

FEBRUARY 2026 NEWSLETTER

POZZUOLO RODDEN, P.C.
COUNSELORS AT LAW
2033 WALNUT STREET, PHILADELPHIA, PA 19103
215-977-8200/FAX 215-977-9663
www.pozzuolo.com



CONFIDENTIALITY AGREEMENTS SHOULD BE A CONDITION OF EMPLOYMENT

To get an edge in today's competitive marketplace, businesses look to exploit every opportunity that presents itself. Without protections in place, this means that competitors may take advantage of your company's confidential and proprietary information, such as customer lists, prospective customer lists, employee lists, pricing, general business know-how, future plans and even trade secrets that your former employees had access to. Even more insidious is the case of an employee pilfering, exploiting and selling your company's sensitive information, including customer leads, for their own personal gain while still currently employed and being paid by you.

As an employer, your business should be proactive and protect sensitive information by requiring a confidentiality agreement as a precondition of employment prior to providing access to such information. By having the prospective employee or independent contractor sign a confidentiality agreement prior to employment, the candidate knows of his/her obligations concerning your company's confidential information from the outset. If the candidate refuses to sign, then you know the candidate may not be the right person for the position and sensitive information has not been compromised.

State law does provide some protection, but reliance on state law and litigation for a common law tort is misplaced. Absent an express agreement for injunctive relief and damages, including a forfeiture of any deferred compensation package, costs of investigation, and attorneys' fees, state law in and of itself may not provide adequate remedies for damage that has been done. More significantly, reliance on state law puts you, the employer, in a "reactive" or "responsive" posture to try and do damage control. Instead, employers are better advised to allow state law to supplement a confidentiality agreement tailored to your business or, if necessary, the specific position or employee and provide the necessary remedies to compensate your business for the damages and costs of investigation.

The confidentiality agreement can be easily placed into an employment or independent contractor agreement, or signed as a separate contract. Providing access to confidential information is sufficient consideration from the employer's standpoint to make the agreement binding and the employee's confidentiality obligations enforceable in court. Care should be taken in defining your confidential information and to ensure that all of your business' sensitive, confidential and proprietary information falls within the scope of the confidentiality agreement's protections. Additionally, in the event of breach, the employers need to be able to avail themselves of immediate injunctive relief without the legal formalities of proving damages or posting a cash bond, which should be agreed to and provided for within the confidentiality agreement.

In summary, be proactive in protecting your business' proprietary and confidential information rather than reactive and require a confidentiality agreement as a precondition of employment.

If anyone has any questions or inquiries concerning this subject matter, do not hesitate to contact us. Feel free to email us your questions or comments concerning this newsletter.

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- How To Use Non-Qualified Deferred Compensation Arrangements As A Business, Retirement And Tax Planning Tool
- Protecting A Client's Business From Unfair Competition Using Restrictive Covenants
- Money Purchase Pension Plan Falls Out Of Favor
- Why An Employment Contract Is Mandatory
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- Structuring Loans From Qualified Plans - How To Handle The Strict Tax Rules
- How An S Corporation Avoids The Double Taxation Incurred When Excessive Compensation Is Treated As A

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- How Mortgage Lenders Should Draft Broker Agreements To Avoid RESPA Violations
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- Diversify Strategies For An Effective Estate Plan
- Use Wills To Maximize Family Protection And Minimize Tax
- Six Proven Estate Planning Techniques
- Divorce Raises The Need For Performing An Estate Planning Review
- Divorce and Estate Planning
- Remarriage Situations Can Raise Special Estate Planning Considerations
- College Funding Tool Offers Estate Planning Advantage
- Drafting The Durable Power Of Attorney For Wealth Protection Purposes
- Why Living Wills Advance Directives Are An Essential Part Of Estate Planning
- Special Needs Trust - An Estate Planning Tool For The Disabled
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