



Vantage Points - Winter Edition

Dear Friends,

A New Year is a real mix, isn't it? The speed at which each one arrives is a shocker, but I sure do appreciate a fresh start. Changing the date from 2006 to 2007 has allowed me to "close the books" on some things and start anew on some pet projects. We wish you a safe, healthy and prosperous year as it unfolds.

The New Year has brought changes at Jenkins Fenstermaker as well! We are very pleased to announce that Brian Lindsay has become a member of our firm. Brian has worked with us for over seven years, and probably is our most traveled attorney through those years. His practice, much of which is in asbestos defense, has taken him all over our state. We wish him our heartiest congratulations, and encourage you to do the same.

We also have announced that Charles K. Gould has become our new Recruiting Coordinator. Charlie, a Huntington native, will be our point person for hiring attorneys, the key to our future success, and replaces Lee Hall, to whom we are grateful. Spring on-campus interviews will be completed next month, although we also talk to interested attorneys and students year round. Please contact Charlie or me if you know an attorney or law student who wants to provide outstanding service to clients. We need to talk to them!

Our newsletter this quarter also has three articles with a fresh perspective. Tom Scarr, one of our senior litigation attorneys, has addressed the investigation of workplace injuries for us. Annual record-keeping for businesses, authored by Wes Agee, one of our senior business attorneys, is a must read for those who have gone to the expense and effort of forming a company and want to continue the protection of their personal assets. You also will want to read the update by Tom Krieger, our senior labor and employment attorney, on recent changes in unemployment eligibility for strikers. Tom, Wes and Tom are available for follow-up questions, as are the rest of us.

Enjoy your chance at a fresh start! And, if January 1st passed you in a blur, resolve to start fresh today!



Warmly,

A handwritten signature in black ink that reads "Barry Taylor".

Barry Taylor
Chief Executive Officer



How To Respond To A Work Place Accident

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Every employer must recognize two unavoidable truths. First, no matter what steps are taken to prevent work related accidents and injuries, some will occur. Second, anyone can file a lawsuit against anyone regardless of fault. While these are unavoidable truths, they certainly should not cause employers to ignore employee health or safety nor acquiesce to litigation or threats of litigation. The best response is to take reasonable steps to prevent work related accidents and to prepare for and react quickly and properly to accidents and injuries when they occur to prevent similar occurrences in the future and to prepare for the potential litigation that may result from it.

Below are several suggestions concerning what to do when an accident does occur. These suggestions come from several seminars that Jenkins Fenstermaker offers to clients concerning: Document and Record Control and Management, Privileges and Evidentiary Protections, and What To Do In The Case of a Work Place Accident and How to Maximize Available Evidentiary Protections.

How To Respond To A Work Place Accident

- Before an accident occurs, ensure that your employees, particularly your supervisory employees responsible for investigating and responding to accidents when they occur, are adequately trained in how to respond to the accident, including first responder procedures, securing the accident scene, notifying appropriate company personnel, conducting an accident investigation, and preparing accident investigation documents. It is also important to assign specific responsibilities for document preparation, document organizing and filing, maintenance and storage, etc.
- Secure the accident scene, including any equipment or property involved. DO NOT make any alterations or repairs to any of the equipment or property involved;
- Call and notify your attorney about the accident;
- Call your insurance company and report the accident;
- Determine whether OSHA/MSHA or any other Federal or State agency must be notified of the event, and if so, when, and act accordingly;
- Determine who will act as spokesman for your company to deal with inquiries from the press or public;
- Identify any potential witnesses;
- Identify and secure all relevant documents which may include various Personnel Records (employment applications, interview notes, performance evaluations, disciplinary records); the Employee's Workers Compensation Records, Employee Medical Records, Pre-Employment Physicals, Employee Testing/Medical Surveillance Records, Attendance and Payroll Records, Job Descriptions, Safe Job Practices (SJP), Job Hazard Analysis (JHA), Training Records (written handouts, videos, sign-in sheets and tests), Company Safety Records, Incident Reports and Prior Accident Records related to the employee involved, area involved and/or equipment involved;
- Allow your legal counsel to assist you in your post accident investigation, analysis and report;
- Be cognizant of and take appropriate steps to maintain the protections provided by legal privileges and evidentiary protections such as attorney/client privilege, work product doctrine, subsequent repairs or measures, and self audit or self-critical analysis. If you have any questions or doubts regarding the extent of a privilege in a given situation, call your attorney;
- Mark or label, as appropriate, all documents that you do not want disclosed during pre-trial discovery or trial. Keep the following labels in mind: Confidential, Attorney/Client Privilege, Work Product Privilege, Remedial Measures, Self-Critical Analysis, and Do Not Copy or Reproduce Without Permission;

- It is good policy and business practice to perform a post-accident investigation, but it is equally important that preliminary reports be limited to descriptions of the known facts only. In conducting an accident investigation, ensure that you are documenting facts, not opinions. Take adequate photographs and video of the accident scene and any evidence remaining, make appropriate drawings, take measurements, and witness statements. Conducting a root cause and analysis and developing a conclusion as to the cause or causes of the accident should not take place immediately after the accident, otherwise they will necessarily be premature and probably contain speculation;
- Instruct employees, particularly supervisory personnel who might be responsible for conducting such investigations and preparing such reports, to omit conjecture, opinions or conclusions of cause or fault, or any other speculation in the initial post-incident report. After consulting your legal counsel, you may, at counsel's direction, prepare follow up investigation reports in which frank self-evaluation and criticism can be offered, as well as any other opinions as to the cause or responsibility for the accident. It is often advisable to direct these reports to your legal counsel and include a statement that the report is prepared in anticipation of possible litigation;
- As a general rule, good documents are clear and concise and only include known, objective facts, not premature and speculative conclusions and opinions. Avoid creation of "bad documents," i.e. documents which mischaracterize facts, conversations or incidents; documents that include inconsistencies, vague, inaccurate or exaggerated statements; inflammatory, emotional or melodramatic comments or phrases, speculation and premature opinions; documents which include absolutes, e.g., always, absolutely; or legal conclusions re: causation; or words suggestive of fault or secretive behavior, e.g. "in hindsight, should have realized/known," "accident caused by," "please destroy after reading";
- Be careful to limit circulation of such documents. Limit the number of copies made and only circulate them to those that absolutely must receive them;
- Be extremely careful about faxing documents, sending e-mail messages and making cellular or telephone calls concerning the accident to avoid inadvertent disclosure of certain documents and information. When sending an electronic message, by fax or otherwise, use a cover sheet with appropriate language identifying the privileged and confidential nature of the documents and with direction in case the documents are inadvertently sent or received;
- Make sure that all employees, whether part of management or not, are instructed to keep any consultations that they might have had with the company's legal counsel completely confidential.



Corporate Records: The Importance of Annual Meeting Minutes

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Courts have long recognized that a corporation is an entity, distinct and separate from its stockholders and officers, and the individual stockholders are not responsible for the debts of the corporation. This idea of "limited liability" for shareholders has been broadly applied by the courts, even when all the stock in a corporation is owned by one person and where the corporate structure has been used for the sole purpose of avoiding personal liability.

However, there are some circumstances where the corporation may be disregarded as an entity standing between its owners and adverse parties. This legal theory is known as "piercing the corporate veil" and is a justification for disregarding the corporate entity. Most courts use a "totality of the circumstances" test in deciding whether to pierce the corporate veil and, therefore, each case must be decided on its own facts. Numerous factors have been identified as relevant in making a determination of whether the separateness of the corporation and the individual shareholders should no longer exist. One factor considered by the courts is the failure to follow corporate formalities. This important factor is usually considered when courts are describing corporations metaphorically as the "alter ego" or "instrumentality" of the shareholders since the shareholders themselves will be personally liable for the debts of the corporation. The basic premise of this factor is, simply stated, if an organization is going to be a corporation, it ought to act like one. Several courts have stated that if shareholders wish to have the protection of a corporation to limit their personal liability, they must also follow the simple formalities of maintaining the corporation.

Though corporate law varies from state to state, most state laws and the corporation's own bylaws require that a corporation hold an annual meeting of shareholders where, at a minimum, the directors of the corporation are elected annually. Most state laws and the corporation's bylaws require an annual meeting of the Board of Directors which usually occurs on the same day as the annual shareholder's meeting. The annual directors meeting usually results in the election of officers of the corporation for the following year. Corporate minutes are the official records of corporate matters acted upon in a corporate meeting. Each year business owners who have a corporation will want to ensure that their annual minutes are prepared and that every meeting is documented with minutes.

In many states, if there is only one shareholder or if all shareholders are cooperative, there are alternative methods which can be used to meet the legal requirements for valid meetings and appropriately authorized corporate actions. When there are several shareholders having disagreements, following the rules for holding corporate meetings and maintaining minutes of meetings is imperative. Corporation owners who keep annual written minutes have taken one step in complying with corporate formalities. Merely keeping annual written minutes is not a guarantee that the corporate veil cannot be pierced. However, corporation owners who are diligent in having written minutes of corporate meetings prepared and filed in the corporate minute book will have complied with one of the corporate formalities, thereby helping them to avoid becoming personally liable for their corporation's debts.

It is easy to forget about annual meetings and corporate minutes in running a business. Minutes may be required in the event of an Internal Revenue Service audit or other governmental inquiry. Minutes may also become a condition to the corporation obtaining a loan from a bank or some other desirable benefit. Finally, minutes can become vital in the defense of a lawsuit.

A New Year Resolution should be made that proper corporate minutes will be maintained. Maintenance of proper minutes may be well worth the cost, even where the corporation consists of a single person.

Please feel free to contact us if you have questions regarding annual meetings and corporate minutes.



A New Year's Wish for the Legislature: Tighten Unemployment Eligibility for Strikers

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We've worked long and hard in this State to fix the workers' compensation system that was such a deterrent to businesses moving in or staying here in West Virginia. I don't hear nearly as much from my clients about that system anymore. Now, I believe we have another system that needs some attention if we are, as the saying goes, really open for business.

The general rule, and one that most employers count on until their lawyer brings them the bad news or they found out after contesting such claims, is that striking employees are normally not entitled to unemployment compensation benefits. Employers understand that if the company bargains in bad faith and does not really try to reach an agreement, or if the company locks out workers to try and force concessions upon them, the workers are going to receive unemployment benefits during the strike or lockout and that economic shot in the arm will enable them to continue their struggle far longer than if they were not receiving these benefits. In effect, those employers will be subsidizing the strike against them through their payments to the unemployment compensation fund.

What many employers can't understand, however, is the relative ease with which striking employees can relieve themselves of the general disqualification from receipt of these benefits. What these employers and I have a hard time with – and what has ultimately cost the jobs of many workers, either by plant closing or relocation – is awarding benefits to striking employees on the theory that (i) those employees are forced to accept wages and benefits below local standards without consideration of the competitive position of the company in its industry, or (ii) the strike has not created a "work stoppage" when the company is able to carry on its operations in full or in part, even at considerable hardship and/or expense.

In the first situation, workers can obtain unemployment compensation benefits if they can show they are being forced to accept wages and other terms and conditions of employment substantially less favorable than those prevailing for similar

work in the locality. Often, the union will simply parade out a number of collective bargaining agreements from the largest and highest paying companies in the local area where there might be similar type work and argue that if the workers on strike were not offered comparable wages and benefits in their contract negotiations, they should receive unemployment benefits. The term “substantially less favorable” somehow gets lost in the application of this provision. An employer can counter to show that its offer was above what some other companies with similar type jobs in the area pay and argue that the “area standard” is below its own wage and benefit level.

However, what if its major competitor(s) is outside the local area and pays considerably less than the struck employer? In a case with which I am familiar, the main competitors for a local business were in Virginia, a right-to-work state, and paid far less in wages and benefits than the local company even before the strike. The local business did not ask for concessions but only asked the workers to reduce their demands so as not to further expand the competitive advantage of the Virginia companies. They refused, went on strike to enforce their demands for ever increasing wages and benefits, and received unemployment benefits because their wages were not as high as the larger plants in the area, even though there were other plants with lower wage and benefit structures operating under union contracts in the area. The wages of the Virginia plants were irrelevant since they were outside the “local area.” Now the company was faced with a dilemma; either match the highest paying labor contracts in the area, regardless of the company’s competitive position in its industry, or risk a strike where strikers would receive benefits underwritten by the company’s own payments to the state’s unemployment compensation fund. Of course, the union was fully aware of the employer’s predicament and, in turn, could up its demands at the negotiating table, knowing that if the employees went on strike, the strikers would receive supplemental income that would greatly lessen the economic impact of the strike on them. The company realized that its chances of remaining a competitive force in its industry were dim under such a dilemma and simply decided it did not need to do business in West Virginia anymore. It not only closed the plant, but two other in-state plants as well. Fortunately, because it was part of a larger corporate group, this company had a choice and chose to shift its business to other plants outside of West Virginia in order to survive. A small local business in the same situation would have no real option; it could only bleed to death over time or close up now.

In the second situation, the myth about no “work stoppage” existing when an employer is able to continue its business in the face of a strike presents an equally untenable choice. If the employer maintains its business during the strike to keep its customers, it risks having the strike funded by the State thereby prolonging the employees’ ability to stay on the picket line. If it doesn’t try to maintain operations, it risks the permanent loss of business from which it may never recover.

In another case, an employer worked its management people and a few temporary workers 12 to 14 hours shifts for more than a month during a strike to make sure that all orders were shipped and none of its customers took their business elsewhere. The company wasn’t pressing concessions across-the-board during contract negotiations; the dispute centered on how much of the huge increase in health insurance premiums would be picked up by the company. The union, of course, wanted the company to pay it all and the company looked for some relief even though it would have to pay substantially more under any proposal. Typical strike and typical situation where workers are generally disqualified, right? Wrong! Lo and behold, because management worked so hard to keep product moving to its customers so as not to interrupt their businesses, the strikers received unemployment compensation benefits. The next contract, the union made even bigger demands and went on strike when the employer refused them. However, armed with their experience from the last strike, management this time simply walked away and let the plant go until the workers got ready to come back to work. Unfortunately, many orders did not get filled and customers looked for new suppliers who did not have unions or the risk of strikes. Many of those customers did not come back and many of the ones that did found new sources of supply as the next labor contract neared its end. Although a successor agreement was negotiated without a strike, it was too late; all the business was gone and was not coming back. The company tried bankruptcy but was never able to recover.

What happened in these situations was that the State stepped in to relieve striking workers of the consequences of their strike for the short haul but those same workers ultimately lost their jobs permanently because of the environment that permitted such results. I wish, then, that the legislature would look at the big picture here and make the following changes to the unemployment compensation system relating to strikes:

1. Include with the “substantially less favorable than those prevailing for similar work in the locality” measure an alternate consideration of wages and benefits paid by direct competitors outside the local area. Employers in West Virginia cannot long survive if they are penalized by State subsidized strikes where they match what the out-of-state competition is pay-

ing even though that may be lower than what non-competing plants and businesses in the area pay. I'm not asking that strikers be disqualified if the struck employer doesn't even match the competition, but if it does the strikers should not look for benefits under this theory. Otherwise, that employer can only hope the union will reduce its demands to match the competition, something that generally evokes the, "That's your problem" response at the bargaining table.

2. Don't penalize a business that successfully keeps its operations going in the face of a strike by awarding benefits to strikers. If the employer is unfair, in that it bargains in bad faith and, in effect, forces the workers to strike, or if it locks them out to force concessions, workers are going to get unemployment benefits by way of other provisions in the law. But if those workers are being unfair, asking the employer to pay above what the competition is paying, or making otherwise unreasonable demands, why should they get benefits if the company tries to maintain its business during their strike? By maintaining its operations, the company is hoping those customers will still be there after the strike and their business will provide jobs for the striking employees. If the struck company can't fill orders or provide the services those customers demand, they are forced to find alternate sources that can lead to new long-term relationships, leaving the struck employer without many of its former customers.
3. Provide some advance notice of the theory that striking workers will use at the Appeal Tribunal hearing to support their claim. There are at least four separate and distinct theories that striking employees can use to relieve themselves of the disqualification from benefits; (i) forced to accept wages substantially below area standards; (ii) locked out to force concessions from them; (iii) denied the right of collective bargaining by the employer's bad faith bargaining; and (iv) employer did not suffer a work stoppage as a result of the strike. Each defense is separate and distinct and requires different facts and perhaps even witnesses to present. Unfortunately, as the system works now, an employer must show up at the hearing prepared for anything and everything. If strikers or their representative had to declare their theory when applying for benefits, the employer could save considerable time and expense in preparing for the hearing. That's not asking for too much, is it?

That's my wish for the New Year – I hope all yours come true.

