

# THE DANGER ZONES

THE TOP 5 RISK AREAS EMPLOYERS DON'T  
REALIZE CAN PUT THEM OUT OF BUSINESS  
(AND WHAT TO DO ABOUT THEM!)



BRETT TREMBLY

# The Danger Zone

The Top Five Risk Areas  
Employers Don't Realize  
Can Put Them Out of  
Business (and What to Do  
About Them)

Brett Trembly

The Danger Zone

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# About the Author

Brett Trembly is the Founder of Trembly Law Firm, a franchise and business law firm in Miami. From one attorney in 2011, the firm has grown to nine attorneys and twenty employees. Trembly Law represents some of the largest businesses in the eastern United States, as well as many small local businesses. All clients are equally important, as the firm's mission is to "*protect the economy one business at a time.*"

Brett grew up in Albuquerque, New Mexico. In 2005, he moved to Miami to attend the University of Miami School of Law. He lives in Palmetto Bay, Florida, with his wife and three children: Liv (age 7), Ritter (age 4), and Bentley (age 1). In the South Florida legal community, Brett has served as President of the South Miami Kendall Bar Association and as Vice-Chair of the Florida Bar 11th Circuit Grievance Committee 11. He also volunteers on the Florida Bar Young Lawyers Division Mentoring Program, the Dade-

County Bar Association's Rainmakers Committee, and annually for Miami-Dade County's Ethical Governance Day. Brett was named a Super Lawyers "Rising Star" in Florida for the past four years and was on *American Ninja Warrior*.

Regarding his philanthropic and business involvement, Brett is strongly committed to leadership and giving back, having served as President of the Rotary Club of South Miami, President of a B.N.I. Chapter, and Vice-President of the Rotary Foundation of South Miami, Inc. He has also served as Director of the Palmetto Bay Business Association and has also been a Board Member of the *Gentlemen's Journal*. Brett is actively involved in the Pinecrest Business Association and the Entrepreneurs' Organization.

Two years ago, Brett organized a fundraiser for hurricane relief for Puerto Rico; he raised over \$7,000 in just a few weeks. This year, on October 10th, Trembly Law Firm is hosting its first annual Charity Domino Tournament, to benefit, Walk to End Alzheimer's. Next year, Brett would like to host this event to help the Nicklaus Children's Hospital Foundation.

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# Introduction

Business owners are the backbone of our economy, supplying more than half the jobs in the United States. Typically, a business owner's day consists of dealing with clients, overhead, payroll, and other expenses, as well as putting out fires. As a norm across most companies, the business owner gets paid last. With all the focus on clients and employees, it's easy to become overwhelmed with the small print that takes place every day in conducting business in South Florida. Unfortunately, ignoring the small print or not being aware it exists can open the business owner up to lawsuits, which can sometimes lead to the closure of the company.

Why should anyone who puts their heart and soul into their business, go through the struggle only to have the very people they're working to employ be able to turn around and sue the company? Most people think that being an entrepreneur is easy; only business owners

know how hard it is. Watching an employer lose all their hard-earned savings due to the cost of litigation is heartbreaking. In too many ways, employers are leaving themselves exposed right now, and we want to help.

After reading this book, you should have a better understanding of the common pitfalls that lie in wait for business owners regarding different aspects of employment loss in addition to the ways you can learn to protect yourself and your business in the future.

Who are we and how can we help you?

Over the years, I have spoken to hundreds of people who want to be in business for themselves. The one thing they hold in common is the idea that being a business owner is easy, and that the money always rolls in. Of course, entrepreneurs, employers, and managers know that isn't the case, but it could be. With the proper legal, financial, and operational guidance, owning a business can *and should* be fun.

In our business, the Trembly Law Firm, we have had above 50% growth for six straight years. We just hired our ninth attorney; we don't see the growth slowing down any time soon. With every *great hire* we make, we ensure the new team member fits our core values. We implement structured training programs to ensure we set up the *great hires* for success. By faithfully following a proven system for success, we have increased the value we can offer to our clients.

I mention all of this because we want the same success for you: a thriving enterprise, with the confidence of knowing your legal foundation is solid, and you're ready to build. We look forward to partnering with you in the future. You have enough on your plate with working in and running your business, let us take care of the small print.

From the bottom of my heart, thank you for reading this book. It's our very first book, and we hope the conversational style gives you some comfort about your business and some ideas for improvement. After all, a business is like a tree; it's either growing or dying. There is no in-between.

Thanks again and best of luck in your journey.

Protecting the economy one business at a time,

*Brett*

# The First Danger Zone Lack of Corporate Infrastructure

Many people go into business on a handshake and a promise. We've seen a lot of success stories of businesses that started in somebody's garage, such as Amazon and Microsoft. Once you dive deep to learn more about the early days of those businesses, you will see the struggle for equity and buyout, and always, there will be fights over ownership.

If you have read the book *Accidental Billionaires* or watched the movie about Facebook, *The Social Network*, you know the owners were embroiled in years of litigation because of the lack of written documents. Many people don't take the time to put corporate documents in place to protect their business. They think, "Let's go into business and start making money, and we'll deal

with it later. We're all friends here. I'm sure it will be fine."

There's a major problem with that type of non-planning. Most of the time, owners never deal with it "later." They get too busy.

### **The Time to "Get Legal Advice" is Before There's a Problem**

Let's be honest, as long as the money is coming in; you don't stop and think about protecting yourself. Problems arise when you must rely on your memory instead of an official document all the partners signed. It's a proven fact everyone will remember the same event in a different way. Even if you have the best of intentions, if you have one or more business partners, the way you remember the agreement can vary greatly, and each person thinks his or her memory is correct. When two people honestly believe they're right, that's when a lot of problems arise. And those problems can get very expensive very quickly.

For example, Trembly Law Firm represents a client who started a business back in the late '80s. For 20 years, things were fine. Out of the three shareholders in the business, the third shareholder acted more like a straw shareholder for the person's spouse, who pulled a lot of the strings for a long time and claimed (his or her) absence on the corporate documents, was due to tax reasons.

The shareholders' agreement was written up in the early 1990s; unfortunately, it left a lot to be desired. As the business continued to grow, no one ever went back and wrote up a more formal and proper shareholders' agreement, nor did they ever draft bylaws. For over 25 years, they managed the company flying by the seat of their pants and grew it into an almost \$10 million company. They never went back and corrected all the things they had forgotten to do in the early 1990s. This is such a common story in businesses across the U.S that it is simply mindboggling. We often hear, "Attorneys are too expensive," or, "We just didn't want to take the time to put all of our documents in place."

Let me show you what happens when you don't "take the time." In the business mentioned above, the guy pulling strings tried to do a corporate takeover. He claimed he had asked for and received over 50% of the company on a deal via email. This led to a costly litigation case that has dragged on for years. The two very honest shareholders who did all the work for all those years had sent money to the third shareholder, who wasn't doing any work. They were afraid of losing their business despite dedicating three decades to growing the business and providing an excellent financial foundation for their families. The human devastation and business wreckage of prolonged litigation are just heartbreaking.

Without getting into too much detail, that situation is not completely resolved. You can imagine the amount of stress and anxiety those business owners have faced, just thinking about having the business taken away from them. Not only did they not have their shareholders' agreement reviewed and rewritten, but they also didn't develop bylaws or take minutes or have annual meetings for all those years. Then they negotiated with one another via email and made big promises and agreements that led to a lot of circumstantial evidence, which creates a lot of problems. Usually, in one of these fights, the party that comes out on top is the party with the most money.

It's also very, very hard to save a corporation that has experienced fighting among shareholders. At that point, the business normally implodes. Everything you've worked for goes away because the two sides or three sides will fight to the bitter end.

### **The Best Place to Start is at The Beginning**

As I said earlier, the first danger zone is a lack of corporate infrastructure. If you are starting a business or thinking about starting a business, see somebody right away who can help you get your ducks in a row. If you're currently in business and you're thinking, "I'll handle it someday," that day should be today. You cannot put off ensuring your documents are in place, and your business is protected.

Another huge thing that causes business owners, a lot of problems is when their CPA does the incorporation. With all due respect to CPAs, they don't have a legal background. While your CPA should help you create a tax strategy, they should not be incorporating you and selecting your legal entity. What they will do is buy you that black binder with the name imprinted and hand you something that says Shareholders' Agreement and Bylaws and Stock Certificate, so you feel like you have something in place, but none of the content is filled out.

Some of our clients are business owners who have been in business for years and years. They will say, "Here are my books," and when we open the binders, they're completely blank. That means going back to the drawing board, so the owners are trying to prove via tax returns and other circumstantial evidence which actually owns what part of the company and who's in control until someone ends up in court, digging through the Florida corporate statutes trying to figure out the best argument to save the company. That's another heartbreaking situation that could have been easily avoided if taken care of in the beginning.

You can face danger from a third party, such as dealing with litigation risk or dispute. When the partners or shareholders themselves are fighting, the business can implode from the inside out. That's a very, very tough situation to

deal with, an unfortunate situation that we see all the time.

## **Getting Everything Together**

As far as your documents are concerned, a Limited Liability Company (LLC) is a great option, and a corporation is an okay option depending on your goals. When I say, “getting your documents together,” I mean drafting an operating agreement if the company is an LLC or a shareholder agreement if the company is a corporation.

*You must have your operating agreement  
or your shareholder agreement in place.  
It's your business bible.*

It says who owns what, who's responsible for what, who's allowed to do what, and who isn't allowed to take specific actions. It may not seem like a big deal and it may appear obvious who does what daily. But things change and people remember differently, so it's essential to have everything in writing. These documents are a legal guide to the ownership of the business and the decision-making structure that has been put into place. But it's important you know that it's not a public document.

There is a website called Sunbiz. This website is a very misunderstood part of the Florida government. It's the site where owners can register and file an annual report for a corporation with the Division of Corporations. For instance, people will say, "Well, my name is on Sunbiz." The problem is that Sunbiz can be changed easily and without notice. Also, it's only there to show a public record. It doesn't prove who owns how much of a company. Please don't rely only on Sunbiz, because it really gives you no protection.

I'm often asked if one type of distinction is better than the other, whether it's a partnership, an LLC, or an S Corp. I don't want to get people confused because an S Corp is not a legal entity. It's just the way a company is taxed. A lot of people get confused about that. The default should be an LLC. If certain things are in place, you may want to file as a partnership or a corporation. My advice is that you should meet with your attorney and your CPA at the same time, as a team of people who should help you. Your attorneys should not be doing your tax advice. Your accountant should not be giving you legal advice. By getting everyone together in the same room, you can sleep well at night knowing you've done the absolute best thing for your company with the highest amount of protection available.

# The Second Danger Zone Employment Matters

There's a lot to talk about when we discuss employment matters. We must cover state and federal rules on how an employer must treat employees. Then usually there is a big misunderstanding between what is an employee and an independent contractor.

## **Are They an Employee or Independent Contractor?**

Let's start with a little bit of an explanation on the difference between an employee and an independent contractor. Many businesses want to hire people to work for them but they don't want to withhold taxes or payroll taxes. To get around that requirement, they try to pay someone who should be an employee as an independent contractor. That can lead to costly trouble for the business in the form of an overtime claim.

*The main difference between an employee and an independent contractor is control.*

True independent contractors can come and go as they want, dress how they want, act how they want, and work from wherever they want so long as they are carrying out a task, which is written in a contract. A typical example would be hiring an IT guy to fix the computer. He may come in and fix the computer for you or take the computer offsite. He may do it at night or on the weekends. He's just being hired to carry out a task, such as building a website.

We see this often in construction or in-home healthcare. A lot of businesses will hire somebody to work on projects, and they have to wear a uniform, follow a delivery route, work certain hours or be available during certain hours, or answer calls on a phone. Those are all components that would lead a judge or jury to determine, based on a test, that the person should have been an employee.

As a business owner, if you pay someone as an independent contractor rather than an employee, you could owe years and years of back taxes on withholdings. Something even worse is that you could owe that employee overtime. Right now, in South Florida, there's a proliferation of lawsuits for alleged overtime claims. I say "alleged" because some of them are true, I'm sure, but most of them, in our opinion,

are not. Without the proper proof, the business owner is fighting an uphill battle because the onus is on the business owner to prove the hours that somebody worked.

### **Overtime Allegations**

Even if you're paying someone as an employee but you're working them more than 40 hours a week, you're going to get into trouble. If you're not working them more than 40 hours a week, they could work for you for three years and then claim they were working 50 or 60 hours a week, for example. If they're owed three years of another 10 hours per week at time and a half, which adds up, the business owner will be responsible for their own attorney's fees, as well as the employee's attorney's fees, if the employer loses the case.

While we're on overtime, I want to tell a quick story about a case our firm handled and won recently. We prevailed at the trial, but it's like winning the battle and losing the war. Our client had to spend so much money on the litigation. She decided since she had worked so hard, dedicating her whole life to building a business and hiring employees, and if all it took was for her to lose over \$100,000 in legal fees, it simply wasn't worth it. She closed her business anyway. That is a sad state of affairs for a hardworking business owner.

In that situation, the former employee claimed that she'd worked an extra 20 hours a week for over three years and was looking for more than a six-figure payout from the business owner. Our client, who had not been our client until the lawsuit started, did not have very good records of employment. Even if you're only open from 8:00 a.m. to 5:00 p.m., if you want to protect yourself, you will require timesheets or have time tracking and check-in and check-out on your employee's phones.

Now there are many different types of sophisticated apps through third parties or even through your payroll company. These apps monitor employees' times when they check-in and check-out on the phone. Some people still use the punch cards, where you punch in and punch out, but you need to have at least a log that gets signed by the employee every week, which certifies the hours they worked.

*It's a lot of red tape in administration,  
but it will save you a great deal of money  
if you do it the right way.*

If you can prove with the time log the employee didn't work the extra hours, you will have a very short case. You will probably win on a motion dismissed or summary judgment because you can fight off those claims. We were able to win by

proving our client was right, but it took so much more time. Without the exact records, we had to piece together the story through testimony of other employees and depositions of the parties in the case. It was a long battle, which was ultimately too costly for the business owner.

You may be reading this and thinking, “Why am I reading so much about timecards? I’m a sophisticated business owner. This isn’t why I wanted to read this book.” You would be surprised at how many big and medium-sized businesses, which seem to have so many cool technologies in terms of development in the workplace, still forget about keeping records of time because they’re trying to create an environment where people can come and go. While we read about open workplaces and unlimited time off and a lot of other new developments in the corporate world, unfortunately, we still must protect ourselves by doing something as simple as tracking our employees’ time.

## **Employee Handbook or Employee Agreements**

There is a litany of other things to discuss between business owners, employers, and employees. There are many documents to put in place, such as employment agreements and employee handbooks. We could review all the different items that need to be in an employment

handbook and the right way to do them, but truthfully, if you don't have an employee handbook, it won't be the end of your business. I would much rather you have employment agreements.

## **Losing Your Protection**

There are certain things you should put into employment agreements and certain things you cannot put into employment agreements.

That's why you need a professional, such as a business attorney or (if the company is big enough) an outsourced HR company, to help you structure the company's agreements. This is necessary to make sure the company is not doing something illegal or putting something into a contract that means the company is no longer protected, which it might have been protected under Florida law or corporate law. One of the many important items to discuss is if the scope of work is defined as well as the pay, which is a step that seems daunting at first. Unfortunately, many of our clients have skipped that step until they started to work with us, and we've helped them safely get that in place.

Another area that's very important is how to fire employees. If the company doesn't have a severance agreement template in place, it needs to be created. The severance agreement can save a lot of time and a lot of money. In Florida federal

court, we've seen a big increase in discrimination claims, with attorneys going around convincing former employees to sue for discrimination. Normally, just defending against a lawsuit is so expensive that the business owner would rather cut a check for \$25,000 than to spend maybe three times as much on legal fees. That's just a business decision. It's very frustrating to get hit with one of those lawsuits. If you had a severance agreement, you might have been able to avoid the whole thing.

Those are just a few of the very important areas of employment law where we help our clients put structures in place to protect themselves. Right now, as I mentioned earlier, the discrimination and overtime lawsuits are really a rising trend in Florida, which is putting a lot of stress on business owners.

### **The Most Important Task**

Every company needs to have a timekeeping system, to make sure that employees are not working overtime. They also need to have an employment agreement. It's hard to say which is more important; one is 1A and the other is 1B. When most people talk about the agreement, it's because of the attorneys who work in this area. Doing the agreement for you is how these attorneys charge their clients. Maybe they wouldn't go out of their way to mention something they can't charge for, which is sad, but

a lot of people work that way. They give you the advice that doesn't cost you a penny, other than some man-hours to put a timekeeping system in place. In my opinion, that's just as important as an employment agreement.

## **The Biggest Mistakes**

Some examples of big mistakes will be if your company doesn't have written policies on time off, sick leave, bereavement leave, or maternity/paternity leave. Also, there are issues when treating employees in the same classes differently, such as management-level employees, entry-level employees, and staff-level employees.

In a law firm, there are attorneys who are partners and attorneys who are associates. You need to treat everyone categorized in the same class equally, or you could open yourself up to a discrimination claim. Let's say you gave one person six weeks off for maternity leave. Unintentionally, maybe you just forgot or didn't write it down; the next person is given four weeks off for maternity leave. That can open you up to a claim. It's a very innocent thing and the employer was probably trying to be nice, but you must enforce your rules consistently.

## **Termination Dangers**

Employee termination is a big place where people get themselves into trouble. There are

federal rules about certain steps you must take. For example, if you fire someone who is over a certain age, it is easy to open yourself up to a discrimination case if you don't follow the proper procedure. Going back to the topic of overtime claims, you can put someone on salary and then have them work more than 40 hours a week without paying them overtime, but only if they're paid a certain amount and if they have a certain amount of autonomy as a management-level employee. You could not do that with all employees.

Maybe you need to fire somebody who is young or a minority, and you didn't follow all the steps equally. For example, maybe your company has a three-infraction rule. If you fire someone in the first infraction but give more chances to other people, you're no longer enforcing the rules the same way across the board for the same class of employees. That will open the business to a discrimination claim.

To return to the topic of having a severance agreement, let's say your company gives someone severance pay and has them sign an agreement that they've had time to personally review or get an attorney to review. That way, you can avoid the situation of this ex-employee turning around and deciding (even a year later) that they want to sue their previous employer. Maybe they just had a run of bad luck. Maybe they finally met somebody who had an idea such as, "Hey, you should just sue your boss. I got a

\$20,000 check because I made up a lawsuit.” Those types of things happen all the time. Just paying the attorney’s fees to deal with it can be very painful. You must be very careful about the way you fire employees.

## **ON purpose or Not**

A big revelation for business owners is that many of these lawsuits don’t arise because the business owner did something intentionally. Most business owners think they’re putting themselves out of harm’s way because they’re not doing anything *intentionally* wrong. The real danger for those types of business owners is in, not realizing *they don’t know what’s opening them up to trouble*.

*It’s not only about taking time to educate yourself, which can certainly take a lot of time; it’s about creating relationships with the right people who will guide you through these danger zones.*

For our very fast-growing clients, the movers and shakers, we understand they need answers very quickly. When they’re trying to strike a deal or make a move, stopping to have your lawyer review the document can delay the process by a week or two or sometimes more. Unfortunately, it’s going to be better in the long run, making sure you took time to dot your I’s, cross your T’s, and get your ducks in a row, doing everything by the book.

## Key to Success Tip

Here's a tip I'd like to share with you. This tip doesn't benefit us as a law firm, but we're very happy to give out this tip to business owners.

There is something called **Employer Professional Liability Insurance (EPLI)**, which can apply if you have an employee handbook and consistent standards. We help our clients develop the necessary documents to get this type of insurance, which will help you pay for your attorneys' fees and the costs of defending claims if or when an employee sues the company. We're not sure why everybody doesn't have it or know about it. We tell all our clients, "Please try to get EPLI." It can save you a lot of money if you're embroiled in a lawsuit by an employee or former employee.

We had one client who got sued twice within a year for discrimination. We defended him and prevailed on both claims. Again, the amount of attorney's fees they were paying was just painful. It's disheartening. Our whole goal is to keep our clients out of the courtroom so they can continue to make money and employ people and help the economy move. If you're able to get it, this insurance will be a great benefit for you as a business owner.

# The Third Danger Zone Contracts and Lease Agreements

As I've stated previously, when you're fighting with the other shareholders or partners in a business, most of the time, it spells doom for the company, and the company implodes. When you deal with disputes between third parties, it's not fun but it's just something to deal with. What we try to do is put our clients in the best position possible with great contracts and lease agreements, so they can create as much leverage as possible.

**What I mean by contracts:** Any sort of vendor agreement, with anyone supplying goods or services to your business.

**What I mean by lease agreements:** This would include any lease agreement on vehicles, warehouse spaces, or commercial spaces. Having your commercial lease agreement reviewed by a very good commercial real estate agent is important, but there are also things that attorneys will know, but the real estate agent or company won't, and attorneys will be able to look out for these things in lease agreements.

Many areas in the commercial leasing space can get clients in trouble, both legally and financially. If a business owner is not careful about what is put into a lease agreement, landlords can take advantage of the business owner. We've seen that it's not always a situation of a savvy landlord taking advantage of an unsuspecting new business owner. Quite a few managers and employers don't take the time to thoroughly review the lease agreement. It's such a long document that they think, "I'll just deal with it later."

### **The Devil's in the Details**

For example, one story I want to share deals with a relocation clause. We had a client who rented space in a mall. They signed the lease without having an attorney review it. A representative of the mall approached them, saying a new, more recognizable tenant wanted their space and our client was being moved to an area in the back of the mall. Of course, our client thought, "You can't

do that, it's not fair." Once we were pulled in to take a look at the existing lease we found out that, sure enough, the mall had the right to do that. To make a long story short, the business eventually went bankrupt because the new location proved to be as unrealistic as we thought it would be at the time. The only choice the client had litigation to delay and stall on a lawsuit they would not win, because there was a very clear contractual agreement.

Another client got into a lease and was launching a food business. On the weekend of the grand opening, the plumbing malfunctioned, and their entire place flooded with sewage. They had spent about \$20,000 on a big grand opening and they had handed out discounts and flyers and people showed up to a place that couldn't open.

Once they finally cleaned that up, they turned on the second oven to cook pizza, and it was too hot. They could only make half of the food they needed to serve the whole store, because the landlord misled them about the amount of equipment that could function properly in that space and the lease didn't provide for a way to get out of that space.

When that company didn't have the financial wherewithal to withstand those challenges, they had an oral agreement with the landlord that they could leave, so they picked up and left. The landlord turned around and sued them, locked them out, and kept all the equipment because the

other clause in the lease agreement (which was very poor for our clients) was that the landlord had a lien on all of the kitchen equipment and furniture in the restaurant. You can imagine how our clients felt. They faced the bait-and-switch from their experienced landlord, who obviously had done that before, while our clients were new in business, trying to make something for themselves.

By the time we got involved, this scenario had already unfolded. We ended up getting a rather favorable result for our clients, but only after several years and a lot of money spent on litigation, and a lot of heartache and regret. If we had just been able to review the lease in the first place, maybe the entire mess could have been avoided.

### **Here Today, Gone Tomorrow**

The third story I want to tell is about another client who had a unique hangout, a food-and-drink spot in a fun area of town in Miami that wasn't zoned properly. The lease didn't protect the company. After almost two years of building up a good reputation and developing a following, and finally starting to break even on a monthly basis in terms of expenses and revenue, they were kicked out overnight without any legal recourse to get back into their spot.

Of course, I could be here all day telling you stories in which the business owner lost a lot of money and went through a very painful situation, especially about lease agreements that weren't reviewed by a professional. Talking about contract and lease agreements. It's not a fun, sexy topic or a topic people want to read about for pages and pages. It won't ever be sexy to sit there and read contracts and documents, so our pitch is, "Let us do that work for you, let us help protect you." Yes, it's a little bit slower, and it will cost you some money now, but it will be pennies compared to what it would cost if you don't have this document reviewed. That's really where it applies when you talk about cost versus value. It may cost you more now, but it'll be a lot more valuable at the end of the day.

### **Protecting Yourself from Outside Threats**

Whose fault is it anyway? That's a load question and one that hopefully you'll never be on the receiving end of. There was an accident on one of the properties our clients were leasing. The question was this: Who is responsible for a billboard attached to the building, the landlord, or the tenant? Of course, we wouldn't have ever thought that a claim would be made against a tenant, but unfortunately, we had to deal with it.

If you're not careful and if definitions aren't carefully drafted, then tenants can find themselves responsible for something they never imagined as their responsibility.

Even if we did recommend tenants review the building for potential changes made by the landlord, I'll tell you that only one in a hundred of tenants would be that careful and studious in noticing changes around the building and seeing how it affects them as a tenant. Even if I recommended that course of action, most tenants probably don't think about what's covered in their lease. They're just so focused on trying to make ends meet or building their business in a lot of cases, and rightfully so, that they really don't have time for these things.

### **Let Me Out!**

When your time is up, take advantage of it. If your lease agreement is up for renewal, you don't want to miss the window in giving your landlord notice that you're going to opt out of your lease. If you're planning to opt out, or even if you're planning to explore opting out of your lease, most contracts have automatic renewals, which can really frustrate the business owner.

In addition, especially in South Florida, you see personal guarantees on most commercial leases. Even if the business goes under, the business owners are normally liable for the rent until the

landlord re-rents the property. In a lot of cases, we've seen landlords really drag their feet on re-renting the property because in their eyes, the individual owner of the business is paying for it anyway. There are far too many ways for a business owner to run into a bad situation via a commercial lease or another third-party contract. We're here to help our clients avoid those situations.

### **Key to Success Tip**

One of the worst things that can happen to an owner is to be limited in your business growth by your physical space. One tip we give is to negotiate for the right to get more space or to get out of your contract if the building can't provide you with more space. If you want more square footage and your landlord doesn't have it available, you can negotiate your way out of a contract if you thought about this ahead of time. You never know. We've seen our clients' businesses grow up in a good way, but they're limited by their physical space or they're paying rent at two places because they couldn't get out of a lease. A negotiation can save people quite a bit of money.

# The Fourth Danger Zone

## Intellectual Property

Maybe everyone, at this point, knows how to identify a trademark, but a trademark protects an image or logo, a set of words, or words in a logo together, from being used wrongly. That is, if a business owner gets a trademark on that word or image.

For example, Coca-Cola obviously has a strong trademark and someone else couldn't use the words Coca-Cola, especially with a red-and-white image, because that would be trademark infringement. Everyone can imagine big logos, from the golden arches of McDonald's to Pizza Hut or Target, but small business owners need to protect themselves in this way as well.

## **Just Because It's Yours Doesn't Mean It's Safe**

The way a trademark works is by protecting the word or the image in a certain classification. There are many classifications, but you can't get across the word "classification" unless your products or services transcend different classes. For example, if your business was a bakery, you could not trademark the name of the bakery for sports equipment. You could only trademark it for food services. I think that's an important thing that people don't realize. Even more dangerous is when you don't trademark the name of your business or its logo, and a competitor comes in and starts using the logo or the name of your business. That can cause a lot of confusion and could even put you out of business.

*The theory behind federal trademark protection is that it prevents confusion in the marketplace.*

If you have XYZ widgets and you're selling trademarked widgets on US1, somebody else isn't allowed to move in across the street and create XYZ widgets and confuse people, who now don't know who they're dealing with when they look up the company online or make phone calls. We've seen that happen when companies don't get a trademark on their names or logos.

A few years back, we got a call from somebody who had a competitor move next door and start the exact same company with the same name. After 10 years of building their business, clearly, they were up in arms. You can imagine the anger and the disappointment caused by that kind of scenario, but they never took the time to get a trademark placed on their name.

Getting a trademark on your name and your logo is how you own what you're working on. Again, just registering your company name on Sunbiz online doesn't mean that someone else isn't going to swoop in and use it under a tradename or a Doing Business As ("DBA"), or just not register the name with the state of Florida but use it to create confusion anyway.

### **Pre-Planning Prevents Confusion**

To avoid that situation, you must get a trademark ahead of time. Once you get your trademark, which there's really no excuse not to (it's a rather inexpensive procedure in the first place), then you will have federal protection from somebody using your trademark. Then you can send cease-and-desist letters and enforce your rights under the trademark. Unless you've registered for the trademark in the first place, you really don't have many rights.

There is a lot of confusion around the trademarking process. I'm often asked about creating a trademark for the name and the image, "Are those two separate processes? Do you need to do the name of the product, the name of the company, and the name and the logo? Are those all separate?"

The short answer is "yes." You'll see companies create a trademark for the name, the logo, and every product line they roll out. It's like the name of a car or a shoe. Of course, you have different lines or different types of cars or shoes, because companies will trademark anything and everything that they can.

### **It's Never Too Late**

I was asked the other day, "Are there any remedies for new businesses that have no plans in place for protecting themselves? It's never too late and the law does change in this area, but it used to be called "first to use," and now it's more like "first to register." For a more likely scenario, let's say you've been in business for five years in Florida. Somebody in Georgia opens, and uses the same business name, and does a federal trademark registration that may prevent you from doing business in your state or in other states. Sometimes, you can continue to do your business because you were the first one to use it, but you are limited on how far you can go. Obviously, that can be really disheartening.

Wherever you are, if you've been in business for a year or 30 years, you want to trademark your name and your logo at once. Of course, you should investigate to see whether you can trademark or whether someone else has done it already, and then you want to move as fast as possible in getting that protection.

This is another question I was asked recently. "If somebody else trademarks the name ahead of you even though you've been in business for many years, at that point, couldn't they force you to change your name?"

The short answer to that is, "Possibly, because we've seen it before." There's not a bright line rule on that because there is a lot of federal case law about somebody who has been in business and someone else who later trademarks the same name or the same logo. The counterargument is that you're grandfathered in because you've been using the name and the logo, but then we get into restrictions on expanding your business using the same name. The bottom line is that it's not worth building a business that's not protected. It's not worth spending attorney's fees or litigating in federal court over something that cost you as little as \$1,500 to protect.

## **Key to Success Tip**

Seek out trademark protection at once, but also give very good consideration to international protection. If you have any possibility of expanding or doing something in another country, even if you're selling a product on Amazon, you should protect yourself internationally as well. You want to investigate all three levels: state protection, federal protection, and international protection.

That would really change things, regarding not being able to grow if somebody else registers your trademark. That would affect internet sales as well. You could really create a lot of online confusion. You see this a lot in the Amazon wars. Somebody in another country will create a product that looks exactly like yours, and you're stuck with people thinking they're buying something from you, but they're really buying something from someone else.

When you're dealing with a country like China, it's hard to enforce your rights. At the same time, because of treaties, most countries in the world will recognize international trademark registration. At the very least, give yourself the most protection that's available even if it's not perfect.

# The Fifth Danger Zone

## Regulatory Compliance

I want to touch upon two topics in this area, which I think are vital. First is the proliferation of lawsuits under the Americans with Disabilities Act (ADA). Second is the new and developing area called the Telephone Consumer Protection Act (TCPA), which I'll touch upon at the end.

Two types of lawsuits have now become rampant in South Florida, posing a very quickly growing risk to employers and business owners. The first type is one we've already talked about, which is the overtime claim. The second type includes claims made under the ADA, which is a federal law.

## **ADA Lawsuits**

A claim under the ADA will allege that the premises are not suitable for somebody with a disability. It could be something major like a wheelchair not fitting through a door, or it could be something as small as a parking spot being an inch too narrow than it's supposed to be under the federal law.

A whole new line of lawsuits is being filed by a handful of attorneys, who are suing anyone and everyone for alleged ADA violations. The tough part in defending these lawsuits is the prevailing party's attorneys' fees clause, which means that if any part of the lawsuit is correct, the defendants of the lawsuit will handle the attorneys' fees for the plaintiff. The defendant is the business owner, and usually the landlord, but could be even a tenant of a building. That usually drives up the cost enough so that employers and landlords and building owners want to settle and just stroke a check, even though they may be able to prevail in the lawsuit.

Our firm sees hundreds of lawsuits being filed per day targeting building owners. The claims can be that a counter is too high, a toilet paper roll is not exactly where it's supposed to be, a handrail is a little bit off, there are too few handicap parking spaces, the ramp isn't the correct angle, or the actual parking spaces themselves are too narrow. These are a lot of what seem like rather benign or, more

importantly, easily fixable problems on the premises. Instead, you're now having to hire an attorney to defend a lawsuit in federal court and potentially pay to fix all the ADA violations, as well as paying the attorney for the plaintiffs, which can be rather expensive endeavor. It might have taken you less than a few thousand dollars to fix your premises in the first place, if you had known.

*The counterargument here is that you should have known you could have your own property inspected.*

While that is certainly true, we have been arguing for notice provisions to be sent to landlords or building owners to fix the premises, with potentially six months to get the place fixed before they'd be eligible to be sued. It is a heavily litigated and developing area. There are so many lawsuits filed that it's really affecting business owners and it's hard to deal with.

## **ADA Online Lawsuits**

The scary thing is that the ADA lawsuits have moved from physical premises to online. A wave of lawsuits is being filed against anyone who has a website that's not ADA compliant. If this is the first time you've heard of this issue, you may be thinking, "How can my website not be ADA compliant?"

The ADA extends to anyone with any type of disability. If someone is visually impaired and they cannot navigate your website or click on something that would make it readable, then you could be in violation of the ADA and face the same type of lawsuit. The wave of ADA lawsuits is coming, if it hasn't already started. We are getting many calls every week for defending these types of cases, which is disheartening. Of course, we understand that the ADA is a well-intended law and it provides good protection for Americans with disabilities, as it should, but it's being abused by certain types of lawyers who are really affecting business owners.

We've created a website so that business owners can type in their website for their business and see what needs to be fixed on it to make the website ADA compliant. We have companies we can recommend that can help you fix your website.

**[app.sitecompliance.com/tremblylaw](http://app.sitecompliance.com/tremblylaw)**

As far as the ADA and your premises, get them inspected before you get hit with a lawsuit. If it's too late and you're served with a lawsuit, there are a lot of first steps you could do to avoid major exposure. Please call us right away and get your website checked out.

## **TCPA Lawsuits**

The second regulatory compliance area I mentioned was the TCPA. This is a rather new developing area, but our firm is starting to see these lawsuits pick up. We're defending businesses that, for the most part, have unknowingly stepped into an area that they probably never saw coming, such as text message marketing.

Text message marketing has been increasing in popularity, and a lot of companies are being pitched by marketing companies to advertise to people via text. Let's say that hundreds and hundreds of customers are coming in and out of your restaurant, and you start collecting their phone numbers as part of the check-out process. The next time you go to Home Depot or Pizza Hut or even Party City, you'll notice that they ask for your phone number. They're doing that because the more information they have on you, the more ways they can market to you.

What companies are supposed to do is get affirmative permission to send you messages via text. Smaller businesses don't have the financial wherewithal to hire full-time attorneys who watch for these kinds of exposure areas. The small business owner has an idea, "Let's start sending text messages," so they start texting their clients.

The nuisance here is that, if you pick up your own phone and start sending a text to your clients, it's okay. You may annoy some of them, but that's your decision as a business owner. There are machines that will do automatic text messaging for you, sending out thousands and thousands of text messages at once. It's a narrowly defined statute, but if you violate it in a certain way, you could be looking at up to \$1,500 per infraction. When you multiply that by the thousands, companies are being sued for millions and millions of dollars for sending out text messages.

### **Ask Before You Text**

If you pay attention the next time you get a text from a company, it will have an opt-out clause. While you need to have an opt-out if you send a text message for marketing, just including the opt-out doesn't mean you're in compliance with the TCPA. You are still supposed to look for and get an affirmative position before you text somebody.

We recently defended one of our clients who was sued under the TCPA. Fortunately, they didn't meet all the elements for a TCPA lawsuit, so the whole thing was dismissed without any exposure whatsoever. The plaintiff in that case was seeking a judgment for more than \$5 million. You can imagine that would put most companies out of business. We must be very careful while

telling our clients how not to fall afoul of the TCPA. The hard and fast rule should be, "Don't have systems that send out automatic text messages indiscriminately even through third-party companies."

Again, a lot of it sounds like business owners just not knowing they are crossing the line, which is not intentional. Well, sending out a coupon to save people a little bit of money, that's a nice thing. You're intentionally trying to help people. You're also potentially (unintentionally) violating a law that could open the company up to a lot of exposure for lawsuits. This service is often sold within marketing packages which the company may not even know they have bought, whether it's content management or a customer management system. They may need to investigate that as well.

### **Get it Because it's New!**

Most of the time, companies are shouting they have the latest newest technology and they pitch the business on this "Great New Service." The business owners know they're buying a service; they just don't know that it's potentially a violation of law. The owner knows a marketing guy. Marketing guy learns about something new and he decides to start a business. He's going to start soliciting companies with this new technology: "Hey, if you have 10,000 customers in your database, with one click of a button, we

can send all of them a text message on Sunday morning offering a discount on a Sunday brunch buffet.”

## **Unexpected Exposure**

Well, imagine how many people will get that coupon which weren't thinking about your business, who forgot about you, or your business just wasn't top of mind. Now they're going to come in and get brunch that day. It makes a lot of sense. Of course, that seems like it would work, but that's not allowed within the law, and it's going to get business owners into a lot of trouble. It's one of those "who knew" things. Who knew you could have so much unfair exposure in terms of the multiplier? Obviously, \$1,500 a text is a lot of money, so that penalty could be a very scary thing for a business to go through.

*Most of the time, these lawsuits apply to a class action in federal court.*

This means you're talking about big-time attorney's fees just to defend the claim, which would have to come from the business owner. Even if you had the foresight or an agreement which supported indemnification from that marketing guy or company, nine out of 10 they will not have the financial wherewithal or the insurance to pay on the claim. Essentially, they'll just disappear, knowing they got someone in trouble; you'll never find them again.

**Key to Success Tip:**

I would strongly recommend that owners avoid texting the client altogether, unless you are absolutely certain and can get it in writing that you're within compliance and that the company has insurance that would protect you from any types of claims. If those two things aren't in place, then I would just steer clear. It's not worth the risk.

# Dealing with Danger Zones in Eight Steps: How to Protect Your Business

We have an eight-step system on how to protect your business. I will review what's involved in each one. While you may be thinking, "Here's the sales pitch," we unapologetically recommend to our clients that they protect themselves. It's not worth the exposure. It's not that hard to take care of everything we've talked about, and we would rather see you not like us now because we're telling you to protect yourself than be really mad at us later because you never took the steps to protect your business.

## **Step One: Engage in a Hiring System**

So many employment complications, as previously reviewed in this book, come from a poor hiring and recruiting system.

## **Step Two: Employment Contracts**

Your business needs a detailed written program that's applied consistently, that has been reviewed by attorneys, and is in compliance with the law. The interview system should be done in the right way handwritten notes are not kept, every person is asked the same interview questions, and there should be multiple people in the interview. You should constantly review your own business to make sure you have the right people on your team.

## **Step Three: Team Member Handbooks**

I know that sounds like a bunch of off the cuff advice with no legal standing, and for the most part, it is. It's a business owner-to-business owner conversation: one owner telling another that your people are everything and they will either make or break your business. The more resources you pour into hiring the right people, the fewer problems you'll have and the happier you'll be. If you start that in the hiring system, it flows to the rest of what we talked about. You can have willing, happy employees signing employment agreements, and a robust, healthy

employment handbook, and a very detailed infraction enforcement system. In the end, this means you will have a good severance system. Putting all those things in place will do wonders for protecting your business from your own employees.

The truth be told, it's better not to have employment handbooks than to have them and not use them or enforce them, believe it or not. If you have fewer than three employees, this may not be that important. Once you get more than five or six employees, you will want to have an employment handbook written and you're going to want to enforce it.

The employment or team member handbook is where you will put all the rules for the entire business that you wouldn't put into an individual employment contract. It runs the gamut of everything you need to communicate to your employees about what it takes to work within your business: dress code, business hours, social media policies, time off, sick leave, potential protected items, proprietary information definitions, computer use and protocol, parking, and so on.

Once you put the rules down, it's important to remember that you must stick to them because that's where the sticking point can be. Not following your own handbook, that can open you up to claims as well.

## **Write Your Systems Down**

There should be a written system detailed in your handbook that you've handed out to all your employees, and they should all sign the acknowledgement form that they received the handbook. Maybe the handbook says if you're late, you're going to get written up. If you're late twice, you're going to get suspended. If you're late three times, you're going to be fired. Let's say four people are chronically late and you fire the fifth person after the third infraction, but the first four were allowed to continue to work without suspending them or writing them up. Then someone will say, "Why was I selected or singled out and fired but no one else was?" That's selective enforcement, which means that person is being singled out, which means that person is being discriminated against. It opens a decent claim for discrimination.

If you've already written a handbook, we recommend you review your employment handbooks at least once a year. You can always let us look at them as well. I do want to iterate that the bigger your team, the more important this becomes. Again, if you're a five-person business, then you just don't have the same level of worry attached as a larger business would.

## **Step Four: Get Insurance**

Earlier, I mentioned EPLI insurance. If you're sued by an employee for discrimination and/or overtime claims, for the most part (depending on what the policy says), the insurance company must pay the legal fees for the defense. Again, I do want to point out that the insurance company hires their own attorneys. Normally, it's not our firm because there are insurance defense companies. This is a completely non-self-serving tip: if you don't have this insurance, you're going to need to hire a skilled team of legal defenders and pay a lot more money. I would rather you have the coverage and stay in business, working with us or a similar firm on ways to be in compliance and out of court, rather than do what a lot of firms do: just hope you don't get sued and then have to pay all the legal fees.

## **Step Five: A Legal Diagnostic**

We invite you to go to our website, **[www.TremblyLaw.com/DangerZones](http://www.TremblyLaw.com/DangerZones)** fill out the survey and see where your business is protected and where it may have exposure. That is a good way to have an idea of what's under the hood.

If your car is running but you never look under the hood, you have no idea if you're two miles away from running out of battery power or brake fluid, blowing a gasket, or experiencing a

failed engine. Let's face it; we don't all have beautiful dashboards with indicators that would let us know of every potential trouble. Unless we're taking the time to investigate what's under the hood, we can be a few miles away from disaster without even knowing it. That's why we suggest starting with a legal diagnostic to see what you have in place, what you need and what's urgent and what's not urgent.

### **Step Six: Hold Quarterly Meetings with Business Development Teams**

On the sixth step, we make recommendations. I call this a "development team" because, on a high level, you don't need to limit this to just meetings with your attorneys. You can have your CPA, your legal team, and sometimes an insurance program representative or a banker, to meet with you quarterly to review what's under the hood. Make sure what needs to be fixed does get fixed. This is something that takes time and it's an expense, but it sure is less expensive than waiting until the whole engine blows.

### **Step Seven: Profit First**

We are currently the only Profit First™ certified business law firm in the state of Florida. While most firms say they really care about their clients, we back up that claim with action. We help our clients implement Profit First™ in their

own businesses because, as they say, “Broke business owners can’t help anyone.” Life is too short to be miserable.

When you go through all of the heartache and the stress of starting your own business, paying for bills and trying to market and sell, filling orders and doing the job, at the end of the day, when everyone else gets paid and you don’t, that is really, really frustrating. It puts you in a place that’s not fun to be.

By being extremely financially prudent, you grow your business faster. Then you start to hire more people and provide more jobs with a work environment that’s stable, where people aren’t wondering if they’re going to show up one day to an empty office because it’s been raided by a creditor. We have developed a Profit First™ system where we help our clients implement Profit First™ into their businesses just like we have. We have joined the Profit First™ team on their mission to help eradicate entrepreneurial poverty.

## **Step Eight: Your Operating System**

Number eight is to develop an operating system, a proven system for running your team. That would mean hiring a coach or some sort of proven program to develop a lot of the processes we’ve reviewed: hiring, team management, financial management and growth, and team communication.

As you're growing, it's very important not to reinvent the wheel. A lot of businesses get stuck on the hamster wheel of just working really hard. The owners don't figure out that, by working *on* the business instead of *in* the business, that's the only way to get off the hamster wheel and actually grow. There are a lot of great resources that we're able to recommend on an individual basis to help our clients keep growing their business, speaking non-legally.

Again, we don't just believe in providing legal resources. We believe in providing business resources as we partner with our clients.

# Is Your Business Protected Against Lawsuits?

You've worked hard building a successful business to support yourself and your loved ones. You provide jobs and a great work environment. Business is good. But have you taken the measures to protect that business from avoidable lawsuits? Could one forgotten contract or one unwritten manual take everything away from you by exposing you to a "business-ending" lawsuit? Are your biggest assets – your employees – also your biggest threat? Are you sure that you're in compliance with all the state and federal laws and regulations required to run a business in South Florida? Or have you unknowingly put your business in .The Danger Zones?

Our legal team analyzed and dissected years of business litigation data, and we identified the 50 most-common areas of exposure threatening businesses today. We have broken those exposure areas down into five categories, which we call The Danger Zones. In this book we illuminate those threats, share some real-life horror stories, and discuss how to avoid becoming one of the many unfortunate business owners drowning in legal fees for failing to take proactive action to protect their business. We also do our best to keep it simple and fun.

Don't feel like reading the entire book and want to skip the line? No problem! We've created a short quiz to help you assess your protection or exposure to the hidden pitfalls of the five Danger Zones. It's a free tool that includes feedback after the quiz regarding your current state of legal affairs.

Take the quiz now at [www.TremblyLaw.com/DangerZones](http://www.TremblyLaw.com/DangerZones) for your free diagnostic.

Or, call us at **305-930-6779** to set up an appointment.

At Trembly Law, we protect honest business owners from getting legally screwed™. It's tough being a business owner today, and that's why we're leading the fight to protect business owners and employers – so that you, the backbone of our economy, can continue to provide jobs and make a difference in the world.

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Brett Trembly is the Founder of Trembly Law Firm, a franchise law, business law, and litigation law firm in Miami, Florida. From one attorney in 2011, the firm has grown to 10 attorneys and over 22 employees. Trembly Law represents some of the largest businesses on the eastern coast, as well as many small, local businesses. Passionate about leading the fight for business owners, Trembly Law's mission is to "Protect the Economy, One Business at a Time."