

Strafford

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*Presenting a live 90-minute webinar with interactive Q&A*

# Shutting Down a Business: Minimizing Personal Liability and Steps to Take Outside of Bankruptcy

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TUESDAY, SEPTEMBER 8, 2020

1pm Eastern | 12pm Central | 11am Mountain | 10am Pacific

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Today's faculty features:

Cleveland G. (Cleve) Clinton, Partner, **Gray Reed**, Dallas

Michael P. O'Neil, Partner, **Taft Stettinius & Hollister**, Indianapolis & Chicago

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The audio portion of the conference may be accessed via the telephone or by using your computer's speakers. Please refer to the instructions emailed to registrants for additional information. If you have any questions, please contact **Customer Service at 1-800-926-7926 ext. 1.**

**TO:** All Practice Group Members  
**FROM:** Michael P. O'Neil  
**DATE:** March 19, 2020  
**RE:** Updated Checklist for Closing Down a Business in Indiana  
  
Privileged: Attorney Work Product  
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In the interest of streamlining communications with clients, I have prepared an updated version of our memorandum which can be used internally, but should not be distributed directly to clients without further discussion.

**A. Lender, Loan Documents and Collateral**

1. Obtain copies of all loan agreements, security agreements, etc., including any extension or forbearance agreements.
2. Conduct search of UCC filings; verify state of incorporation/organization.
3. Identify any defects in security or other documents.
4. Due diligence regarding any unique aspects or issues for that particular lender, including regulatory oversight or other special conditions that might limit the bank's flexibility.
5. Identify and review any subordination agreements and intercreditor agreements.
6. Identify any issues pertaining to unique collateral or statutes:
  - a. PACA/PASA
  - b. [other]

**B. Company Books And Records**

1. Obtain most recent balance sheet and other financial statements.
2. Determine if outside help is needed to prepare meaningful 13 week cash flow statements.
3. Get copy of latest borrowing base certificate if such items have been submitted to lender.

### **C. Employee Matters**

1. When is payroll distributed?
2. Is payroll processed through a third party (ADP) or by the company itself?
3. How many days in advance must the payroll account be funded?
4. Verify whether all trust fund taxes and other withholding items have been accounted for and remitted; if not, remedy immediately.
5. Verify type of health insurance plan and how funded; when does the existing policy expire.
6. Verify how many former employees are using COBRA coverage and how that is being funded and overseen.
7. Is there a union involved? Get copy of CBA and all pension plan info
8. Examine 401(k) plan; terminate any employer matching contribution requirement; insure that all funds withheld have been remitted to 401(k) administrator.
9. Terminate 401(k) plan and get the plan shut down in same calendar year; requires all accounts to be distributed; set up PENCHEX accounts for stragglers.
10. Fees for accountant/actuary needed for Form 5500 and other filings.
11. Notice to employees of termination or changes to any plan. Also determine whether WARN Act applies and issue notice if practical.
12. Identify any §125 plan, dental, optical and similar plans and properly terminate all such plans (refunds are an issue).
13. Key employee retention plan.
14. Any employee lien, "hot goods" or similar issues?

### **D. Insurance**

1. See references to health insurance and category C regarding employees.
2. Verify expiration date for all CGL, workers compensation and all other liability policies.
3. Post-closing, advise all insurance carriers regarding cessation of operations and try to recover unearned premiums.
4. See if there are any premium finance companies involved.
5. Look at key man life insurance policies and any cash surrender value.
6. Look into D&O policy and purchase "run-off" coverage.

### **E. Litigation**

1. Make sure we are aware of all pending litigation.
2. Obtain copies of all demand letters and similar communications.
3. Verify any arbitrations or similar proceedings.
4. Consider changing registered agent to Taft Service Solutions.
5. Any "bad check" criminal cases?

## **F. Real Estate**

1. Verify whether each business location is owned or leased.
2. Assure proper security for each location.
3. Verify terms of any leases including expiration dates, timely payment of rent and so on.
4. Determine whether company's secured lender has subordination/attornment agreement with landlord.
5. Verify whether any mortgages are properly recorded.

## **G. Taxes**

1. Once operations have ceased, file Form BC-100 (or equivalent) so that estimated taxes are not imposed when quarterly or other returns are not filed.
2. Obtain copies of relevant tax returns, including ad valorem property taxes, income taxes, real estate taxes, etc.
3. Determine what tax returns must/should be filed; final income tax returns; employment taxes.
4. Flag any personal tax liability for owners resulting from recent operations, cessation of operations, etc.
5. If any debt is cancelled as a result of a workout with the bank or other creditor, consider potential of cancellation of debt (COD) income and try to mitigate.
6. If individual guarantors are required to make payments to the secured lender, make sure their capital accounts at company reflect any such payments in order to increase basis and be able to take losses.

## **H. Guarantors**

1. Identify all existing guarantees.
2. Determine whether guarantees are unsecured or collateralized.
3. Have each guarantor update his/her personal financial statement in contemplation of negotiations with the lender; write down or write off the value of ownership stake in the subject company; determine whether any prior financial statements were inaccurate.

## **I. Generating Cash**

1. Determine if company needs additional professional assistance.
2. Identify any surplus inventory or machinery that can be sold.
3. Identify executive level expenses and items that can be trimmed.
4. Any football, basketball or other spring event tickets, any concert tickets, seat licenses, etc.?
5. Receivables collection; lender letter.

6. Sell customer lists, drawings.

**J. Corporate Governance**

1. Get broad Board resolutions approving sale of assets from shareholders/members, as well as board of directors.

**K. Professional and Other Fees**

1. See above regarding benefit plan and taxes.
2. Law firm.
3. Local counsel to defend creditor complaints, if needed.
4. C.R.O. and firm.
5. Key employees/C.R.O.
6. Secured party counsel
7. Real estate broker/auctioneer; equipment auctioneer

**L. Post-Closing of Sale(s)**

1. Appoint receiver: which county?
2. Identify receiver candidates

**M. Miscellaneous**

1. Forward mail after premises closed.
2. File annual reports to keep the corporation or LLC in good standing for some period post-closing.
3. Secure laptops, hand tools, etc.
4. Get rid of leased vehicles and equipment.
5. Identify and terminate company credit cards, especially American Express.
6. Document storage for key items; what happens at end of storage period?
7. Data Room

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# Shutting Down Your Business Q & A

FEATURED

Michael O'Neil

TYPE: LAW BULLETINS

DATE: 05/20/2020

As companies reach a point where they need to close down their businesses, there are many factors to consider. This bulletin addresses frequently asked questions and provides guidance on how to minimize risks associated with the shutdown.

## **My business is dead and can't be revived. How do I shut it down to minimize my risks?**

1. Shutting down a business that can't be revived is an art, not a science. People often speak of tossing the proverbial keys to the business's creditors, but as a practical matter, that usually doesn't work. Lenders and other creditors are under no obligation to catch any keys that are tossed their way.
2. You can contact us to obtain a detailed checklist of the issues that need to be addressed. Foremost on that list is ensuring that employees receive the wages, benefits, and vacation pay to which they are entitled. Such employee-related claims account for the vast majority of cases where creditors of a business assert claims against the owners for personal liability.
3. In addition, there may be additional sources of recovery that are not obvious to you right now but that could be used to fund the wind-down of the business. For example: tracking down insurance premium refunds, especially where premiums were based on headcount or revenue figures that are out of date; security deposits; season ticket licenses; and intellectual property licensing or sale.
4. See our Q&A regarding business owner guaranties [here](#).

We will continue to provide any guidance on companies under distress. If you have additional questions, our Distressed Company Task Force can answer, please email [distressedcotaskforce@taftlaw.com](mailto:distressedcotaskforce@taftlaw.com).

Please visit our COVID-19 Toolkit for all of Taft's updates on the coronavirus.

## Additional Resources

[COVID-19 Toolkit](#)

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