

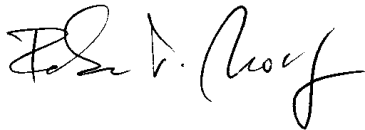
Compilation of recent, interesting legal news, views and perspectives from the desk of Rob Wolf.

**v. To ponder, consider or deliberate at length.*

(American Heritage Dictionary, Fourth Office Edition, 2000, Houghton Mifflin)

Happy New Year!

I had every intention to get this edition out before December to share the results of the survey regarding "what you would do if you were in charge of the economy." One thing after another conspired against these best intentions, most particularly the holidays. But the results are still timely, and most surprising. Virtually no one wanted a "Wall Street Bail Out." Brief survey results inside and more details on-line. Next month we'll have the first in the series of summaries regarding our banker/lender survey to share what we have received for comments from lenders and what they want to see from potential borrowers. Most of all, Happy New Year, and may 2009 bring good fortune for everyone.



BUSINESS START-UP CHECKLIST

The start of a new year is a traditional time for budding entrepreneurs to make the mental launch to strike out into self-employment and make "this year the year."

While it might be fun to indulge one's imagination about what a new business started from scratch could be like, would-be entrepreneurs need to engage in cold, hard calculation and planning before taking the plunge. At the risk of pouring cold water on the anticipation and excitement, what follows is a brief narrative about how to plan and think through the many decisions that must be made well before you have that "Grand Opening" sign made.

Some common reasons for starting a new business include escaping the whole 9-to-5 routine (though it

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AGE DISCRIMINATION IN EMPLOYMENT

When the federal government required one of its defense contractors to reduce its workforce, the contractor first evaluated its employees based on the criteria of "performance," "flexibility," and "critical skills." After adding points to scores for years of service, the employer arrived at a list of 31 employees to be laid off. On their face, the criteria were age-neutral, but all but one of the employees chosen to receive a pink slip were at least 40 years old, within the age group protected by the federal Age Discrimination in Employment Act (ADEA).

The laid-off employees sued their former employer under the ADEA, alleging the disparate impact form of age discrimination. Disparate impact refers to the use of policies or criteria by an employer in making employment decisions that are not overtly based on age, but which, when applied, allegedly have a disproportionate impact on older individuals. (The other type of employment discrimination, known as "disparate treatment," asserts that the employer intentionally treated applicants or employees differently because of their age.)

The plaintiffs first established, using statistical experts, that such a skewed result against older workers under the layoff criteria would rarely happen by chance, and that the same factors that were most closely

linked statistically to the older employees—flexibility and critical skills—were also the factors most influenced by the discretion of the contractor's supervisors.

The contractor countered that it was not liable because the ADEA provides that an employer action is not unlawful if differentiation among employees is based on "reasonable factors other than age" (RFOA). A jury returned a multimillion-dollar verdict for the plaintiffs. Ultimately, the case reached the United States Supreme Court, which upheld the judgment for the plaintiffs.

The critical issue determined by the Supreme Court was whether the RFOA element needed to be proven by the plaintiffs or by the defendant employer. In other words, did the plaintiffs have to prove that there were no reasonable factors other than age underlying the employer's decision, or did it fall to the employer to present an "affirmative defense" and prove the existence of the other reasonable factors? Examining the language of the ADEA and taking note of a previous ruling where a similar provision in the law was in the nature of an affirmative defense, the Court ruled that RFOA is an affirmative defense that the employer must

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Business Start-Up Checklist

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may be replaced by an 8-to-8 routine), answering to no one else, upgrading your standard of living, and being convinced that you can provide a needed product or service.

Why You?

Not everyone is cut out to the boss, so be honest with yourself about whether you have the necessary characteristics, skills, and experience. Can you make yourself pull the trigger on an important decision? Do you see competition as exciting or just stress-inducing? Are you willing and able to plan ahead? Do you have the perseverance to put in long hours to make the business succeed? Are you prepared to risk your savings? Are you comfortable with hiring, supervising, and possibly having to fire other people? Do you know anything about the paperwork and legal side of running a business, such as payroll and accounting?

Why This Business?

If there is no niche and not enough people to want to buy what you are selling, the new business will fail. Do the necessary investigation to determine if there is some currently unmet demand for the product or service you want to supply.

How?

Turning the idea into bricks and mortar (literally or figuratively) involves a lot of decisions, many of which are best made only after getting professional advice. Seek good legal counsel and select the appropriate business form and have it set up correctly. Save money and time by getting it "right" at the start. Make sure you know which local, state, and federal laws and regulations apply to the business, and the permits or licenses you will need. Make an unflinching and detailed examination of your financial picture. How much money you have now, how much will you need to start the business, and how much will you need to stay in business? Projecting cash flow into the future includes taking into account the rate at which customers will pay off accounts if credit is extended to them. Don't forget to think about security with appropriate types and levels of insurance.

Background

There are significant resources available to help the new business owner. One excellent resource is from the Small Business Administration (SBA) at <http://www.sba.gov/>, or SCORE at <http://www.score.org/index.html>. Local universities that have entrepreneur programs include University of New Hampshire's Whittemore School at <http://www.wsbe.unh.edu/> and Suffolk University's Sawyer Business School at <http://www.suffolk.edu/business/index.html>

BANK VIOLATES TRUTH IN LENDING ACT

A husband and wife who operated a day-care business out of their home decided to take out a new mortgage on the home. Over the 10 years that they had owned the business they had taken corresponding deductions and depreciation on their tax returns to account for the business run from the home. As calculated for tax purposes, approximately 17% of the home was devoted to the day-care business, even though during the hours when the day-care business was open about 52% of the home's square footage was devoted to that use.

The homeowners came to realize that their lender had dramatically increased their monthly payments and had sent the loan documents to them when it was too late by law for them to change their minds (more than three days after they signed the papers). They sued the bank under the federal Truth in Lending Act (TILA), asking that the loan transaction be rescinded. Among other things, TILA requires lenders to provide particular disclosures to borrowers of "high-rate" loans when points and fees exceed 8% of the amount borrowed. The bank had not made these disclosures to the borrowers at least three days ahead of the transaction, as required by TILA.

The bank's response was two-pronged. First, it argued that TILA did not even apply to the case because of an

exemption in the law for extensions of credit primarily for business or commercial purposes. Second, the bank took the position that the points and fees that the homeowners were required to pay could not count toward the 8% threshold because the homeowners had folded those costs into the loan instead of paying them up front in cash. A federal trial court sided with the homeowners on both points, allowing their case to go to trial.

Regarding the bank's claim that the "business purposes" exception in TILA should apply, the key fact was that, properly calculated; only a small percentage of the home was devoted to the business, thus defeating any attempt to argue that the loan was primarily for business or commercial purposes. As for the fact that the points and fees were financed, not paid in cash, this method of payment was of no consequence for purposes of meeting the 8% threshold. The applicable statutory language says only that the points and fees must be "payable" by the consumer at or before closing. The borrowers did bear the costs of the points and fees at the time of closing, no matter whether they were being paid then, deducted from loan proceeds, or, as happened here, added to the amount to be financed over time.

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Bank Violates Truth In Lending Act

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Working in favor of the borrowers on both points was the fact that TILA is a remedial statute to be construed and applied so as to achieve its goals of assuring the meaningful disclosure of credit terms and avoiding the uninformed use of credit.

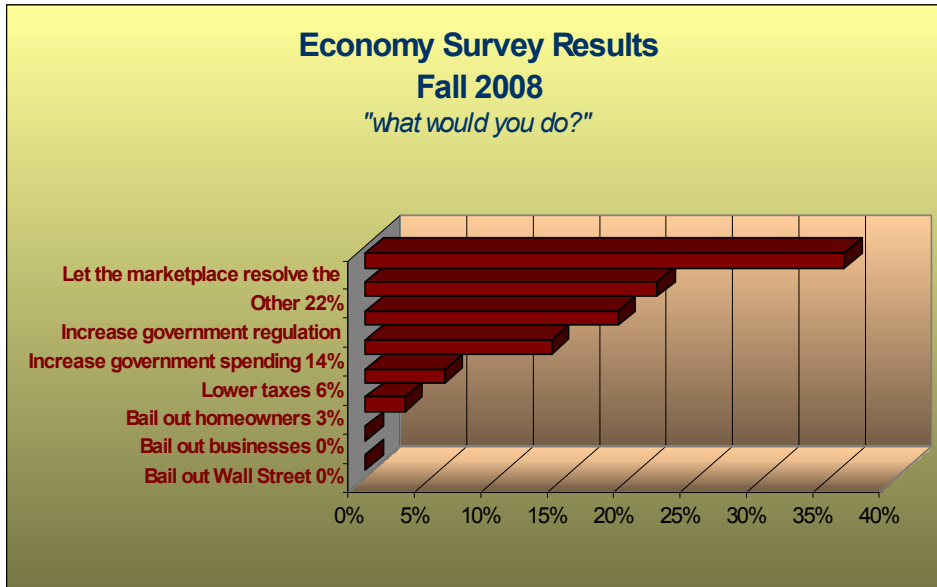
Background

In Macheda v. Household Fin. Realty Corp. of N.Y., 2008 WL 2562003 (N.D.N.Y. 2008), the court denied a lender's motion for summary judgment on a claimed violation of the Truth in Lending Act, 15 U.S.C. §§ 1601 et seq., arising from a new loan obtained by owners of a home that was also used some of the time for a day-care business. The lender could not avail itself of the express exemption in TILA for "[c]redit transactions involving extensions of credit primarily for. . . argument concerning the special, additional disclosure requirements which apply to "high-rate" loans pursuant to 15 U.S.C. § 1639.

Such a loan is defined in the definitions section of TILA as follows: "A mortgage referred to in this subsection means a consumer credit transaction that is secured by the consumer's principal dwelling, other than a residential mortgage transaction, a reverse mortgage transaction, or a transaction under an open end credit plan, if . . . the total points and fees payable by the consumer at or before closing will exceed the greater of . . . 8 percent of the total 3 loan amount; or \$400." 15 U.S.C. § 1602(aa)(1)(B)(i), (ii). Points and fees that are financed, as in Macheda, rather than paid in cash at or before closing, nonetheless count toward the 8% threshold. 2008 WL 2562003, at *4-*5 (citing Short v. Wells Fargo Bank of Minn., 401 F. Supp. 2d 549, 562-63 (S.D. W. Va. 2005) (the term "payable" in 15 U.S.C. § 1602(aa)(1)(B) should be interpreted as meaning legally enforceable or an obligation to pay; the term "payable" looks to the fact that the consumer bears the cost of those fees at the time of closing, not whether those fees were financed, paid separately, or deducted from the loan proceeds)).

Economy Survey Results

In late November we asked what you would do if you were in charge of the economy. Answer options ranged from "Let the marketplace decide" to "bail outs" for Wall Street, Main Street or homeowners. All replies were anonymous; and additional comments were thoughtful and "pithy." Overwhelming response in support of "let the marketplace" work it out; virtually no support for the Wall Street "Bail-out." Details on-line at NHBizLaw.com and MassBizLw.com.



A selection of individual responses has been posted on-line including these from late November:

"The name of the game is JOB CREATION. We need to bring off-shore jobs back to the USA. People can pay their mortgages and buy automobiles when they have jobs--without jobs, no houses bought and no autos sold. Seems pretty simple to me."

"The economy is not going to get better until the liberal media stop with the exaggeration of every little thing that happens..."

"The current situation is caused by too much debt..."

"A better response would be to BOTH increase governmental regulation... and assist homeowners who were duped..."

Next Issue

⇒ **Banker / Lender Survey.** We've written to literally hundreds of bankers and specialty finance companies and lenders to gauge the real access to capital for small and mid-cap businesses in New England. The responses, reaction and results may surprise you. Read what the banks are saying in the next issue and on-line

YOUR "MUSE" AND COMMENTS WELCOME: NHBizLaw.com / MassBizLaw.com

If you have questions or suggestions for upcoming topics, make sure to write: RWolf@Shaines.com.

Age Discrimination in Employment

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prove and, in this case, had not.

The Court's opinion anticipated criticism, which, in fact, was forthcoming, that its decision could open the floodgates for similar claims and make it too easy for plaintiffs to prevail. It pointed out that, even before the RFOA affirmative defense comes into play, the plaintiff in an ADEA disparate impact case must isolate and identify specific performance practices by the employer that are responsible for statistical disparities disfavoring older workers. As the Court put it, "[t]his is not a trivial burden."

However, concerns about tilting the scales too far against employers should be directed at Congress, according to the Court, since it created the RFOA concept and made it a defense to be proven by employers.

Legal Background

In Meacham v. Knolls Atomic Power Lab., 128 S. Ct. 2395 (2008), the Court held that the exemption from liability for a disparate impact claim under the Age Discrimination in Employment Act (ADEA) for employer actions based on reasonable factors other than age (RFOA) creates an affirmative defense, on which the employer bears both the burden of production and the burden of persuasion.

The pertinent part of the ADEA provides as follows: It shall not be unlawful for an employer, employment agency, or labor organization-- (1) to take any action otherwise prohibited under subsections (a), (b), (c), or (e) of this section where age is a bona fide occupational qualification reasonably necessary to the normal operation of the 4 particular business, or where the differentiation is based on reasonable factors other than age[.] 29 U.S.C. § 623(f)(1) (emphasis added). The outcome in Meacham was greatly influenced by earlier decisions of the Court recognizing that the RFOA clause's "nearest neighbor," the bona fide occupational qualification clause, is also an affirmative defense. Smith v. City of Jackson, Miss., 544 U.S. 228, 233 n.3, 125 S. Ct. 1536, 1540 n.3 (2005) ("Like Title VII with respect to all protected classes except race Discrimination Act of 1967, §§ 2 et seq

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Rob Wolf is admitted in both the state and federal courts in Massachusetts and New Hampshire. Professional affiliations include the New Hampshire Bar Association, the Massachusetts Bar Association and the American Bar Association Law Practice Management Section in addition to the Turnaround Management Association and New England Business Brokers Association.



Actual resolution of legal issues depends upon many factors, including variations of facts and state laws. This newsletter is not intended to provide legal advice on specific subjects, but rather to provide insight into legal developments and issues. The reader should always consult with legal counsel before taking action on matters covered by this newsletter.