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Polymer Advisory

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In This Issue...

Cleveland:

2300 BP Tower
200 Public Square
Cleveland, OH 44114-2378
Phone: 216.363.4500
Fax: 216.363.4588

Columbus:

88 East Broad Street
Suite 900
Columbus, OH 43215-3506
Phone: 614.223.9300
Fax: 614.223.9330

www.bfca.com

Protecting Your Business Against Exiting Employees

During the course of employment, your employees acquire specialized knowledge about your business, learn your trade secrets, and gain access to your customers and their information. How can you protect your business from employees taking their expertise and your trade secrets to your competitors when the employment relationship ends? One way is through the use and enforcement of non-competition agreements.

What are Non-competition Agreements?

As the name implies, a non-competition agreement is a contract between an employer and an employee whereby the employee promises not to use information or skills gained through employment to benefit anyone other than the employer. Non-competition agreements are a valuable tool for protecting company resources, but because they may restrict employment, they are also considered a restraint of trade. Therefore, non-competition agreements must meet strict legal requirements to be enforceable.

> "...the use of non-competitive agreements... will...minimize expenses and reduce the threat of harm brought about by an exiting employee."

While standards vary from state to state, non-competition agreements generally must: (1) safeguard legally protectable interests; (2) be reasonable in scope; and (3) manifest an exchange of adequate consideration. If a non-competition agreement fails to meet every requirement, it is not enforceable.

Only Legitimate Business Interests are Protectable.

Only legitimate business interests are protectable by non-competition agreements. Protectable business interests that have been recognized by courts include customer relationships/goodwill; trade secrets and confidential information; investments in training and development; and unique services.

Identifying a company's protectable business interests is a fact specific inquiry which varies from company to company and may even vary from employee to employee. For example, product designs, test procedures, financial information and marketing plans are usually considered trade secrets that merit protection if the employer has taken steps to maintain the information or documents as confidential.

Non-competition Agreements Must be Reasonable.

To be legally enforceable, the geographic scope and duration of a non-competition agreement must be reasonable and no greater than required to protect the employer's legitimate business interests.

Continued on page 2

Continued from page 1

In most states, including Ohio, overbroad agreements are not enforced. Ohio courts have the authority to redraw overbroad agreements to comply with legal requirements; however, this remedy is not always exercised and many states do not allow similar judicial discretion. If a court is unable or unwilling to amend an overbroad non-competition agreement, the agreement is unenforceable. Therefore, it is important to have non-competition agreements that are tailored to your particular business and employees.

Non-competition agreements may only prevent employees from engaging in post-employment activities that *actually* interfere with your company's legitimate business interests. For example, an agreement preventing an employee from working in a similar business in any position and in any geographic area is overbroad and unenforceable if the company's protectable interests are limited to the customer relationships the employee developed in a specific geographic area.

There are no hard and fast rules concerning temporal and geographic restrictions. Traditionally, courts in Ohio enforced non-competition restrictions lasting two years, but recent cases have held one year agreements unenforceable. Thus, an employer must be prepared to justify with factual information the duration specified in its non-competition agreements. As with time restrictions, distance requirements must be carefully drafted to ensure enforceability. Ohio courts have upheld restrictions on competition anywhere in the United States, but denied enforcement of a poorly drafted agreement where the former employee was competing across the street. As mentioned earlier, reasonableness of time and place restrictions is determined in light of all the facts.

What Constitutes Adequate Consideration?

As with any contract, adequate consideration by both contracting parties is required. In most states where non-competition agreements are enforceable, the execution of a non-competition agreement as a condition of employment constitutes sufficient consideration. Other circumstances often deemed adequate consideration include promotions, salary increases, benefit enhancement, and exposure to trade secrets. Since the determination of what constitutes adequate consideration may vary from state to state, you must confirm what is considered adequate consideration in the jurisdiction where an employee will be working before presenting the employee with a non-competition agreement. For example, it was not until early 2004 that the Ohio Supreme Court determined that continued employment of an at-will employee is sufficient consideration to support a non-competition agreement entered into after commencement of employment.

In today's business world, non-competition agreements are becoming more necessary than ever. Although enforcement of non-competition agreements may be difficult, enforcement is available when the agreements are carefully drafted. Companies contemplating the use of non-competition agreements will find that advance preparation, including consultation with an attorney familiar with the laws governing this type of contract and the business interests the company is trying to protect, will ultimately minimize expenses and reduce the threat of harm brought about by an exiting employee.

For additional information on this topic, please contact Ann E. Knuth at 216.363.4168 or aknuth@bfca.com.

Environmental Disclosure under Sarbanes-Oxley

The Sarbanes-Oxley Act of 2002 (the "Act") dramatically altered the corporate disclosure landscape. Although environmental disclosure might not leap to mind when thinking about Sarbanes-Oxley, the Act could have a significant affect on the procedures public companies employ for the disclosure and reporting of environmental information. Implementing proper procedures to ensure disclosure of environmental liabilities in compliance with the law is a must. The polymer industry is subject to a variety of environmental regulations and potential liabilities, some of which may need to be disclosed. Knowing what to disclose is only part of the equation. The Act requires more elaborate systems to ensure that top management is aware of environmental issues.

To comply with the new regulations under the Act, public companies must first understand what the legal requirements for environmental disclosure were prior to the new law, and then consider how the law has affected these requirements.

Since 1982, Regulation S-K[1] has required public companies to disclose information relating to material effects of compliance with environmental laws and material environmental proceedings. The SEC views a matter as material if there is a substantial likelihood that a reasonable person would consider the information important under the circumstances.[2]

The Act did not create any new environmental-specific disclosure or reporting obligations but it did create enhanced reporting procedures. The Act requires public companies to create, implement, monitor, and evaluate "disclosure controls and procedures." These disclosure controls and procedures must be designed to ensure that material environmental information is recorded, processed, summarized, and communicated to principal executives and financial officers in ample time to allow decisions regarding disclosure. A company

> **"The Act did not create any new…reporting obligations but it did create enhanced reporting procedures."**

executive must certify in every periodic report that (a) the public company's disclosure controls and procedures are functional and adequate and (b) they have evaluated the effectiveness of the disclosure controls and procedures within 90 days prior to filing the periodic report, and also must include their conclusions about the effectiveness of the disclosure controls and procedures based on requirements as of the date in that report. Thus, the burden of establishing disclosure controls and procedures rests at the *executive* level. That burden comes with some teeth: certifying executives who fail to comply with the Act face stiff fines and imprisonment.

> **"…the burden of establishing disclosure controls and procedures rests at the *executive* level."**

Each company should select environmental disclosure controls and procedures that are tailored to its own internal structure and procedures. Despite variations among individual companies, successful systems share three common characteristics: (1) a method that identifies, analyzes, and tracks existing and potential environmental issues; (2) effective internal reporting mechanisms that communicate these issues from front-line employees to upper-level management for materiality determination; and (3) a process for evaluating the effectiveness of these controls and procedures.

Identification. Existing and potential environmental issues currently facing the public company must be identified, compiled, and analyzed. Most companies have environmental management systems in place. Bottom line is that each company must be aware of its involvement in any active, threatened, or foreseeable judicial or administrative environmental actions, must have identified ways in which they interact with the environment and environmental regulators at each stage of their business, and are monitoring and assessing legal and regulatory changes.

Communication. A public company must design and implement the specific environmental disclosure controls and procedures that will communicate material environmental information from front-line employees to upper-level executives. Again, these should be tailored to each company's specific circumstances and ordinary information "flow" procedures.

If procedures for reporting environmental information are already in place, the company need only review and, if necessary, modify the existing system so that material environmental information is identified and timely disclosed to the appropriate people. Existing disclosure controls and procedures to comply with the Act can also be tailored or expanded to encompass environmental issues.

For companies starting from scratch, the process of designing and implementing environmental disclosure controls and procedures is more involved. First, the company needs to identify an environmental disclosure controls and procedure point person who will be responsible for (1) gathering and presenting all environmental information to those charged with determining whether the information is material, (2) evaluating and monitoring the disclosure controls and procedures, and (3) maintaining all applicable documents. Once this person is identified, he or she must consider the form of information flow that would work best for the company, *i.e.* written questionnaires, periodic e-mails, informal telephone conferences, and then make sure it is implemented.

Evaluation. The effectiveness of the environmental disclosure controls and procedures must be continually monitored and evaluated at the working level as well as at the executive level. The Act requires the responsible executive to certify that she has evaluated the effectiveness of the disclosure controls and procedures within 90 days prior to the report and to include her conclusions about the effectiveness based on that evaluation. Absent a periodic (at least quarterly) evaluation, the executive cannot make this certification.

In most cases, complying with the requirements of the Act in making environmental disclosures would involve the fine-tuning and coordination of existing environmental management systems and Sarbanes-Oxley disclosure controls and procedures to ensure that appropriate systems are in place. Even if systems need to be built from scratch, however, the stiff penalties under the Act make compliance the only option.

For additional information on this topic, please contact John J. Fahsbender at 216.363.4483 or jfahsbender@bfca.com.

[1] Securities Act Release No. 33-8238 (June 5, 2003), *available at* http://www.sec.gov/rules/final/33-8238.htm (accessed on August 10, 2004).

[2] S.E.C. Staff Accounting Bulletin No. 99, 1999 WL 1123073 (Aug. 12, 1999).

H-1B Visas

An H-1B visa, a frequently used non-immigrant employment based visa, is available to aliens who will be employed in the United States in a "specialty occupation." The number of new H-1B visas available each federal government fiscal year is capped at 65,000, a number established by federal law. On October 1, 2004, the first day of the federal government 2005 fiscal year, the United States Citizenship and Immigration Services announced that it had received enough H-1B visa petitions to meet the cap for

Continued on page 4

Continued from page 3

the fiscal year 2005. The resulting lack of new H-1B visas created a real dilemma for employers, especially in the areas of engineering and science, as well as for foreign nationals, particularly recent college graduates. Congress responded with provisions in the Omnibus Appropriations Act for FY 2005 known as the H-1B Visa Reform Act of 2004. In addition to other provisions, the Act exempts from the cap the first 20,000 H-1B beneficiaries who have earned a master's degree or higher from a U.S. institution of higher education. Although this exemption will be a welcome relief for some employers and aliens, it is expected that this cap relief will also be quickly exhausted. Thus, rather than rely on congressional action, employers must plan recruiting and hiring for specialty occupations around expected visa availability.

"…employers must plan recruiting and hiring for specialty occupations around expected visa availability."

"Specialty occupation" refers to an occupation which requires the theoretical and practical application of a body of highly specialized knowledge to fully perform the occupation, and which requires the attainment of a bachelor's degree or higher as a minimum requirement to perform the job duties. H-1B visas are valid in three-year increments, generally for up to six years, and are both employer and location specific. In addition, H-1B visas require that the alien be paid the prevailing wage for the job in the geographic area of intended employment or the actual wage paid to similar employees of the employer in the same occupation at the same work site, whichever is higher.

For additional information on this topic, please contact Ann E. Knuth at 216.363.4168 or aknuth@bfca.com.

FOR MORE INFORMATION ABOUT OUR POLYMER LAW GROUP PLEASE CONTACT ONE OF THE FOLLOWING:

Allan Goldner
216.363.4623
E-mail: agoldner@bfca.com

Megan L. Mehalko
216.363.4487
E-mail: mmehalko@bfca.com

Industry Events

January 19, 2005
Doing The Deal® The Annual Benesch Private Equity Summit *"Current Issues in Private Equity"* Cleveland, Ohio

Keynote speaker, Carmen Gigliotti, Managing Director, DuPont Capital Management will discuss partnership terms, conditions and governance issues. Panel discussions will cover the state of the market, what limited partners are looking for, current issues in valuation, fund formation, and governance. Additional conference and registration information can be found at www.bfca.com/events

February 11, 2005
China: Training Executives To Do Business … Better, Cleveland, Ohio
8:30 a.m. – 4:00 p.m.

This Benesch co-sponsored training conference is for executives with 1-5 years experience in doing business in China. The program will bring together industry leaders in their fields who will provide practical, technical skill training in intermediate level subjects. For additional information and to register, go to info@chinaresourcenetwork.com

February 27-March 2, 2005
Plastics News Executive Forum, Phoenix, Arizona

Allan Goldner will moderate a China panel discussion and audience Q&A. The Benesch Polymer Law Group will again co-sponsor and co-present the Supplemental Session for Managers on Wednesday, March 2, 2005. Jim Hill, Megan Mehalko, Steve Auvil, and John Banks will present this half-day Session, *Creating Advantages: Managing Complexity, Capital and Competition*, and will cover information that executives will be able to apply including differentiating through strategic alliances, capitalizing on your intellectual capital, and managing manufacturing complexity. For additional information or to register for the Forum, please log on to www.plasticsnews.com/forum2005.

March 10, 2005
Transportation & Logistics Conference, Columbus, Ohio

The Benesch Transportation & Logistics Group will present *Maximizing Opportunities and Minimizing Risks in Transportation and Logistics: How The Law Can Help*. Additional conference and registration information can be found at www.bfca.com/events