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LEGALNOTES

INFORMATION FOR OUR BUSINESS AND CORPORATE CLIENTS

IN THIS ISSUE

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Protecting Trade Secrets

Employers are constantly doing a high wire act. They must balance their employees' need to know while protecting the company's proprietary information. With today's transient workforce, an employer's balancing act is even more treacherous. Deciding how much information to disclose is a critical decision.

Proprietary information falling into the hands of a competitor can ruin a business. This risk of losing proprietary information is real. It is estimated that U.S. businesses lose approximately $100 billion annually because of the misappropriation of trade secrets.

What is a trade secret?

A trade secret is difficult to define. However, all trade secrets have common characteristics which most state statutes or common law recognize. They are:

- Secrecy
- Security
- The Value of the Information
- The Effort Expended to Create the Information, and
- Ease of Duplication

Secrecy

The most important characteristic of a trade secret is secrecy. In determining whether information qualifies as a trade secret, courts focus upon how extensively the purported proprietary information is known to employees, the public or competitors. The more extensively circulated, the less likely the information will be considered a protected trade secret.

Security

Courts will critically examine the extent that a company takes security measures to preserve the secrecy of the disputed information. These measures constitute evidence of the existence of trade secret information. To install these security measures, companies incur time and money. When confronted with these measures, courts presume that businesses incur these costs because they believe that the information provides them with a competitive advantage.

The Value of the Information and The Effort Expended to Create Information

The greater the value of the information, the more likely the company is to protect its secret. Evidence showing the cost incurred by the company to devise the information and the value that the information provides to the company are the critical components of this characteristic. The more time, effort and money expended in developing the information, the more likely it is a protected trade secret.

Ease of Duplication

The more easily information can be obtained or replicated, the less likely it is a protected trade secret.

A customer list is a classic example of information that might be considered a trade secret. The list, by itself, would probably not be a protected trade secret. It could only be protected if the customer list is not "readily ascertainable" from sources outside the particular company. In

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Keeping the Home Field Advantage: Reasons to Avoid "Choice of Forum Clauses"

You need new computers or other equipment for your business and negotiate an advantageous lease with a leasing company in California. The lease agreement has all the correct terms, but somewhere in the fine print is a "choice of forum clause" which provides that the lease will be interpreted under California law and all legal actions arising from the lease must be brought in California. The last thing most non-lawyers would ever think about when negotiating a lease for equipment or entering into another contract, is what law will apply and where legal action can be brought should there be a problem.

However, when you are forced to litigate, it is advantageous to litigate in court near your home or business. The justice system in your home state may be more sympathetic to your situation. When you file a lawsuit in your home state you have a "home field" advantage that should be guarded, yet many parties lose this advantage by contracting it away even before the dispute arises.

The danger of the "Choice of Forum Clause"

In a recent case, a Pennsylvania company agreed to a clause in a contract with its supplier that would force it to litigate all disputes in England, under English law. When a dispute arose between the parties, a Pennsylvania trial court dismissed the claim, enforcing the choice of forum clause contained in the contract. The Pennsylvania Superior Court reversed the trial court's decision, stating the choice of forum clause would not be enforced because all of the witnesses and evidence were located in the United States, both parties to the contract had offices in Pennsylvania, and some of the parties to the litigation were not parties to the contract. This case represents the extreme facts that are necessary for a court to refuse to enforce a choice of forum clause.

A court will enforce a choice of forum clause when the parties have freely agreed to the clause and where such an agreement is reasonable at the time of litigation. An agreement is unreasonable if its enforcement would seriously impair the plaintiff's ability to pursue its cause of action. A clause is reasonable if it makes enforcing the agreement merely inconvenient or expensive. It is reasonable even if it is standard or boiler plate language, as is often the case in leases and sales or purchase agreements. Accordingly, most choice of forum clauses will be enforced. A party who agrees to a choice of forum clause is faced with the potential nightmare of having to enforce or defend its rights in a distant state, or even in a foreign country.

Keep your options open

This problem will not arise when you either refuse to agree to a choice of forum clause or negotiate a favorable choice of forum clause. When the parties have not agreed in advance where a dispute should be litigated, the plaintiff chooses where the case is tried. The plaintiff cannot, however, choose to bring the lawsuit anywhere it wants. The case can be tried only where the defendant has sufficient contacts. These rules of procedure ensure that the case is tried where it is fair for both parties.

Athletes know that the "home field" advantage is a real phenomenon. Teams play better on their home field. If you agree to a choice of forum clause, you give up the "home field" advantage, and perhaps your best chance of prevailing, if a dispute arises.

For further information, contact Drew S. Dorfman E-Mail **at 215-893-8705**

What is Title Insurance and Why do I Need it?

Almost every purchase or sale of residential or commercial real estate involves title insurance. It is used in almost every transaction involving lending based on real estate.

Types of Policies Issued

Title insurance offers reliable protection for a buyer's investment in real estate through an "owners title policy" and guarantees a lender priority through a "mortgagee title policy", usually titled a "policy". Each policy issued by a title insurance company requires the payment of a one-time premium. The premium is based on the purchase price of the property or the amount of the loan being insured. It is usually paid at the closing of the transaction. As a result, the purchaser/borrower normally pays the premium for the policy.

Coverage

Title insurance is a contract of indemnity. The title insurer agrees to pay the owner or lender, as the case may be, the loss or damage the insured suffers (up to the amount of the policy), if there is a claim against title to the property. It would, perhaps, be more properly defined as a "guarantee of the title". All too often there is a correlation in people's minds between title insurance and other types of insurance, such as casualty or life insurance. However, title insurance insures against events of the past, rather than events of the future.

The one-time premium paid at closing covers the insureds under the policy until the property is sold or otherwise transferred. Sometimes, if there is a change of entity that owns the property, i.e. a conversion from one form of ownership to another, without the sale of the property, the title insurance policy may terminate.

The loan policy covers the term of the loan underlying the insured's mortgage. This would typically extend to the assignees of the lender. If the loan policy is purchased at the same time as the owners policy, the charge for the loan policy is nominal. Lenders will often

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How to Avoid Mistakes in Employee Performance Evaluations

Employee performance evaluations almost always become a matter of evidence in employment discrimination and wrongful discharge lawsuits. A proper performance evaluation system can be an excellent defense against such lawsuits by former employees. At the same time, a haphazard, incomplete and poorly executed employee evaluation process can give a plaintiff a victory in Court. Therefore, employers should treat their process for employee evaluations carefully.

At a minimum, performance appraisals should be based upon clear job descriptions. All employees, no matter how long they have worked for their employer, should understand what is expected of them. Furthermore, the employees should understand all of the criteria on which they will be evaluated. Ideally, all job expectations should be communicated in writing to every employee.

The individuals conducting the performance appraisal should be properly trained. It is not safe to assume that your supervisors and managers know how to conduct proper evaluations. Inappropriate or biased comments during an evaluation can find their way into a personnel file, which is discoverable in the event of litigation. A common pitfall is that supervisors and managers are often reluctant to communicate criticism to an employee. The employer must be certain that any valid criticism is effectively communicated. Inflated employment evaluations can mislead the employee and can add to the difficulty of defending a termination decision.

At the same time, when an employee is given an unsatisfactory evaluation, the best practice is to discuss the evaluation with the employee and to review specific goals for improvement and a time frame for achieving the goals. It is best to avoid a one-on-one review with the employee. Another representative of management should be present.

During the meeting with the employee, the evaluators should address the results that the employee has achieved or failed to achieve, and should refrain from using language that is critical of the employee as a person. Specific steps and goals to improve performance should be emphasized.

All evaluations should be in writing, and the employee should have the opportunity to review the evaluation and comment upon it. An employee should also acknowledge receipt of the evaluation, usually by signing a copy of it.

Employers should be on the lookout for red flags during the evaluation process. If an employee makes claims of unfairness, discrimination, or of retaliation, such comments should be communicated immediately to a person within the organization who is trained to deal with these claims. Other situations deserve special attention as well. When an older worker suffers a sharp drop in performance, this should be reviewed immediately to avoid a later claim under the Age Discrimination In Employment Act. It is important to document any drop in performance in language that is not based on the age of the employee.

Finally, it is important to follow-up on areas addressed during the evaluation. Any improvement goals should be given specific timelines, and the employer should follow up within that time frame. If the stated deadline passes without comment, the employee may have the impression that he has fulfilled the improvement requirements.

Remember that employees have a right of access to their personnel files and evaluations. Treat performance appraisals as confidential and do not disclose the contents to others in the company or to third parties who do not have a need for access to such information.

For further information, contact
Diane Bernoff Sher E-Mail
(215) 893-8726

REMINDER

REAL ESTATE TAX ASSESSMENT DEADLINES ARE APPROACHING

If you think that your property assessment is unfair, let us review it for you.

CONTACT:
S. David Fineman at 215-893-9300

Dear Friends:

As you may know, we recently invested in both hardware and software to upgrade our computer system. As a result, I am proud to say that we are now able to work more efficiently with our client base and within the legal system.

To help us work better with you and your firm, we would appreciate it if you'd forward us your business e-mail address, if you haven't done so already. For convenience, e-mail our Director of Administration, Fred Esposito at fesposito@finemanbach.com

Thank you, and as always, if you have any questions or suggestions, please don't hesitate to call me or Fred at 215-893-9300.

Thank You

S. David Fineman

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Protecting Trade Secrets

making that determination, the courts will look to see if the customer list contains detailed and sophisticated information. For example, a list of customers containing data revealing their monthly purchases would more likely constitute a trade secret. The mere listing of customer names and addresses which could be obtained from a telephone book, would probably not constitute a protected trade secret.

Developing a program to prevent misappropriation of trade secrets

Developing a program to prevent misappropriation of trade secrets is an important step for any company trying to protect its trade secrets. If used properly, the company can avoid needless litigation and preserve the integrity of its proprietary information. It also can help prevent the company from being accused of misappropriating a competitor's proprietary information. This program should cover four distinct areas. They are:

- Recruitment
- New Employees
- Current Employees, and
- Departing Employees

Recruitment

Extensive interviews of any applicant is imperative. During the interview, the employer must determine if the applicant has any knowledge of his or her former employer's trade secrets. If the applicant has knowledge, the employer must determine whether the applicant can fulfill the responsibilities of the job being sought without disclosing those trade secrets. The employer should also ask the applicant to sign a non-disclosure agreement specifying that he or she will not disclose his or her former employer's trade secrets and will not bring any files or other tangible documents to your company's workplace. The employer should also determine whether the applicant has signed a confidentiality and/or noncompete agreement with former employer.

New Employees

Advise all new employees of the importance of maintaining the secrecy of your company's secrets. All employees who have access to proprietary information should acknowledge the secrecy and the value of the information in a confidentiality agreement. This acknowledgment should be in writing and should be used in conjunction with a non-compete agreement to protect the company's trade secrets and also its confidential and proprietary information.

Current Employees

Constantly remind current employees of the obligation to keep trade secrets and other proprietary information confidential. An employer should take the time to identify trade secrets and properly dispose of any documents containing trade secret information. Since secrecy is an important component of any trade secret, the company must take reasonable steps to maintain the secrecy of information. For example, keep all secret documents under lock and key and limit access to sensitive computer information by use of passwords. Your company should mark all proprietary information it wishes to maintain confidential as "proprietary" and/or "confidential." Requiring current employees to sign a non-disclosure agreement and limiting access to this sensitive information to those employees with a legitimate need-to-know are also appropriate measures to take.

Departing Employees

During an exit interview remind the former employee to return all trade secret and proprietary information belonging to your company. If the employee signed a nondisclosure agreement, remind the employee to abide by its terms. Immediately upon termination, remove the departing employee's access to sensitive information stored in files or on computer and check a departing employee's computer to determine whether confidential information was recently downloaded, copied or e-mailed to another destination.

Trade secrets are a valuable tool to maintain a competitive advantage. To be able to protect trade secrets you must take reasonable steps to insure their secrecy.

For more information, contact Jay Barry Harris E-Mail at (215) 893-8704.

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What is Title Insurance and Why do I Need it?

require a new title policy in connection with the refinancing of a loan or an additional loan being placed on the property.

The forms used by any title insurer are approved by the Commonwealth of Pennsylvania - State Insurance Department. An owner's policy insures against three primary losses sustained by owner (insured). These losses ordinarily arise out of: (1) the title to the real estate being vested in someone other than as stated in the policy; (2) any defect or lien or encumbrance on a title other than as set forth in the policy; or (3) the unmarketability of the title.

A loan policy provides coverages to lender for matters unique to the lender. This policy typically covers the invalidity or unenforceability of the lien of the mortgage on the property and the priority of the lien over other liens on the property.

Exceptions to Coverage

When the owner orders a title policy, a title report or commitment is issued by the title insurer. This report indicates the state of title to the property. The title report will disclose liens, encumbrances and judgments on the property, as well as other restrictions that affect the property. Typically, these are listed as "exclusions" or "exceptions" from coverage. This means that the insurance company will not indemnify the insured for any loss which occurs by reason of such items, and will not defend against causes of action relating to these items.

Review of the Policy is Important

It is important to have counsel review these exceptions and exclusions to determine what items can or should be removed from the exceptions to the title policy. If these exceptions are not removed, or cannot be removed, then the buyer and/or lender may not be getting the protection they believe they are acquiring from the title policy.

For more information, contact Scott Mustin E-Mail at (215) 893-8741.