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Four groups to address when the end is near

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UP TO THIS POINT, MANY restaurants have been able to survive due to PPP funds, concessions from landlords, interest-only payments from banks and generous terms from suppliers. However, for many time has run out. It is always hard to know when you've reached this point. Is it because you are out of funding or you don't want to put more funding in? Are you trying to protect your other restaurants and have one problematic situation? It may even be the location no longer fits because of COVID, plus recent civil unrest may have changed the desire of certain consumers to visit restaurants in certain neighborhoods. This being said, let's look at each problem that can arise when you are getting ready to close a restaurant. There are four different constituencies that need to be addressed.

1. Employees When you close a restaurant and/or lay off employees, they know you won't be hiring them back. You want to make sure all payroll is paid up to the last day. It is a requirement that employees receive all their payments within 48 hours. We've seen cases where this hasn't happened and various state agencies plus the attorney general get involved, so make sure payroll is paid within the statutorily required time. It is important to pay payroll and sales taxes because these are items that create personal liability for the responsible party—meaning the person in charge of the funds or the owner can be personally liable for any deficient amounts. Additionally, make sure there is full compliance when laying off employees, including appropriate notice, assistance in getting unemployment—particularly if they are restarting unemployment—and ensure you have satisfied their paid-leave requirements as well as any kind of paid time off (PTO).

2. Landlords Landlords can be your friend or foe. If you as the owner have personal guarantees to the landlord, try to strike a deal to get out of the personal guarantee. Turn back the property voluntarily. Give the landlord personal property in the restaurant. This is to avoid personal liability and litigation. Approach the landlord early in the process to tell them you are planning to close. If necessary, you can offer to help the landlord find a replacement tenant. Be transparent and disclose the financial position of the company—which presumptively has no assets and no cash—and make sure it is always with an eye towards trying to get out of any personal liability. If you have more than one restaurant, each restaurant should be in a separate company, so that if you can't pay rent and there are little to no assets in the company with the restaurant you need to close, you have protection. If there are other restaurants in that company, look at some kind of spin off well in advance of the closure. You may need to use bankruptcy to reject the bad lease.

3. Banks Banks are the most problematic part of this whole scenario because they don't have leeway, so the best thing you can do is try to convert any obligations to banks to something long-term or interest-only. You may have to personally guarantee it if you haven't already. If you haven't personally guaranteed, it may be a reason to file bankruptcy— but more than that, make sure the entity you are using to operate the restaurant is asset-protected. There are a number of things you can do to slow up the process. One is to form your entities in Delaware. The reason for Delaware is certain requirements to attach assets in the borrower entity. The bank can help you refinance if you think there is a future. A couple of other related issues to consider are the forgiveness aspects of any PPP loans and if there are SBA loans, they need to be reviewed with the bank to protect their insurability.

4. Investors Many restaurants have investors, and like dealing with banks, it is key to be transparent and go to them early and tell them what's happening. Ask if they would be willing to entertain a capital call. It may also help with the banks if investors are willing to put new money in. This new investment usually will be a preferred position where they get this money back first after the creditors get paid. You may also require shareholder loans be converted into equity. There are also cases where an investor may agree to a high-interest rate loan so that investor takes a priority position over other investors.

Once you have determined that you cannot make it and the optimism is all gone, then you do need to look at taking as much care in getting out as you did to getting in. FSN

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