

## W E L C O M E

A MESSAGE FROM  
ALAN M. TARTER

Alan M. Tarter

We are pleased to bring you our fall issue of *The TKD Staffing Advisor*, a special publication for our clients and colleagues in the staffing industry.

This newsletter includes an in-depth examination of the legal and strategic issues involved in packaging a staffing company for sale, including how to assemble a team of professionals for the deal and the critical importance of the valuation report. Other articles focus on legal protections against unauthorized downloading of confidential information, recent court decisions on recruiters' fee claims, a new law on unemployment benefits with major benefits for the staffing industry, and proposed legislation to regulate day and temporary labor service providers.

We hope you find the articles informative and useful, and we welcome your comments and suggestions. If you have a specific topic that you would like to see addressed in a future *Staffing Advisor*, please feel free to contact me at 212.216.8010 or [atarter@tarterkrinsky.com](mailto:atarter@tarterkrinsky.com).

Alan M. Tarter  
Managing Partner

## Bill Introduced in Albany to Regulate Day and Temporary Labor Service Providers

A bill creating the Day and Temporary Labor Services Act was introduced in Albany earlier this year in order to protect the rights of day and temporary laborers, who, as a group, are considered to be particularly vulnerable to labor abuses. This law would require all providers of day and temporary labor services to register with the New York State

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## LEGISLATIVE UPDATE:

## NY LAW WILL REDUCE UNEMPLOYMENT INSURANCE COSTS FOR STAFFING INDUSTRY

Legislation amending the New York state law on unemployment benefits will take effect on January 1, 2009, resulting in major benefits for the staffing industry.

Under current law, if Jane Doe files a valid claim for unemployment insurance, her last employer is charged 100% of her benefits for the first seven weeks that she collects benefits. Even if she worked for that employer for only one or two days, the employer still has to pay for seven weeks of benefits. Because staffing companies frequently hire people for short periods, they have often had to pay more than their fair share.

The new law will remedy this situation by limiting the last employer's responsibility to the amount of wages it actually paid. For example, if Jane Doe files a valid claim for benefits after working for a staffing company for only two weeks, the company will need to notify the New York State Department of Labor that the first seven weeks of benefits will exceed the amount of wages it paid her. The company's liability for benefits will then be recalculated so that it will be charged an amount equal to two weeks' wages. Responsibility for the remainder of Jane Doe's benefits will be shared proportionately by all of her employers during the base period (the first four calendar quarters of the last five quarters prior to the date when she filed her claim).



# BEING FIRST IS NOT ENOUGH: COURTS REJECT RECRUITERS' FEE CLAIMS

By Linda Singer Roth



Linda Singer  
Roth

In two recent but unrelated cases decided in New York State Supreme Court, legal recruiters were unable to collect fees they claimed were owed to them.

In *Mark Bruce International, Inc. v. Blank Rome, LLP*, it was undisputed that in October 2005 Mark Bruce first proposed a merger between Blank Rome and Healy & Baillie, a 28-lawyer firm specializing in maritime law. It was also undisputed that Blank Rome agreed, in an email communication, to pay Mark Bruce a "reasonably determined" merger fee if the deal went through. But soon after the initial proposal, Blank Rome informed Mark Bruce that it was not interested in the suggested merger.

Almost immediately, however, the same deal was proposed to Blank Rome again – this time by another recruiter, Major, Lindsey and Africa. While Blank Rome initially rejected Major, Lindsey's proposal as it had

rejected the Mark Bruce proposal, the firm eventually changed its mind and a merger between Blank Rome and Healy & Baillie was announced in September 2006. In connection with the merger, Blank Rome paid Major, Lindsey a \$729,931 fee, but refused to pay Mark Bruce.

In deciding to dismiss Mark Bruce's claim, the Court found that under the statute of frauds, a contract to pay compensation for services rendered in negotiating a business opportunity had to be in writing, and the written contract had to contain all essential contract terms including terms regarding the payment of fees. The Court ruled that the email referencing only a "reasonably determined" fee was not sufficient to satisfy the statute of frauds or make the contract between Blank Rome and Mark Bruce enforceable.

In *Sivin-Tobin Associates v. Akin Gump Strauss Hauer & Feld*, New York headhunter Eric Sivin claimed he was entitled to a fee because he first introduced Akin Gump to Korea specialist Chang-Joo Kim, who joined the firm's New York office in April 2006. But the Court held that even if Sivin was first to

submit Kim's resumé to Akin Gump, that fact alone did not make him the "procuring cause" of the placement.

The Court also focused on the fact that Sivin sent Kim's resumé unsolicited to Akin Gump's New York office, while another headhunter from Boston Executive Search Associates sent the resumé to the Washington, D.C.-based head of Akin Gump's Korea practice, who met with Kim shortly after receiving the resumé. Akin Gump credited Boston Executive Search with the placement and paid it \$227,500. The Court further noted that given Sivin's relative inactivity, he had no reasonable expectation of payment.

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## About Linda Singer Roth, Counsel

Linda focuses her practice on commercial litigation. She has handled numerous matters involving breach of contract, unfair competition, misappropriation of trade secrets and fraud, and often works on cases related to the staffing industry. Linda can be reached at [lroth@tarterkrinsky.com](mailto:lroth@tarterkrinsky.com).

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## BILL INTRODUCED TO REGULATE DAY AND TEMPORARY LABOR SERVICE PROVIDERS

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Department of Labor and would impose fines and other penalties on service providers who do not comply.

In addition to the registration requirement, the law would impose certain recordkeeping requirements on day and temporary labor service providers and would require them to give each day or temporary laborer, when he or she is sent to work on a job, a written statement containing:

- The laborer's name;
- The name and nature of the work to be performed;
- The wages offered;
- The name and address of the laborer's destination;
- The terms of transportation; and whether a meal and/or equipment will be provided by either the service provider or the provider's client, and the cost of the meal and equipment, if any.

Please note that as of October 2008 this legislation is still being reviewed by the Senate and Assembly Labor Committees. It will not

become law until it is passed by both the Senate and the Assembly and signed by Governor Paterson.

### New Law Provides for *Paid* Family Leave in NJ

On May 2, 2008, New Jersey Governor Jon S. Corzine signed legislation that grants employees up to six weeks of *paid* leave during any 12-month period for certain family and medical events. The New Jersey Temporary Disability Benefits Law, which already provided for paid temporary disability leave in the event of an employee's own non-work related injury or illness, now affords paid leave when a family member needs care due to:

- The birth of a newborn or the adoption of a child within the first 12 months after the birth or adoption, or
- A serious health condition.

Under the new law, employees will be eligible to receive up to two-thirds of their pay, with a maximum benefit of \$524 per week for up to six weeks. The benefits will be funded through payroll deductions starting on January 1, 2009. Employees will not, however, be eligible to receive benefits until July 1, 2009.

# PACKAGING YOUR STAFFING COMPANY FOR SALE

By Alan M. Tarter and Arthur Zagorsky



Alan M. Tarter

Selling a staffing company is much like selling any other business, but the nature of the industry makes packaging one for sale a unique process. As the seller, your first steps include prioritizing goals, setting up a timeline, devising an exit strategy and assembling a professional team. Next, the valuation and sale of the business must be done at the right moment, so that the price tag will be reasonable to a buyer and also meet your expectations.

By prioritizing needs and desires, you can generate a list to use when making decisions about the sale. For instance, all-cash deals can enable a clean break from the company, while financing part of the sales price can provide the leverage to raise the asking price. Keep in mind that rarely does a sale meet every objective. The list of priorities will help you decide which objectives to forego.

Planning for the sale is vital to successfully achieving most of your goals. Ideally, the right time to sell is when the business is doing well. It usually takes at least a year to completely “clean up” the business to get it ready for a sale, and up to another year to find a buyer and complete the transaction. When you package a staffing company, every aspect of the business should sparkle. In many instances, this will require going



beyond what you have done in the past. If you want to realize top dollar, you cannot afford to neglect this step.

Allowing time for the sale puts you in a position of power, with less pressure to enter into a bad deal simply for the sake of getting out fast. Also, it gives you time to renegotiate key contracts with clients that the buyer will want or need to have locked in before taking over. Buyers want the predictability associated with contracts that have been negotiated prior to a sale. Therefore, your company’s well-respected, longstanding reputation for providing excellent services and obtaining favorable rates from clients is of little relevance if there are no guarantees for the future. What is more, key contracts should be assignable to the buyer.

## Assembling a Team

Choosing a team of professionals for the deal is another crucial stage that requires thoughtful planning and early action. To sell a staffing company successfully, you need the assistance of an accountant, lawyer, business broker, business appraiser/valuation expert and tax expert. Each professional will play an essential role in packaging the company.

Your accountant and attorney will assist you in considering, selecting and optimizing your objectives in structuring the sale – *e.g.*, stock versus asset sale, all cash or partial earn-out. They may also be aware of potential buyers and will be able to refer you to other key professionals. A good accountant is a business advisor who will guide you in the clean-up process discussed above, as well as

recommend what parts of your business need to be improved and how to achieve the improvements.

When you are contemplating a sale, retaining counsel at an early stage is crucial. Your attorney will help protect your confidential information, client and contract information and trade secrets by preparing a confidentiality agreement to be signed by any prospective buyer, and will advise you concerning what information should or should not be shared at various stages of the process. Together with your accountant and other business advisors, your attorney will negotiate the terms and structure of the sale, and then prepare a term sheet and/or letter of intent for negotiation by the parties. He or she will assist in the due diligence process, and, after you and the buyer have agreed to terms, prepare definitive agreements for the sale.

Your attorney will also assess any legal considerations that could expose you to liability. He or she will determine what disclosures must be addressed up front to avoid problems at the eleventh hour, after the parties have invested significant time and money, and to avoid possible future claims. In addition, your attorney will help you reduce exposure to liability after the transaction is complete.

## Valuing the Business

The business appraiser on your team will ensure that the price is just right, because if the “porridge” is too hot or too cold, a potential buyer may look elsewhere. The appraiser will first look to cash flow, future earnings, and the ability of the company to function after your company’s principals have left.

You may want to take proactive measures to improve the financials of your business and obtain a higher valuation. Buyers will generally turn to the income statements and assess earnings before interest, taxes, depreciation and amortization (EBITDA), hoping to find steady, predictable and high income streams. Often buyers will calculate an offer using simple multiples, such as EBITDA, or sometimes multiples of gross revenue. The valuation report will serve as a check on the buyer’s offer, ensuring that it meets your asking price, or is reasonably close to it. It will also provide the buyer with proof that your asking price is reasonable.

Projections of future earnings, based on financial statements from the last two to five years, will be critical. These projections will give you an opportunity to bolster the case for the future success of the company by citing new processes and methods that you may have implemented and/or new lines of business or contracts that should produce significant growth. For example, the projections may highlight your successes in adding higher-margin premium placements, expanding the customer base, providing incentives to sales and operations staff, improving customer service to increase client loyalty, lowering recruiter turnover, fostering company loyalty and teamwork, incorporating value-added services like background checks and drug testing, and reducing costs through automated timekeeping, tracking and payroll functions. Finally, demonstrating diversification of revenue will increase your chances of getting a favorable valuation and terms that meet your needs.

However, although these successful business practices make your company more attractive in theory, they will not be of much value unless an experienced manager or team of employees is in place to keep them going

after the company's principals sell and leave the company. Unless the buyer wishes to actively manage the company, ultimately replacing the manager and employees or incorporating the business into an already existing company, he or she will want reassurance that your management team and key employees will remain with the company after the sale. Providing job descriptions, organization charts and procedural operations guides will help give the buyer confidence in a successful transition, succession and continuation of the business. Also, providing incentives such as retention bonuses, phantom stock and/or value appreciation plans, will improve the likelihood that employees will remain with the company and therefore increase the company's value to the buyer.

To recap, successfully packaging your staffing company for sale requires that you:

- Plan carefully and prioritize your goals;
- Assemble a team of professionals and retain counsel at an early stage;
- Marshal all the facts justifying your asking price in the valuation report; and
- Provide for a smooth transition.

**About Alan M. Tarter, Partner**

*Alan is the Managing Partner of Tarter Krinsky & Drogin LLP and an Industry Partner of the New York Staffing Association. For his clients in the staffing industry, he provides not only legal counsel, but also advice on a variety of issues involving business growth and strategy. Alan can be reached at atarter@tarterkrinsky.com.*

**About Arthur Zagorsky, Partner**

*Arthur is a member of TKD's Corporate and Real Estate Practice Groups. He represents a broad range of clients, from start-up businesses to publicly-held companies, and has represented many clients in the staffing industry on mergers and acquisitions, shareholder and operating agreements and other contractual matters. Arthur can be reached at azagorsky@tarterkrinsky.com.*

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