

**2019 INFORMATION & INSIGHTS**

# For Entrepreneurs & Employers

**BOYAR**  **MILLER**  
ATTORNEYS AT LAW

FELLOW BUSINESS OWNERS,

---

# The entrepreneurial spirit is alive and well.

Starting, growing or selling a business is exhilarating and current trends indicate that this may be a good time to put plans into action. The Houston economy is strong, some capital is still available, and the city possesses a powerful support network for business owners.

We understand the challenges and the opportunities in building a business, and we have helped clients put their dreams into action. BoyarMiller serves as a strategic partner for businesses of all sizes—from entrepreneurs to Fortune 500 companies. Whether you are forming, buying, selling, or expanding a business, we support and help you to advance your business goals by bringing new possibilities into focus with clarity and confidence.

We also believe in sharing our knowledge and providing perspectives to help our clients succeed. This eBook offers information and insights that may be of interest to both entrepreneurs and employers. Regardless the size of your business, we hope you find it of value as you assess your business plans and challenges.



Please contact us if we can help you face business challenges and pursue new opportunities. It's what we do.

Best regards,

*Chris Hanslik*

**CHRIS HANSLIK**  
Chairman

## TABLE OF CONTENTS

---

- 03 : Selling a Business? Steve Kesten Answers Four Key Questions
- 04 : Employers Beware: Non-competition Agreements Are Confusing
- 05 : Entrepreneurial Resources
- 06 : Legal and Ethical Challenges for Employers in an Online World
- 07 : Entity Selection for Business Owners
- 08 : Employer Considerations in a #MeToo World
- 09 : Entrepreneurial Inspirations
- 10 : The BoyarMiller Difference
- 11 : Practice Leaders

## CONTACT

---

2925 Richmond Avenue  
14th Floor  
Houston, Texas 77098

713.850.7766  
**boyarmiller.com**



# Selling a Business?

## STEVE KESTEN ANSWERS FOUR KEY QUESTIONS

Mergers and acquisitions have become increasingly common in today's highly competitive business world. There are many factors to consider when making this important decision, such as: strategy, culture, timing, and finances. BoyarMiller Business Group Chair Steve Kesten answers four common questions he is asked about selling a business.

Q Is now a good time to sell a business?

A Yes. Absolutely. Corporate and private equity purchasers today have access to record amounts of capital. Tax reform combined with a more relaxed U.S. regulatory climate have fueled activity and it is expected to continue this year.

Q So what is the first step for those considering selling their business?

A Prepare—get your house in order. That includes reviewing the company's records to make certain they are in a good state. Be ready to tell your growth story throughout the years, and make the case for the company's continued growth. The private equity market wants to see a path to growth for the next three to five years, at least.

Q What options are there for structuring the transaction?

A There are two primary types of transactions to evaluate—asset sale or stock sale. It has been my experience that many buyers prefer asset sales involving the purchase of the seller's assets and liabilities. Conversely, most sellers prefer stock sales where the owner's equity securities in the entity are purchased. Among the considerations that must be addressed when evaluating the type of transaction are tax implications and retained liabilities.

Q How much longer will it be a good time to sell?

A Prospects for the M&A market remain strong this year. In a 2019 M&A trends report by Deloitte that surveyed U.S. dealmakers, 79 percent of respondents expect the number of deals they close in the next 12 months to increase, up from 70 percent last year. Companies still seem eager to sell and the capital to support purchasing activity is still abundant.



# Employers Beware:

## NON-COMPETITION AGREEMENTS ARE CONFUSING

Non-competition agreements in Texas have become an increasingly contentious area of litigation over the past decade and are a confusing area of law for employers. At its core, a non-competition agreement is a document that attempts to block an individual from potentially entering into competition with another party. These agreements have become common when hiring employees who will be exposed to sensitive information about the company. BoyarMiller Litigation Group Chair Andrew Pearce provides answers to three common questions about enforcing non-compete agreements.

**My employee's non-competition agreement from a previous employer stated "confidential information" would be protected. What information are they talking about?**

"Confidential information" can mean many things to many people and can vary widely by industry. Routinely in litigation, the question of whether certain information is truly "confidential" is hotly contested. Therefore, to protect information that is confidential and proprietary to their business(es), employers must strive to be as specific as possible in defining what truly is "confidential," while still allowing for the inclusion of a proper breadth of proprietary material.

**If I pay severance to a terminated employee, can I receive a post-employment non-competition agreement?**

Under Texas law, the consideration given by an employer in exchange for a non-competition agreement must possess a "reasonable relationship" to the employer's interest in restraining the employee's competition against the employer's business. Though Texas courts have significantly reduced the legal threshold for what form valid consideration can take, a lump sum payment of money at the time of termination is presently unlikely to pass muster as being reasonably related to the employer's interest.

**Is my employee's non-competition agreement enforceable from state to state?**

What constitutes "the law" is not the same from state to state and, in fact, can vary widely on any particular issue. This is certainly true when it comes to the enforcement of non-competition agreements. For instance, given Texas' general reputation as being a pro-business state, it is not surprising to find that non-competition agreements are routinely enforced as a protection of free enterprise within the Lone Star State. On the other hand, California generally does not allow for the enforcement of non-competition agreements. Other states will vigorously reform a subject non-competition agreement or take a "blue pencil" to the agreement and find objectionable provisions as void or unenforceable.



# Entrepreneurial Resources



## Network and Expand Your Business through TEI

The Entrepreneur Institute (TEI) is considered the original network for business leaders. TEI's Houston Chapter provides an active support system of experienced executives and business owners who want to share their knowledge through an open exchange of ideas to support business growth.

BoyarMiller is a proud partner of TEI, and Shareholder and Business Group Chair Steve Kesten is a past board member and past chair of The President's Forum, an annual conference for small- and medium-size business leaders. The conference brings together a powerful network of entrepreneurs and expert service providers to deliver valuable insights, practical solutions, and innovative ideas on growing a business. Scheduled in October, attendance for TEI's annual conference is by invitation only, fostering strong peer-to-peer interaction.

For information about the next President's Forum and other TEI Houston networking programs visit [www.tei.net/partners/houston](http://www.tei.net/partners/houston).



## EO Houston Accelerates Business Growth

The Entrepreneurs' Organization (EO) is a network of influential business owners and its Houston chapter consists of more than 160 members. The purpose of the chapter is to provide entrepreneurs a local resource for them to learn and grow including access to executive education events, networking opportunities, and mentorship programs.

As an EO Houston partner, attorneys at BoyarMiller regularly deliver presentations and share information to help other members advance their business goals.

For membership information about EO Houston, visit [www.eonetwork.org/houston](http://www.eonetwork.org/houston).



## Texas Global Business Network Assists International Companies

BoyarMiller Shareholder Gus Bourgeois is the founder of the Texas Global Business Network (TGBN), a networking group of seasoned professionals who assist international entities in doing business in the U.S., specific to Texas. TGBN provides support, counsel and services for companies seeking to acquire U.S.-based businesses and establish strong U.S. operations once an acquisition or expansion is finalized. Each TGBN member has years of experience in working with international businesses in such areas as legal, international tax, immigration, insurance, employee benefits, banking, real estate, payroll, and human resources.

See [www.texasglobalbusiness.com](http://www.texasglobalbusiness.com) for more information.



# Legal & Ethical Challenges FOR EMPLOYERS IN AN ONLINE WORLD

Hiring employees is a critically important milestone when building a successful business. It can also be costly whether the “right” employee is hired or one that doesn’t meet job expectations.

BoyarMiller Chairman Chris Hanslik presented an overview of pre-employment screening and other hiring strategies to the Association of Corporate Counsel Houston chapter. Pre-employment screening refers to the process of investigating the background of potential employees and is commonly used to verify the accuracy of an applicant’s claims. It can also be used to discover criminal history, workers compensation claims or employer sanctions.

## **THERE ARE SOME IMPORTANT RESTRICTIONS EMPLOYERS MUST KNOW WHEN SCREENING APPLICANTS:**

- In-house searches have become more common and a generally accepted practice with the availability of online resources. They include Google searches of applicants, checking LinkedIn profiles, and conducting public record searches.
- Employers who consider hiring an outside company to conduct pre-employment screening must be aware that the Fair Credit Reporting Act requires written notification and consent of the applicant before obtaining a report.
- Prior to taking any adverse employment action, it is required that the employer provide a copy of the screening report to the applicant along with a copy of “A Summary of Your Rights Under the Fair Credit Reporting Act” that is readily available online.
- If an adverse employment action needs to be taken, employers must:
  - Advise the applicant in writing of the rejection and that it was partially based on the information obtained in the report.
  - Provide the contact information for the consumer reporting agency that was used for the screening. Advise the applicant that the agency did not make the hiring decision, and so it cannot provide any reasoning for that decision.
  - Know that the applicant has a right to dispute the accuracy of the report and can receive an additional free report within 60 days.
- It is best to exercise caution when asking applicants about arrest records.
- A recent 5th Circuit Opinion (State of Texas v. EEOC) suggests consideration of an applicant’s criminal conviction record may be permissible in the hiring process. The court recognized that, at times, employers have a genuine interest in not hiring persons convicted of violent crimes and those involving drugs, dishonesty or theft as examples.
- There are limitations in Texas that prevent a consumer reporting agency from releasing information related to a person’s conviction that is more than seven years old. An exception to that restriction applies if the applicant’s annual salary will be more than \$75,000.



Some studies have shown that replacing a salaried employee can cost a business owner more than six months of that employee’s salary. Making the correct hiring decision is important, and so is understanding the legal implications involved in pre-screening applicants.





# Entity Selection

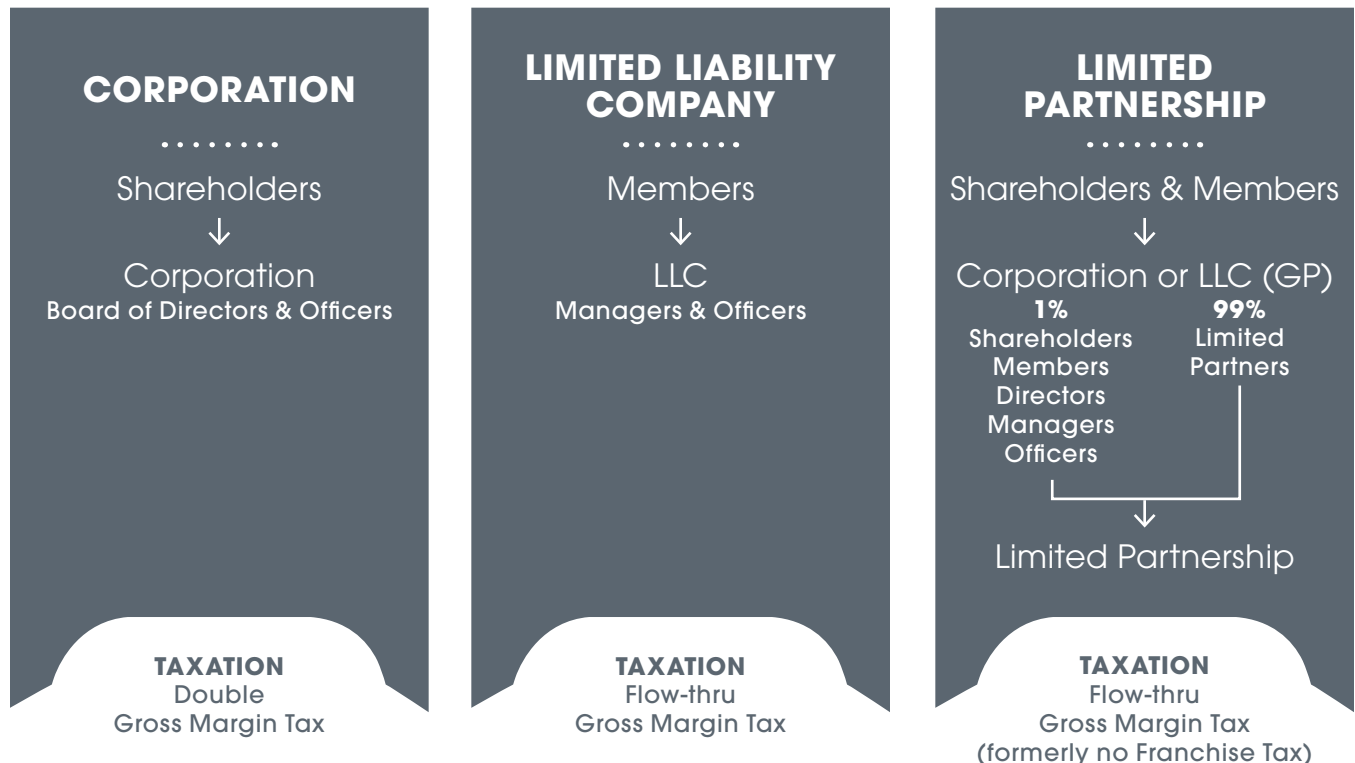
## FOR BUSINESS OWNERS

Selecting the type of legal structure for a business is one of the most important, yet complex, decisions for entrepreneurs. There are several forms from which to choose and each one offers different considerations regarding taxes, personal liability, record-keeping, and even the future sale of the business. It is essential to understand the differences, and to select the appropriate structure for the business.

“Get expert advice upfront from an attorney and accountant to fully understand the pros and cons of various types of business entities. The only correct entity structure is the one that is right for your current and long-term business goals.”

**STEVE KESTEN**, *BoyarMiller Business Group Chair*

### BASIC COMPARISON CHART OF THREE STRUCTURES





# Employer Considerations

## IN A #METOO WORLD

Workplace harassment cases cost businesses millions of dollars every year in lawsuits and reduced productivity. In 2017, the Equal Employment Opportunity Commission (EEOC) obtained \$46.3 million in monetary benefits for victims of sexual harassment. That is the same year that the #MeToo movement heightened awareness of sexual harassment in the workplace.

Since then, many employers have taken new steps to prevent or to address these cases by instituting a strong anti-harassment policy and by increasing employee training. Employers have an obligation to maintain a safe and harassment-free workplace for all employees.

---

### STEPS FOR EMPLOYERS TO CONSIDER TO AVOID LAWSUITS AND CREATE A POSITIVE WORKING ENVIRONMENT

---



Develop a well-written anti-harassment policy that describes what constitutes “harassment” and reflects zero-tolerance for the behavior.



Promote the phrase: “If you see something, say something.”



Be certain employees understand that there is no retaliation for reporting.



Make it known that any report of harassment will be investigated thoroughly.



Begin employee training during the on-boarding process.



Consistently educate your employees; one 45-minute video is not sufficient.



Advise employees of a well-documented reporting structure including multiple outlets for reporting.





# Entrepreneurial Inspirations

## 27million

working-age Americans  
starting or running  
new businesses

*Source: 2017 Global Entrepreneurship  
Monitor United States Report*



## 42

The average age of  
an entrepreneur starting  
a business

*Source: 2018 MIT and U.S. Census  
Bureau Study*

## Most entrepreneurs are **NOT** millennials

*Source: "Age and High-Growth Entrepreneurship"*

## 24%

U.S. entrepreneurs  
who expect to  
hire 20 people  
in 5 years

*Source: GEM United States 2017 Report—Babson College*

## 27million

Americans will leave  
the traditional workforce  
in favor of full-time self-  
employment by 2020

*Source: FreshBooks 2018 Report*

## 40%

of new businesses  
are started by women

*Source: 2018 State of Women-Owned  
Businesses Report*



## 125%

higher success rate  
of entrepreneurs who  
worked in the industry  
of their new business

*Source: FitSmallBusiness.com*



## 51%

Working population says  
it's a good time to start  
a business

*Source: 2019 Startup Statistics—  
Small Business Trends*



# The BoyarMiller Difference



Our commitment to our mission guides us to provide counsel beyond expectations, build lasting relationships, and make a meaningful difference in people's lives.



Today's business environment produces many varied obstacles, but also endless opportunities. We strive to guide you forward, bringing new possibilities into focus along the way, and achieving extraordinary outcomes with confidence and clarity.



We work hard to understand each client's business, strategies, and goals. The result is longstanding relationships built on trust, honest communication, and respect—all of which are critical to an effective professional relationship.



We offer comprehensive legal services including corporate, finance and capital formation, real estate and real estate litigation, business litigation, employment litigation, and probate litigation.



BoyarMiller is a strategic business partner with its clients, and we are rooted in a culture of achieving practical business solutions using our vision, creativity, and expertise.



BoyarMiller has a long-term history of supporting organizations for entrepreneurs and business owners such as EO Houston and The Entrepreneur Institute (TEI).



Our business law and litigation practice groups serve multinational companies, middle-market businesses, and entrepreneurs in need of collaborative and strategic representation.





# Practice Leaders

**CHRIS HANSLIK***Firm Chairman*

---

Represents companies in all aspects of the energy sector, both domestically and internationally, in disputes ranging from breach of contract and fraud to misappropriation of trade secrets and employment-related disputes. Has secured favorable results in both state and federal courts, as well as international arbitration proceedings for energy clients.

**STEVE KESTEN***Chair, Business Group*

---

Represents multiple international energy and energy services clients with outbound expansion (i.e., U.S. companies expanding internationally) and inbound expansion (international companies expanding to the U.S.), including start-up expansion or expansion by acquisition, as well as in connection with financing and merger and divestiture transactions.

**ANDREW PEARCE***Shareholder, Litigation Group*

---

Represents both individuals and corporations in all types of commercial and business litigation—including the oil and gas and chemical industries—for conflicts involving employment disputes, trade secrets and confidential information, breach of contract, and more.

**BILL BOYAR***Founding Shareholder, Business Group*

Represents the various parties involved in the acquisition, disposition, capitalization and financing of national and international businesses. Served as lead counsel for numerous complex, multi-party acquisitions and project financings with significant experience in corporate finance, mergers and acquisitions, private equity, and structure finance.

**GARY MILLER***Founding Shareholder, Business Group*

Represents numerous domestic and offshore-based companies in connection with acquisitions and divestitures, financings, joint ventures, and general corporate matters in the U.S.