

SEPTEMBER 2014 NEWSLETTER

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HOW EMPLOYERS CAN PROTECT THEMSELVES FROM THE THEFT OF ELECTRONICALLY STORED CONFIDENTIAL INFORMATION AND DATA BY DEPARTING EMPLOYEES

FIRM ANNOUNCEMENTS:

A. Joseph R. Pozzuolo, Esquire will be a speaker at a CPE seminar sponsored by the Montgomery County Society of CPA's on Wednesday September 10, 2014 @ 9:00 a.m. at the Cedarbrook Country Club, 180 Penllyn Blue Bell Pike, Blue Bell, PA 19422.

Please contact Diane McLeer @ DMcLeer@Janney.com

B. FREE ONLINE CLE/CPE CREDITS:

Pozzuolo Rodden, P.C. is pleased to announce the opportunity to obtain free CPE/CLE credits by viewing the LawLine webcast courses previously taught by Joseph R. Pozzuolo and/or Jeffrey S. Pozzuolo titled “The Negotiation and Documentation of Commercial Financing Documents Including the Use of Convertible Loans With Put and Call Options”, “How Middle Income Families Should Plan for Retirement Including Ethics” and “The Fundamentals of Starting a Business”.

*How Middle Income Families Should Plan for Retirement- <http://bit.ly/ZvgNbr>

*The Fundamentals of Starting a Business- <http://bit.ly/13Q8dei>

*The Negotiation and Documentation of Commercial Real Estate Loan Documents- <http://bit.ly/17jfXSN>

Any problems, please feel free to contact Chrissy @ chrissy@pozzuolo.com

Also, each of these seminars can be viewed without receiving credit on the internet at “Pozzuolo Rodden, You Tube” or at www.pozzuolo.com.

QUESTION OF THE MONTH:

FIVE MISTAKES TO AVOID FOR A SUCCESSFUL BUSINESS SUCCESSION

Answer-See Page 5 of this Newsletter

HOW EMPLOYERS CAN PROTECT THEMSELVES FROM THE THEFT OF ELECTRONICALLY STORED CONFIDENTIAL INFORMATION AND DATA BY DEPARTING EMPLOYEES

Due to advances in technology, employers need to recognize the need to protect themselves from the theft of electronically stored confidential information and data from departing employees. In a recent survey of employees the *Wall Street Journal* reported that fifty (50%) percent of departing employees took confidential information when they left their employment. The use of thumb drives, emails and other electronic transfer and storage devices have made it easier than ever for employees to leave their employment with the confidential information of their employer without detection. A large amount of data theft by departing employees is unreported and undetected. Accordingly, there is an increasing need for employers to take precautionary measures to protect themselves against any such theft and to know what steps to take in the event of theft by a former employee.

Before an employer can take any steps to protect themselves from data theft, it is important the employer has a comprehensive understanding of how its information is electronically stored and how it can be accessed and transferred by employees.

I. Prevention and Precautionary Measures

First, it is necessary that an employer have clear policies defining confidential information and data as company property. Furthermore, the employer's policies should expressly prohibit the removal of any confidential information or company data by an employee departing employment. These types of policies typically will define and identify what is considered confidential information and set forth any limitations to an employee's ability to access and retain any confidential information.

These policies and procedures should be applied consistently by an employer to all employees and should expressly state that an employee has no reasonable expectation of privacy over information and communications from company computers and accounts. It is important to include this clause in employment agreements or employee handbooks so an employee cannot later argue that emails sent from his or her work computer on his or her personal computer, which could contain confidential information, should be subject a reasonable expectation of privacy from monitoring by the employer. To more easily enforce these policies if necessary, an employer should have all employees sign an acknowledgement that they have received, reviewed and understand the policies and how they will be enforced. Once the proper policies are established an employer should be sure to educate its employees on all of the policies and use periodic reminders to keep employees informed of the policy.

Additionally, it is prudent for an employer to draft agreements to be executed by its employees to protect the employer's confidential information and trade secrets. These provisions can appear in employment agreements, severance agreement, or a stand-alone confidentiality or non-disclosure agreement. These types of agreements can limit the employee's ability to obtain and disclose confidential information and should be reviewed by an employer's legal counsel. Any provisions dealing with confidential information should clearly define and identify what information the employer deems confidential or a trade secret. The agreement must also prohibit the disclosure of any such information for non-company uses and the consequences and procedure for a violation of any confidentiality/non-disclosure provision.

Another way an employer can take precautionary measures to protect itself is to limit an employee's access to confidential information and data through a secure network with passwords in place, or have an employee access data in a manner where it could not be easily misappropriated by downloading or printing. Furthermore, an employer can have programs in place to track when data is accessed so an employer can more easily determine if its confidential information has been compromised. Employer may also want to consider redistricting an employee's access to personal email and drop box accounts that would easily allow the employee to transfer the employer's electronic data to the employee's personal accounts.

Lastly, once an employer is aware an employee is departing, an exit interview is a good opportunity for an employer to reinforce its policies and remind the employee of his or her obligation to return all of the employer's confidential information and data prior to the termination of his or her employment.

II. Pennsylvania Uniform Trade Secrets Act

The Pennsylvania Legislature has adopted the Uniform Trade Secrets Act ("UTSA"), 12 Pa.C.S. §§ 5304-5308, which can provide protection to employers from former employees misappropriating confidential information for their own personal use. The UTSA defines trade secrets as follows:

Information, including a formula, drawing, pattern, compilation including a customer list, program, device, method, technique or process that:

(1) Derives independent economic value, actual or potential, from not being generally known to, and not being readily ascertainable by proper means by, other persons who can obtain economic value from its disclosure or use.

(2) Is the subject of efforts that are reasonable under the circumstances to maintain its secrecy.

According to the UTSA a company should be taking reasonable steps to prevent disclosure of any its trade secrets if it seeks to protect those trade secrets under the UTSA. Pursuant to the UTSA, the Court can enjoin a party from committing an actual or threatened misappropriation of a company's trade secrets. This type of injunctive relief will last until the trade secret has ceased to exist or for a reasonable time as determined by the Court to be necessary to eliminate the commercial advantage that a misappropriation of the trade secret could create. The Court may also award monetary damages, exemplary damages, and award attorney fees in considering claims made under the UTSA.

III. Civil Remedies

Once it has been established that a data theft occurred an employer may want to bring a lawsuit against the offending employee. A civil suit may help compensate the employer for any injuries it suffered as a result of the misappropriation of information from a departing employee. Typically, there are two main categories of civil suits, contracts and torts.

A. *Contracts*

A contractual claim exists for employers who had entered into a contract or agreement with their former employees protecting the use of the employer's information and data. As discussed above, employers must take the necessary precautions when drafting these agreements to make sure its confidential information is protected and that these agreements are enforceable. Furthermore, these agreements can contain provisions dictating what state's law will apply to violations of the contract, select the court with jurisdiction over the contract, and provide that if the employer is successful on its claims for breach of contract that it is awarded attorney's fees.

B. *Torts*

An employer may be able to assert tort claims based on an employee's removal of confidential information, however, if the information qualifies as a trade secret under the UTSA, then the UTSA displaces any conflicting tort claim. Tort claims that an employer may consider bringing against a former employee can include conversion, fraud, intentional interference with business relations, and, breach of a fiduciary duty, if the employee was a higher level employee that had a fiduciary relationship with the employer.

If you are an employer, seeking to draft policies, procedures or agreements to adequately protect your confidential information, trade secrets and data from departing employees or suspect that a misappropriation has occurred, please contact this office to meet with one of our experienced attorneys for further assistance.

QUESTION OF THE MONTH:

FIVE MISTAKES TO AVOID FOR A SUCCESSFUL BUSINESS SUCCESSION

It is seen time and time again where 20 to 30 years have passed and a fledgling privately owned business has now grown into a major asset without any plan for succession. Whether your business is just starting to be successful or is firmly established it is best to avoid the following mistakes to ensure: (1) there is a smooth transition for the business after your permanent disability or death; (2) that your family is taken care of; and, (3) that the federal and state governments do not take up to one-half of your wealth.

Delaying to Plan – Many people put succession planning off because they think they do not have time, think their business is too small, do not want to contemplate their own death or disability, or want to postpone final decisions on division of their assets as it may make a current relationship awkward. It is important to plan early to give you time to contemplate who the successor should be, and to allow enough time to set the plan in motion.

Choosing the Wrong Successor – It is important to choose the right successor to ensure the continued prosperity of your business and the maintenance and security of your family wealth. If you own a building supply chain, and your son has no interest in building supplies or managing a business, or lacks the skills to manage the business, leaving the business to your son is not a smart idea. In this situation, cashing out by selling to management, a competitor or a third party and then leaving your family the security and flexibility of a liquid investment trust may protect the business and avoid a severe loss in value.

Splitting the Company Equally – There is a difference between equal and equitable. Splitting a business equally among all of your children may not be equitable or fair and may wreak havoc on a business. The children directly involved in the business may feel like the disinterested children are riding their coattails. Also, the disinterested children may maliciously use their ownership interest to play out family feuds. It is better to leave control with the children directly involved in the business or give them a chance to purchase the business and gave the disinterested children other assets.

Delay Implementation of the Plan – The best plan in the world means nothing unless it is timely implemented. If you plan to have your children take over, they should be involved in management discussions and be given their own projects to develop their own management ability. Many times a parent micromanages and stifles the child's growth and wonders why the child is not ready at 40 or 45 years of age. Further, it is important to establish a support network of senior managers to help guide your child or children especially in the event of your disability or early death. The earlier this is done, the better equipped your successors will be to take the reins.

Failing to Provide Liquidity for Taxes – For most privately held business owners, the business is their estate. If you have a business worth \$20 million, after applying the Federal Unified Credit, your death tax bill will be approximately \$4 million. You need to provide liquidity through life insurance, holding separate liquid assets, or even selling the business to your children or a third party at or prior to death to pay for death taxes or else your family will be forced to sell at an inopportune time to raise funds for such tax.

Avoiding the above mistakes by starting early and being proactive with planning will give you the

best chance that your business will continue to be successful through the next generation, your loved ones will be taken care of, and you will minimize your federal and state death taxes.

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- If there are any legal questions you would like this office to answer in the future, please email the question to us at info@pozzuolo.com. Each month, the question with the most relevance to our privately held business clients, advisors, and friends will be answered in our monthly newsletter. The questions can relate to any of the areas practiced by this office including business planning and transactions, corporate law, commercial litigation, employment law and litigation, commercial real estate and development, construction law and litigation, estate planning, estate administration, tax and pension law, family law litigation.
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PUBLICATIONS

All of the following professional publications and past newsletters written by attorneys of this office are available by clicking here: [http://pozzuolo.com/Pubs Articles.shtml](http://pozzuolo.com/Pubs%20Articles.shtml)

Corporate/Tax Articles

- Bankruptcy - How To Prevent It And How To Cope With It Should It Happen To Your Business
- Deferred Compensation Rewards And Retains Key Employees
- Design Buy-Sell Agreements For Maximum Utility
- How An S Corporation Avoids The Double Taxation Incurred When Excessive Compensation Is Treated As A Dividend
- How Mortgage Lenders Should Draft Broker Agreements To Avoid RESPA Violations
- How To Look, Act And Sound Like A Professional Corporation
- How to Structure a Suitable Buy-Sell Agreement
- How To Use Non-Qualified Deferred Compensation Arrangements As A Business, Retirement And Tax Planning Tool
- Money Purchase Pension Plan Falls Out Of Favor
- Protecting A Client's Business From Unfair Competition Using Restrictive Covenants
- Structuring Loans From Qualified Plans - How To Handle The Strict Tax Rules
- What Type of Qualified Corporate Retirement Plan Best Serves Your Business, Tax And Retirement Needs
- Why An Employment Contract Is Mandatory

Estate Planning Articles

- Adapt Estate Planning Strategies to Fit the Needs of Same-Sex Couples
- College Funding Tool Offers Estate Planning Advantage
- Diversify Strategies For An Effective Estate Plan
- Divorce and Estate Planning
- Divorce Raises The Need For Performing An Estate Planning Review
- Drafting The Durable Power Of Attorney For Wealth Protection Purposes

- Estate Planning For Pet Owners
- Remarriage Situations Can Raise Special Estate Planning Considerations
- Six Proven Estate Planning Techniques
- Special Needs Trust - An Estate Planning Tool For The Disabled
- The Limited Liability Company -A Sophisticated Tool For Estate Planning
- Using Trusts To Maximize Family Protection And Minimize Estate Tax
- Why Living Wills- Advance Directives Are An Essential Part Of Estate Planning

Actual resolution of legal issues depends upon many factors, including variations of facts and state laws. This newsletter is not intended to provide legal advice on specific subjects. It is to provide insight into legal developments and issues. You should always consult with legal counsel before taking any action on matters covered in our updates.

This newsletter is courtesy of Pozzuolo Rodden, P.C.

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