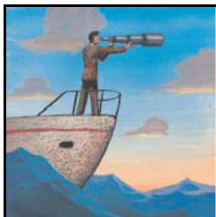

Legal Advisory

IDEAS AND STRATEGIES FOR YOU AND YOUR BUSINESS / FOURTH QUARTER 2008

inside

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 insignificant role for your company.

Furthermore, there must be some "give and take" for the contract to be legally enforceable. In other words, the employee must receive some-

*(see **Your Competitive Edge** on next page)*

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 community 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. ✍

How to Protect Your Competitive Edge

(continued from front page)

thing 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. ✍

Key Points in the New Housing Law

Following close on the heels of the new military relief act (see page 2), Congress this summer passed the Housing and Economic Recovery Act of 2008. This new law affects a wide range of individuals—including first-time homebuyers, existing homeowners and senior citizens—as well as mortgage lenders. Here's a roundup of several important provisions.

- A new program allowing homeowners to replace existing loans with renegotiated loans.
- A new tax credit of up to $7,500 for first-time homebuyers.
- An increase in the limit for jumbo loans bought by Fannie Mae and Freddie Mac to $625,000.
- A property tax deduction of up to $1,000 for non-itemizers on 2008 tax returns.
- Relief from high fees associated with reverse mortgages.
- Simplification of the low-income housing credit.
- Modifications of rules for Real Estate Investment Trusts (REITs).
- Simplification of rules for tax-exempt housing bonds.
- Additional funding for mortgage revenue bonds.
- Enhancement of the rehabilitation tax credit.
- Extension of Gulf Opportunity (GO) Zone tax incentives.

The new law also includes several revenue-generating provisions. For instance, a portion of the gain from a converted investment property may not qualify for the home-sale exclusion. More details are available upon request.

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 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. ✍

Testing Job Applicants 1, 2, 3 …

Suppose your firm puts job applicants through a battery of tests. Is it legal? Yes, within certain limits. Although testing is allowed, however, both federal and state laws may restrict what you can test and to what extent. To further cloud the issue, the legal interpretations may be fuzzy. Following are some basic parameters to observe.

Skills test: A skills tests can be as simple as asking someone to do some basic keyboarding. But it can be more complex for technical jobs or positions requiring professional or special talents. Generally, you can use this type of skills test only if it is a legitimate means for measuring the skills necessary for a particular job.

Psychological and aptitude tests: An employer may use a written test (often in a multiple-answer format) to provide insight into an applicant's personality or attitude. If the test is made mandatory for applicants, it could open up your firm to potential lawsuits. For instance, the test could be found to discriminate against minority or female applicants because it does not reflect actual skills. Similarly, such a test may invade a person's privacy by inquiring into personal areas like religion or sexual orientation.

Lie detector tests: Under the federal Employee Polygraph Protection Act, employers are generally prohibited from requiring applicants to take a lie detector test or asking applicants about previous lie detector tests. (There are some exceptions where security is involved in the position.)

Medical tests: If you conduct a medical exam before offering a candidate a job, you may be violating the Americans with Disabilities Act (ADA). Also, do not inquire about the applicant's medical history. Subsequently, a job offer may be made conditional upon the applicant passing a medical exam. However, this process must be followed for everyone to avoid discrimination problems under the ADA.

Drug tests: Drug testing laws vary from state to state. For instance, in some states drug tests are permitted only for jobs involving public safety; others allow drug testing for any occupation and still others prohibit them completely. Recommendation: Before you initiate a drug testing policy, consult with an attorney regarding the applicable laws. ✍

BRIEFS

The Bond Market—As a result of a closely watched Supreme Court case, the interest from municipal bonds issued by an individual state remains tax-exempt to its residents. The plaintiff in a lawsuit had argued that it was unconstitutional for the state to tax interest income on out-of-state municipals while exempting tax on interest from in-state bonds. The new decision maintains the status quo.

Parity on the Job—In a new case, the only woman crane operator at a construction site was denied bathroom breaks. Men on the site did not request them. The woman worker sued for sexual discrimination. **Result**: The District Court in Ohio, citing obvious biological differences between men and women, said the company's policy was unequal.

Health Care Directives—You may use a health care proxy to designate a person to provide informed consent regarding your medical treatment if you cannot do it yourself. This document may be coordinated with a power of attorney. **Reason**: Under the Health Insurance Portability and Accountability Act (HIPAA), an institution may not allow your family or spouse to act on your behalf.

Taking It Personal—When an 80-year-old woman lost her job, she sued both her employer and supervisor for age discrimination. She argued that the boss, as an "agent" defined by the Age Discrimination in Employment Act (ADEA), could be held personally liable. But the District Court in Indiana held that personal liability did not attach. **Caveat**: Supervisors may be personally liable in other employment situations under these circumstances.