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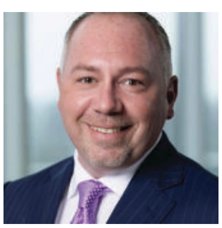
Small business owners should consult legal experts about coming changes in laws, regulations

Caurie Putnam SPECIAL TO THE RBJ

A July 2023 Statista survey of American small business owners showed about ten percent of respondents identify government regulations as the biggest problem they face today. This number is an increase from July 2022, when government regulations were the biggest concern for five percent of small business owner respondents.

This increase comes at a time when there are notable recent and upcoming laws and regulations that will impact businesses of all sizes. We asked three attorneys in WNY to identify what some of these changes are and what impact they may have on small businesses in particular.



Ehrenreich

NYS Pay Transparency Law

Elliott J. Ehrenreich, a partner at Phillips Lytle LLP, points to New York State's Pay Transparency Law that goes into effect this week [September 17, 2023] as legislation that most businesses need to be aware of, including those on the smaller side.

The law — in which the impetus was gender pay equality — requires employers with four or more employees to disclose the following when advertising internally or externally for a job, promotion, or transfer opportunity: 1) Compensation or range of compensation and 2) A job description, if one exists.

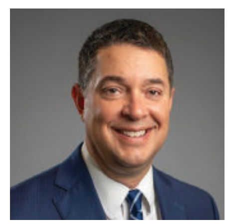
Depending on where in New York state a business is located, there could be additional pay transparency requirements at a municipal level, said Ehrenreich. Examples are NYC's Salary Transparency Law and the City of Ithaca Pay Transparency Law, both of which went into effect last year.

Penalties for noncompliance with NYS Pay Transparency Law are fines of $1,000 for the first violation, $2,000 for the second violation, and $3,000 for the third and subsequent violations.

Whether it's new or pending legislation dealing with pay transparency, recreational cannabis use, data and privacy, or a variety of other hot topics being discussed today, Ehrenreich encourages small businesses to reach out to their trusted legal advisors for guidance.

Corporate Transparency Act

Another notable change on the near horizon is the federal Corporate Transparency Act (CTA) of 2019 which, following some delay due to the pandemic, goes into effect on January 1, 2024. It addresses the disclosure of corporate ownership and aids in the prevention of money laundering and the financing of terrorism per its summary on Congress.gov.



Lizas

"The Corporate Transparency Act will make it harder for criminals to own entities to hide their illicit funds," said Constantine P. Lizas, a member at Harris Beach PLLC, who has a unique regulatory and litigation background as a former federal prosecutor with the U.S. Department of Justice and enforcement attorney with the Federal Deposit Insurance Corporation (FDIC).

Lizas explains that while the bill has some exceptions, for the most part, it requires corporations, limited liability companies (LLCs), and other similar entities created in or registered to do business in the United States to file a report with the Financial Crimes Enforcement Network (FinCEN) identifying their beneficial owners.

In general, FinCEN defines "beneficial owner" as (1) who directly or indirectly exercises "substantial control" over the reporting company, or (2) who directly or indirectly owns or controls 25 percent or more of the "ownership interests" of the reporting company.

Identifying the beneficial owners may be more straightforward for small businesses that have simple ownership structures and are used to reporting this information to their banks already, Lizas says, but if there are any questions, an attorney can help identify who the beneficial owners are.

"If it's a single owner it could be a pretty straightforward process," said Lizas, about businesses identifying and reporting their beneficial owner(s) to FinCEN. "It can be more difficult with a larger company that has a complicated ownership structure."

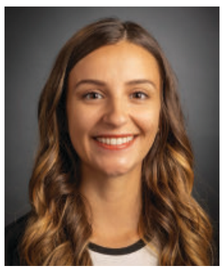
It will be important for companies of all sizes to keep track of what they are reporting and to keep their reporting current (any changes to beneficial ownership must be reported to FinCEN within thirty days).

The federal government's database on beneficial owners will not be made public, but FinCEN can disclose it to certain groups, including U.S. Federal agencies engaged in national security, intelligence, and law enforcement activities; the U.S. Department of Treasury; and, in some cases, financial institutions.

There will be no fee for reporting beneficial ownership information to FinCEN (which will be done online) and as far as repercussions of an entity failing to do so, "There is the potential for fines of up to $10,000 and criminal penalties, but FinCEN has not yet articulated how it will enforce the CTA," Lizas said.

LLC Transparency Act

Vittoria Buzzelli, an associate in Harter Secrest & Emery LLP's corporate practice, identifies the LLC Transparency Act, which was passed by the NYS Legislature in June, as legislation that could potentially have a wide impact on small businesses.



Buzzelli

"I do think a lot of small businesses will be affected by the LLC Transparency Act because the LLC is such a common entity choice for small and closely held businesses," Buzzelli said.

Currently, New York LLC owners can form their LLCs while maintaining full anonymity, but this act – which is awaiting signature from Gov. Kathy Hochul to be turned into law – will require LLCs to disclose the names of their beneficial owners at formation or qualification to do business in the state.

"It is modeled after the Corporate Transparency Act and draws a lot of provisions and definitions from it," Buzzelli said. "Both were in response to the government trying to prevent illegal activities like money laundering and tax evasion."

In New York state, the legislation is also driven by a push to hold landlords more accountable to tenants by cracking down on anonymous LLCs leasing real property, Buzzelli said.

There are some major differences between the two pieces of legislation. The CTA applies to corporations, LLCs, and other entities, while the LLC Transparency Act would apply to LLCs only.

Additionally, unlike the CTA, the LLC Transparency Act calls for the creation of an online, searchable public database where users can find the full names of LLC beneficial owners.

"There is a lot of concern coming from business owners because they see this an invasion of privacy," said Buzzelli, who notes potential exemptions for public disclosure will be available at both a company and owner level, but the state will most likely not grant these exceptions lightly.

Penalties for LLCs failing to report required beneficial owner information will include a past-due or delinquent mark and $250 fines. Beyond these, an LLC that isn't in compliance may experience other difficulties, Buzzelli said, such as getting approved for a loan.

She says now is a good time for New York LLCs and those that do business in New York to reach out to their legal advisors to plan for the upcoming changes and possibly look at alternatives available (such as restructuring) for those that have privacy concerns and may not qualify for an exemption.