

FRANLAW[®]

MICHAEL R. LISS

Business & Franchise Attorney
1301 West 22nd Street, Suite 709
Oak Brook, Illinois 60523
(888) FRANLAW

Liss & Lamar, P.C.
Telephone (630) 571-5625
Facsimile (630) 571-1882
e-mail mliss@FRANLAW.com
<http://www.LINKEDIN.com/in/MichaelLissEsq>

HOW TO BUY A BUSINESS: A LAWYER'S PERSPECTIVE

By Michael R. Liss

How can you increase your chances of success in business? That is a question many new business owners ask. Obviously many elements are necessary to succeed in your own business. It is my experience that buying an existing business is one of the best ways to bring together those elements needed for your immediate success.

New business owners always want to know how successful or profitable their new business will be. Their initial business plans are, among other things, attempts to estimate early results. But these are guesses at best. When you buy an existing business, the seller's past performance can be the best indicator of your future success.

Rely on Historical Performance

When you start a business from scratch, there is no way to know how well that business will do. You could start it as a franchise, and then you would have some clue as to how it might perform, because it is a clone of other similar stores in the same franchise chain. However, what if you could know *how this business at this location with these employees performed?* What if you could see exactly how profitable this business was last week, last year and for each of the last five years. That would be reassuring to you and to your potential lenders or investors. That is what buying an existing business can mean to you.

Built-in Source of Financing

Financing is another reason to buy an existing business. Most businesses are sold with some form of seller financing. Typically, the seller may require one-third of the price as a down payment and payment of the balance over five years along with eight percent interest. This is, in effect, a built-in source of a loan for you. That way you can afford to buy a bigger business which then makes you an even larger profit.

The seller is frequently much more willing than a bank to finance your purchase, because the seller truly understands the business and its value. With respect to bank financing, banks are far more willing to lend you money to buy a business which has a successful track record than they are to lend you money on a startup business.

Key Employees

When you buy an existing business, you receive trained employees right along with it. This can be very worthwhile. These employees can be the reason customers come to the business as well as the reason suppliers deal with it. When you buy the business you receive not only the equipment but also the people who make it successful.

Start in Business Immediately

In business, time is critical. Starting a business from scratch always seems to take forever. This is because there are so many aspects of the business you need to coordinate before you can start operating and then eventually become profitable. When you buy a business, everything is there. It is an operating business. You start immediately.

Can You Find a Good Business For Sale?

One of the biggest challenges of buying an existing business is simply finding one for sale. There is a shortage of good businesses for sale — so many buyers, so few sellers. You will need to use professionals to help you. Use the networks of business attorneys, bankers, accountants, insurance agents and business brokers. They know business owners. You will also find yourself calling and visiting business owners personally to inquire about buying their businesses. It may be a long search.

Investigate, Negotiate, Document

As a business lawyer, I work on the “due diligence” investigation and prepare the legal documents to purchase the business. I focus on the contracting process. There are three elements to this process: Investigate, negotiate and document.

During the due diligence investigation, you will find out if this business is really what the seller told you it was. This thorough investigation is done before you buy the business. The business books and records are carefully examined by your lawyer, accountant and you yourself. This includes financial statements, tax returns, customer contracts, supplier relations, employee issues, real estate leases, title to business properties, trademarks and all other aspects of the business that you deem important. If the condition of the business is found to be unsatisfactory, then you do not have to purchase it.

Purchase of Assets Structure

Businesses can be bought by either buying the assets of the business or by buying the stock certificates of the selling corporation. Either way, you end up with the business. Most deals are structured as a purchase of assets in order to minimize the chance of the liabilities of the seller becoming the obligations of the buyer. Also, there may be better opportunities for the buyer to depreciate the purchased assets and take tax writeoffs when the buyer purchases assets.

Typical Contract Provisions

The typical legal provisions in an Asset Purchase Agreement are listed in the table accompanying this article. In general, you will find that sellers desire short agreements that just describe how they will get their money. However, in general, you will find that buyers want long agreements in order to carefully describe the exact condition of every aspect of the business so that if there are any surprises, it will be the seller who has to pay for the harm caused. Since buyers do not want to become responsible for the seller's problems, buyers require the seller to state exactly what problems do exist and that in fact no other business problems exist. This is also why the lawyer for the buyer tends to write the first draft of the Asset Purchase Agreement.

Hire an Experienced Business Lawyer

If you are planning to buy an existing business, you will need an experienced business lawyer, one who does these deals frequently, knows the terms, negotiates superbly and, most importantly, does not kill your deal. Your business lawyer will check out the business you propose to buy and then prepare the legal documents to protect you. That way you will receive the right business in the right condition.

Michael R. Liss is a business and franchise attorney working to help businesses start and succeed. He is a frequent instructor at area colleges on buying a business, franchising, financing, and the legal issues which business owners must know. He can be reached toll-free at 888/372-6529.

**TYPICAL CONTRACT PROVISIONS
OF THE
ASSET PURCHASE AGREEMENT**

1. Introduction
2. Identification of Parties
3. Definitions
4. Assets Being Sold
5. Purchase Price and Financing
6. Closing Requirements
7. Covenants and Agreements
8. Representations and Warranties of Seller
9. Representations and Warranties of Buyer
10. Indemnification
11. Termination
12. Miscellaneous
13. Execution
14. Exhibits