

# Environmental laws pose dangerous liability for small business



## SMALL BUSINESS BY MARK STEVENS

Ask small business owners to name their biggest problems and many will say "taxes and competition." But another major threat, the growing exposure to environmental laws, is often unnamed and unnoticed. With the government now cracking down on environmental offenders, this kind of management myopia can cost companies hundreds of thousands of dollars in fines and penalties.

"Unlike big corporations which have entire departments assigned to monitor and implement compliance with environmental laws, small companies generally have to rely on outside consultants for that," says Howard Epstein, a partner with the law firm of Lord Day & Lord, Barrett Smith. "Because this can be costly, management often ignores the problem, hoping that it will simply go away. Of course, that's a pipedream. The failure to recognize and deal with environmental laws leads to greater and more costly liability down the road."

At the crux of the problem is a new focus by government agencies on small and mid-size companies. Although most of the environmental laws have been on the books for years now, many

have phase-in provisions that are first impacting smaller companies.

"Consider the rules for the proper treatment of underground tanks used to store fuel and hazardous materials," says Lord, Day & Lord attorney Larry Schnapf. "These rules have applied to big companies for years, but are now applicable to mom and pop firms with as few as one tank. They must meet strict standards designed to prevent the contents of their tanks from leaking.

"In many cases, this means removing tanks and retrofitting them. Because small companies are often hard-pressed to secure sufficient capital for this, compliance with the law can pose a major hardship. One solution is to seek financial assistance from vendors whose products are stored in your tanks. This can be

especially effective for gasoline and heating oil dealers."

While you may be tempted to risk environmental exposure on the theory that the liability from fines and penalties will be less than the cost of compliance, be aware that there may be more at stake than your company's bank account. The majority of criminal cases brought against environmental offenders involve the owners of small and mid-size companies.

"Because major corporations have so many levels of management, the government often finds that it cannot place culpability with a single individual," Epstein says. "But because the small business owner often plays a prominent role in all of his company's affairs, he can be singled out as the culprit responsible for environmental abuse. When that happens, owners find themselves facing jail sentences."

Even those companies that are aware of environmental issues, and that make a determined effort to comply with the law, can find themselves subject to liabilities they never knew existed. When you lease a business facility, for

example, you may be held liable for illegal practices committed by the landlord or the previous tenant.

"Assume the previous occupant discarded hazardous materials in the septic tank," Schnapf says. "Unless you take steps to limit your liability, you could get nailed for that. One strategy is to conduct an environmental audit of the property before signing the lease. This way you'll be forewarned of non-compliance and can ask that abuses be corrected before you move in. But whether you do an audit or not, you'll want to have a clause in the lease declaring that the facility is in full compliance with environmental laws and indemnifying you against any claims if this proves to be untrue."

In another often-overlooked exposure, companies may be in the habit of discarding used materials, fluids and lubricants "behind the building." Although these so-called bone yards may be convenient dumping sites, they are often

illegal.

"Let's say you are storing hazardous waste on your property," Epstein says. "Even if the waste is in properly sealed containers, it must be removed from the premises within 90 days. Failure to do so may subject your company to substantial fines and penalties.

"What's more, when government inspectors see bone yards littered with violations, they view this as a red flag indicating extensive non-compliance with environmental laws. Many will subject the company to an extensive review."

If you've always dealt with environmental abuse by looking

the other way, or by crossing your fingers in the hope that you wouldn't get caught, the time has come to reassess your practices. The wisest approach is to develop a strategic plan, listing each area of environmental exposure and taking steps to assure full compliance. Environmental consultants, as well as lawyers specializing in this field, can guide you through the process.

For a list of Cash Sources for Small Business, send \$1 and a stamped, self-addressed envelope to Mark Stevens, PO Box 487, Chappaqua, NY 10514.

*Mark Stevens' syndicated column appears weekly in Business Monday.*