



How to Protect Your Competitive Edge

In this uncertain economy, the last thing your business needs is for one of your most valued employees to suddenly leave the job, especially if the worker's new employer is one of your main competitors. But you may be able to prevent such an occurrence by having employees sign a "noncompete agreement."

Typically, a noncompete agreement prohibits the employee from performing the same (or a similar) job in a limited geographic area for a specified period of time. Also, depending on the relevant state law, the agreement may stop the employee from revealing confidential information about your company and calling on your customers.

What happens if an employee ignores or violates the noncompete agreement that he or she has signed? You can take appropriate action against the employee. For

instance, if you institute a lawsuit, you can seek monetary damages for lost business opportunities. In some cases, you may be able to prevent the employee from working for the competitor under the terms of the agreement.

Caution: You are not entirely in the clear once the ink dries on the contract. The courts tend to frown upon agreements that substantially restrict or restrain trade or a person's right to pursue a livelihood. In addition, state law may have an impact in this area.

Nevertheless, a noncompete agreement may be enforced if it is "reasonable" under the circumstances. What is reasonable? It often depends on the scope and nature of the employee's job. For example, you may have trouble restricting the right of an employee to work for a competitor if he or she played an company.

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Call to Arms: The Heroes Act

The new Heroes Earnings Assistance and Relief Tax Act-frequently called "the Heroes Act" for short-carves out several special tax breaks for families of military personnel and their employers. Here is an overview of several main provisions in its arsenal.

Economic stimulus rebates: Rebates are authorized for military couples filing joint tax returns so long as one spouse has a valid Social Security number and is also a member of the armed forces.

Plan withdrawals: Reservists who are ordered or called to active duty are permanently allowed to make penalty-free withdrawals from IRAs, 401(k) plans and 403(b) plans. This extends the exception from the usual 10% penalty, which had officially expired after 2007. Reservists may also take tax-free distributions of unused benefits in a flexible spending account (FSA) used for health care purposes.

Wage withholding: Differential wage payments are treated as wages for purposes of tax withholding, IRA contributions and in-service qualified retirement plan distributions.

Employer tax credit: Small employers of reservists may qualify for a temporary differential pay tax credit of up to \$4,000 per worker.

Death benefits and insurance: Payments of military death benefits and military insurance proceeds may be rolled over tax-free to a Roth IRA or Coverdell Educational Savings Account (ESA).

Survivors of plan participants: Pension plans are required to provide additional benefits and accruals to survivors of plan participants who die while on active military duty.

Combat pay: Tax-free combat pay is permanently treated as earned income for purposes of the Earned Income Credit (EIC).

Disabled veterans: Retired veterans are granted more time to claim tax refunds after disability determinations. Also, Supplemental Security Insurance (SSI) is enhanced for veterans.

Home-sale exclusion: The home-sale exclusion is liberalized for certain members of the intelligence com-

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Furthermore, there must be some "give and take" for the contract to be legally enforceable. In other words, the employee must receive something of value for signing the contract. A small signing bonus or the mere promise of continued employment does not suffice in some states. And you cannot coerce an employee into signing the agreement.

The courts may also focus on the relative harm suffered by both parties. Who is worse off-an employee who cannot pursue a chosen profession or a company that risks the loss of its customer base? Again, this determination depends on the particular facts. Finally, your position for protecting trade secrets is weakened if the information is a matter of public knowledge or there is no confidentiality within your company.

Practical approach: Meet with legal counsel to determine the best route to take for your company.

Do not take any action until you consult with an WAW attorney who is experienced in employment law.

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munity and Peace Corps volunteers.

Conversely, the Heroes Act offsets these tax advantages with three revenue-raising provisions.

1. Higher taxes are imposed on certain affluent individuals who renounce their U.S. citizenship. This provision generally applies to expatriates with a net worth of \$2 million or more.
2. Foreign subsidiaries of U.S. companies working under a government contract are treated as American employers for employment tax purposes.
3. The minimum failure-to-file penalty for individual tax returns is increased to the lesser of \$135 or 100% of liability.

Final point: There's more to the law than first meets the eye. Both individuals and employers should seek professional assistance.

beneficiary pays tax on the amounts received from the trust. At the end of the stated period, the property goes to the charity named when you set up the trust.

This can accomplish a number of objectives. For instance:

1. The donor can claim a current tax deduction for the value of the remainder interest that passes to the charity. The value of the donation is based on special government tables.
2. The donor may also avoid a potentially large capital gains tax on the sale of appreciated property.
3. The designated beneficiary can rely on a steady stream of income from the CRT.
4. The CRT may be combined with a "wealth replacement trust" to achieve estate-planning benefits.

How it works: The wealth replacement trust is funded in whole or in part by the tax savings generated by the CRT. The trust then uses the money to purchase life insurance to "replace" the wealth donated to charity. When all is said and done, your heirs come out even or ahead of where they would have been if you had not set up the CRT in the first place.

Be aware that a charitable remainder trust is irrevocable. In other words, you cannot change your mind and take your assets back. In addition, there are fees for establishing and maintaining the trust. Finally, other special rules may come into play.

Of course, this type of arrangement is not for everyone. If it makes sense for you, coordinate a CRT with other aspects of your estate plan.

Where Can You Place Your Wealth?

If you are holding appreciated property-for example, stock in a company you own or rental real estate-you might opt to use a tried-and-true estate-planning device: the charitable remainder trust (CRT).

Basic premise: You transfer the appreciated property to the CRT and designate a beneficiary to receive income from the trust for life or a period of years. For instance, you might name your spouse as the income beneficiary of the trust. The

Questions?

For more information about articles and information contained in the WAW Brief, contact Wharton Aldhizer & Weaver at (540) 434-0316 or send e-mail to info@wawlaw.com.

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