
LAWYERS AGAINST LAWSUIT ABUSE, APC

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The Top 10 Mistakes Which Can Lead to (or Worsen) Lawsuits

Many lawsuits are brought about, or worsened, by a common set of mistakes we see business people make over and over. California is experiencing a lawsuit crisis, which appears to be getting worse. A major component of this problem, which is completely avoidable, is the failure to take appropriate steps to reduce the risk of being sued.

The following list was compiled from the regrets expressed by defendants in lawsuits who suffered unnecessary and avoidable exposure and “wished they’d been warned.” While this is not an all-inclusive list, it does represent some of the more common mistakes we’ve seen which lead to, or worsen, lawsuits against small business:

1. Doing business as an individual or a partnership: You can be sued at any time, and many defendants who were doing business as individuals or partnerships have been forced to file bankruptcy, needlessly part with personal assets, and pay costly legal bills which in many cases could have been avoidable if they had properly formed a corporation or limited liability company (“LLC”) sufficiently before the lawsuit was filed.

If you are not doing business as a corporation or limited liability company (“LLC”), all of your personal assets may well be at risk for claims relating to your business operations. Doing business as a general partnership is even worse—you can be 100% liable for the some of the acts of your partners. Further, one or more associates or employees can be deemed a partner of yours for liability purposes, even if you had not intended them to be. A corporation or LLC can eliminate these and many other risks, and may provide important tax advantages as well. Many business owners put off incorporating because they think they can’t afford it, and usually find out too late that they can’t afford not to do it.

What can you do? Form a corporation or LLC as soon as possible, and take care to operate it so as to maximize your liability protection.

2. Holding real property in your own name, a living trust or a partnership: Real estate is perhaps one of the riskiest possible assets to hold in your own name, or that of a partnership or living trust. Aside from the fact that is it very easy to determine how much equity you have in every property you own from a free internet public records search, the presence of your name on the “chain of title” of a piece of real property can never be removed, and could become significant in the event of an

environmental or other lawsuit many years from now. Many lawsuits, such as ADA access lawsuits, can make the financial resources of the property owner highly relevant to the proceedings— if you don't hold your property in the name of a business entity, all of your personal resources may be deemed available for such purposes.

What can you do? Consider transferring/transferring your real property (except your home) to an appropriate LLC or Limited Partnership, and operate it to maximize liability protection; see Section 10 for home equity issues.

3. **Noncompliance with any statute, law or regulation:** There was a time when failing to comply with an applicable law or regulation meant that you only had to worry about action from appropriate governmental authorities; in fact, many of the smallest businesses in California do not strictly comply with all applicable laws, regulations and requirements. Today, however, the California Unfair Competition Law ("UCL"- Business & Professions Code §17200) allows private attorneys to file lawsuits against you on behalf of the general public; in many cases, these lawsuits have been filed under circumstances in which a governmental organization might not have taken action. In addition, because these lawsuits can be extremely burdensome and intrusive— and can even shut a business down-- many firms find it cheaper to settle, even though they have done nothing wrong.

What can you do? Check carefully to make sure every transaction and business practice in which you engage meets all applicable laws and standards— consult a qualified business attorney. Consider legal insurance and appropriate modifications to your standardized agreements.

4. **Engaging in Internet activity without the proper legal safeguards:** If you have a website or engage in Internet communication in your business, very small matters can lead to considerable liability. For example, when you make a statement or representation on the Internet, you are making it, in effect, to the entire world, and can be sued in any number of jurisdictions in which you may not realistically interested in doing business. A lawsuit that proceeds to judgment in many of these jurisdictions could be enforceable in the United States, and therefore cannot be ignored. If you do not wish to offer your product or service to (and risk being sued anywhere in) the entire world, it makes considerable sense to limit the terms of your website to reduce the risk of lawsuits from your Internet activity. There are other ways to do this as well, including requiring visitors to your website to agree to certain terms as a condition of accessing the information, products or services you provide. Particular attention should also be paid to privacy rights of visitors to your site, representations made about others or their products, the use of information you derive over the Internet, and the use of intellectual property of others.

What can you do? Make sure your website has appropriate terms and conditions and an accurate privacy policy with which you genuinely comply. Consider ensuring that your website is accessible to programs used by

visually impaired users to navigate the internet by voice. Have a qualified attorney review your site regularly.

5. **Advertising/statements about others or their products**: Advertising claims and representations about others (or which could have bearing on the business of others) should be reviewed in advance by a qualified attorney. **Truth is not a defense** to a number of powerful business tort claims like Intentional Interference with Contractual Relations and Intentional Interference with Prospective Economic Advantage.

What can you do? Avoid making representations about others and their products/services. If you must make them, have a qualified lawyer review them first.

6. **Failing to comply with access laws for the disabled**: Thousands of lawsuits have been filed throughout California against businesses which did not remove barriers that prevent the disabled from gaining access to the goods and services they provide. Many small firms have been closed, or forced into bankruptcy by these lawsuits; don't let yours be one of them. Too many business owners incorrectly believe that they have been "grandfathered" or are otherwise exempt from compliance with these laws because: (a) they have made no changes to their business for many years or (b) a building or fire inspector approved their premises. The fact is that if your business or website is open to the public, you may have obligations to make appropriate modifications to help the disabled have meaningful access.

What can you do? If your property has not been inspected by a qualified access inspector (i.e., not just the building inspector), arrange an inspection asap through your attorney (to preserve privilege if you are later sued). Train employees and implement policies to ensure disabled visitors receive all appropriate assistance.

7. **Not reducing the risk of employee claims**: Employment-related lawsuits can be among the most costly for the average employer to litigate. Despite this, many employers customarily fail to take reasonable precautions which can reduce the likelihood, if not prevent, these problematic suits.

What can you do? The following is not a comprehensive list, but can dramatically reduce the risk of lawsuits if done properly:

- a. **Run checks on prospective employees (with their prior consent)**: Some of the worst people can sometimes make the best first impressions. Given the cost of an employment-related lawsuit, a thorough background review and search for lawsuits, claims, judgments and bankruptcies may be the single best investment an employer can make.

- b. Consider a written employment agreement; confirm policies and reprimands in writing: Some lawyers have been reluctant to advise employers to have written employment agreements for fear they could create unintended expectations for employees. A well-drafted employment agreement should do exactly the opposite— it should eliminate any doubt about the requirements and expectations of the employer. For example, a prospective employee's agreement to, or acknowledgment of, permissible sick days, working hours, personal Internet usage and other important policies and procedures might help prevent uncertainties which could later lead to lawsuits.
 - c. Carefully document reprimands & terminations: Companies exist in perpetuity, but even the best employees will not stay forever. Because terminations are inevitable, the failure to plan for them is inexcusable. Consult a qualified lawyer if you are dealing with serious/repeated misconduct or need to fire someone.
8. Failing to confirm it in writing: While it is always best to have a qualified lawyer reduce any written agreements to writing, the fact is that this never happens in far too many cases which lead to lawsuits. Often, judges may be reluctant to invest the time and effort necessary to “figure out” arrangements the parties themselves did not bother to clearly confirm. Remember, that parties to an agreement can change with bankruptcy, death, retirement or resignation.

What can you do? Some written confirmation is almost always better than none. While it is generally better to have all agreements reviewed by a qualified attorney, sometimes, just the process of writing down the “deal points” or essential terms of any transaction can help eliminate uncertainty and/or future claims.

9. Failing to take out all appropriate insurance: If you fail to take out reasonable amounts of insurance for an activity for which insurance is generally purchased and available, you may not be entitled to corporate liability protection if sued. Additionally, insurance can be surprisingly useful in defending meritless claims, and coverage can often come from unexpected sources. Defending a lawsuit through trial can cost \$100,000 to \$500,000— unless you consider those numbers small, you could be forced to make significant settlement payments to settle meritless claims.

What can you do? Speak with several experienced brokers about coverage which may be available for your business, and consider a personal umbrella policy.

10. Failing to protect your personal assets: Even if you are doing business as a corporation or LLC, you can always be sued personally. While the protection that a corporation or LLC provides is an absolutely essential first step, too often, the need to protect personal assets is ignored. You can always be sued personally for any

matter in which you are, or even should have been, involved. If you are, any assets held in your own name are vulnerable to the claims of those suing you. Many people incorrectly think that each of the following can protect their assets:

- [Living Trusts](#): There is generally no asset protection from a living trust, unless it is ***irrevocable*** (i.e., can't be changed); almost all living trusts are revocable and offer no asset protection whatsoever.
- [Fictitious Name Statements \(i.e., DBAs\)](#): DBAs provide no asset protection.
- [Transfers to Spouse/Family Members](#): In many cases, such transfers can be ineffective; in all cases, they expose the asset to claims against the recipient and can easily be reversed by a court. Transfers to spouses may still be subject to community property claims without an effective transmutation agreement.
- [Individual Retirement Arrangements \(IRAs\)](#): Unlike an ERISA-qualified pension plan (which has strong asset protection), the protection of most IRAs is limited, at best, and may not provide any meaningful protection when you need it.

[What can you do?](#) While this section cannot include a comprehensive discussion of all available means to protect personal assets, or even the selected few summarized below, the following are among the more common alternatives you might consider:

- [ERISA-Qualified Pension Plans \(not IRAs\)](#): These are available through most brokerage houses and if properly structured can provide some of the strongest asset protection available.
- [Family Limited Partnerships \(FLPs\) and Family Limited Liability Companies \(FLLCs\)](#): In addition to substantial tax and estate planning advantages, FLPs and FLLCs have offered strong asset protection to families for decades.
- [Offshore trusts](#): Certainly not for everyone, these arrangements are becoming less expensive and more common, and provide a level of protection and anonymity which can't be matched in the U.S.

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