LLP are here to support you now and in the future. While we may not be sitting in our offices at this time, we are all working and at the ready to assist you. Email and our direct office phone numbers are still the best ways to contact us.

Wishing everyone well!