

# PERSPECTIVES

SCHERER SMITH & KENNY LLP  
THE STRENGTH OF PARTNERSHIP

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Scherer Smith & Kenny LLP serves mid-sized and fast-growing entrepreneurial companies. From complex litigation to business, real estate, intellectual property and employment law, our team brings strategic thinking, pragmatism and intense dedication to our clients' success.



## Stay Open or Shut the Doors?

### Personal Liability for Business-Related Debts

In these trying economic times, many companies face the arduous task of deciding whether to remain in business or shut their doors. For businesses forced to shut their doors, there is a critical issue to consider: the potential individual liability for business-related debts facing owners, operators or high-ranking managerial staff. Businesses that are not formed and operated as separate legal entities (i.e. corporations, limited liability companies, limited liability partnerships or limited partnerships) are considered sole proprietorships. This means that the persons responsible for the day-to-day management of those businesses will be personally liable for all business-related debts.

If the business is properly formed and run as a separate legal entity, individuals affiliated with that business will generally not be personally liable for business-related debts. This protection against individual liability is commonly referred to as the "corporate veil" and creditors seeking personal liability must either "pierce the corporate veil" (i.e. establish "alter ego" liability, which is an issue beyond the scope of this article) or rely on some other independent basis for personal liability. Examples of the more common bases for personal liability occurring in the context of a business closure include the following:

### Personal Guarantees

An obvious basis for personal liability occurs when an individual personally guarantees the obligations of the business. Lenders, commercial landlords and equipment vendors often require personal guarantees to address uncertainty about a business' financial stability.

### Government Debt

Government taxing agencies such as the IRS, the Franchise Tax Board, the EDD, and State Board of Equalization have the power to hold "responsible persons" of the business personally liable for unpaid taxes of the business. The definition of a "responsible person" is interpreted broadly to include persons with check-writing authority or the ability to hire and fire employees, among other grounds.

### Payments Received by Corporate Officers or Directors

Corporate officers and directors must be careful about all payments made when a company is "insolvent" (i.e. the period when the company is not able to pay its debts as they fall due). The company's distribution of salary or other compensation to an officer or director during the period of insolvency (and commonly after a period during which compensation was not regularly paid or had been deferred) is one example of a payment made outside the ordinary course of business which may be viewed as an unlawful act of self-dealing by the responsible officer or director. This type of action may subject the recipient officer or director to a creditor action for disgorgement of the payment(s). As you would imagine, the ultimate success of these actions depend largely upon the facts of each case. Therefore, an exhaustive list of the scenarios which may pose the risk of personal liability to the recipient and the assessment as to whether or not such a claim would ultimately succeed go beyond the scope of this article.

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Bill Scherer

Welcome to the inaugural edition of *Perspectives*, Scherer Smith & Kenny LLP's new quarterly newsletter. *Perspectives'* intent is to provide our clients with an analysis and review of current legal issues of interest that impact your day-to-day business and life. Four times throughout the year our firm's lawyers will provide their unique point of view on these issues — indeed, their individual perspective. We want this newsletter to spur interest and dialogue.

Our newsletter begins in a year that many hope will be more profitable and successful than 2009. Our clients occupy a broad spectrum of business and industry, ranging from software companies to doctors, lawyers and accountants, to product distributors and traditional manufacturers, but every one of them is unanimous in the assessment that 2009 was challenging. With the return of growth in the economy we look forward to offering our

## Wages

Unpaid wages are one of the most common business-related debts that remain after a business shuts its doors. Under California law, individual business owners, managers and responsible persons are generally not held personally liable for unpaid wages to employees. Consequently, more often than not, affected employees of California businesses are left with unrecoverable unpaid wages claims against the insolvent business.

However, federal law (codified in the Fair Labor Standards Act or "FLSA") significantly differs from California law on this issue (and California employees have their choice of federal or state law in this regard). Critically, it is generally settled that certain managers, depending on factors such as the amount of interest and control they exert over the structure of an employment relationship (most notably, authority over the payment of wages), can be individually liable for violations under the FLSA as an "employer." In fact, a recent 9th Circuit opinion (*Boucher v. Shaw*) found certain managers of a bankrupt business individually liable for unpaid wages. The FLSA and controlling case law, thus, provide serious ammunition for savvy plaintiff lawyers seeking to find a source of funds for their clients' unpaid wages claims against an insolvent business. Given the recent publicity associated with some of these federal court opinions, we expect to see a sizeable increase in California employee's federal court lawsuits for unpaid wages. The obvious lesson for business managers is that they should prioritize the payment of wages over most everything else.

The above examples of the personal liability risks facing managerial-level employees highlight the need for business owners to consult with experienced employment law practitioners before closing their business, or otherwise failing to pay business-related debts. Scherer Smith & Kenny LLP remains available to provide the advice and expertise necessary to assist you during these difficult situations.



## Commuter Benefits:

### The Cost of Doing Business in San Francisco

This month, January 2010, marks one year that the latest of a series of employment-related ordinances passed by the City and County of San Francisco in January 2009 has been in effect and impacted employers in the City.

Commuter Benefits Ordinance 199-08 requires certain employers to provide benefits or reimbursements to employees for their daily commute to and from work. The Ordinance is intended to encourage employees to use public transit or carpool systems to assist the reduction of carbon dioxide emissions in San Francisco. A good thing for the environment, but there are implications for small business employers.

Here is context for this Ordinance, after 12 months in action. We hope this helps your business understand what to do, and we invite your calls if you need help on employment law issues.

### Which Employers Are Covered?

All employers in San Francisco that have 20 or more employees who work a minimum average of 10 hours a week must comply.

Even if your company is located outside of San Francisco (and meets the 20+ employee threshold) but maintains at least one employee who works within the county limit and your company is required to obtain a San Francisco business registration certificate, you still must comply.

### Which Employees Qualify?

Any individual employed for at least one month who works on average at least 10 hours per week, for compensation, during a month and commutes to work via public transit, carpool or vanpool. Employers may offer this benefit to all employees, regardless of the hours worked, but this is not required.

Union employees and workers placed and paid by a temporary staffing agency are also eligible.

resources to help our clients achieve the success that this new year promises on many fronts. We believe all our clients deserve to take advantage of these "green shoots."

What makes this edition so personally gratifying is that this newsletter will place a spotlight on each of our firm's attorneys and their specialties. Many of you receiving this newsletter may work with or know just one or maybe two of our lawyers, meaning you have yet to be introduced to the other extraordinary people who work here and the breadth of experience and judgment that they possess. *Perspectives* will introduce you to all of us through the individual essays and articles that appear here.

For example, in this edition, my partner Denis Kenny, who specializes in employment law and commercial and employment litigation, writes on classes of claims that may create personal liability for owners in circumstances in which their business closes, and also explores the provisions of a recent San Francisco ordinance that impacts the cost of doing business in the City.

Of course, our firm is more than each individual within it; we pride ourselves on our collaborative spirit and the sense of partnership we enjoy here, which is designed to assure that each issue faced by our clients receives all appropriate input from our attorneys. We believe this permits us to offer the best possible service. We also take seriously the trust placed in us by our clients and we work every day to earn it. This collaborative partnership, both internally and the one we value with our clients, is what we mean by "The Strength of Partnership."

This space that I occupy here in this edition, "Partner Notes," will be used in future editions to highlight the personal strengths and points of view of

### Available Commuter Benefit Options:

Employers can offer commuter tax benefits as a payroll deduction, a subsidized benefit, or a combination of the two. Here are the options:

**Pre-tax Transit:** Employer sets up a deduction program which allows employees to use up to \$230 a month in pretax wages to purchase transit passes or vanpool rides (but not for parking). Note that if you choose this method, you must allow every employee to deduct the maximum amount each month. The most commonly used commuter benefits provider is Commuter Check. See [www.commutercheck.com](http://www.commutercheck.com) for more details on available programs.

**Employer Paid Transit Benefits:** Employer pays for workers' transit fares on any of the San Francisco Bay Area mass transit systems or reimburses workers for their vanpool expenses. Reimbursements for transportation expenses must be at least an equivalent value to the purchase price of a San Francisco MUNI Fast Pass, which is presently \$60 or \$70 (MUNI and BART).

**Employer Provided Transit:** Employer offers workers free shuttle service on a company-funded bus or van between home and place of business.

### Penalties for Non-Compliance:

Non-compliance may result in fines: \$100 for a first violation, \$200 for a second violation within the same year, and \$500 for each additional violation within the same year.

### Action That Must Be Taken:

In order to comply with the Ordinance, a Certificate of Compliance must be posted at the workplace so that it is visible to employees. To receive a Certificate of Compliance, first complete and return an Employer Compliance Form. You can request a copy of this form by emailing [CommuterBenefits@SFGov.org](mailto:CommuterBenefits@SFGov.org). If you are concerned with which commuter benefit method will work best for your company or whether your business is excluded from the Ordinance, please feel free to contact our office and speak with one of us. Scherer Smith & Kenny LLP wants to help you with these and any other matters impacting your business.



## California Employer Alert: Did You Know?

When you terminate or layoff an employee, you must provide him or her with written notice of that decision, and include the following information: the name of the employee and employer, the employee's social security number, the effective date of the change, and the reason for the change in relationship (e.g., discharge, layoff, involuntary leave/furlough, conversion to independent contractor). You must also provide the employee with the Employment Development Department's "For Your Benefit Pamphlet," available online here: [http://www.edd.ca.gov/pdf\\_pub\\_ctr/de2320.pdf](http://www.edd.ca.gov/pdf_pub_ctr/de2320.pdf).

Failure to comply with these requirements may subject the employer to civil and criminal penalties.

### Areas of Practice

[Business, Estates and Trusts; Intellectual Property and Employment Law;](#)  
[Litigation and Dispute Resolution; Nonprofit; Real Estate](#)

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