



Greater New York



www.chamber.com

Shelowitz & Associates and the Greater New York Chamber of Commerce are pleased to announce the launch of

The SA Business Briefing Breakfast Series™

Beginning on May 28th, 2008 at 8:15 am with:

Employer Self-Defense 101: How to Prevent Employee/Consultant Theft of Company Secrets

This program will provide key insights on non-competition and non-disclosure agreements to help you protect your business from renegade employees and consultants.

This presentation is intended as an information source for the clients and friends of Shelowitz & Associates PLLC. The content should not be construed as legal advice, and readers should not act upon information in this publication without consulting with legal counsel.

Copyright © 2008 Shelowitz & Associates PLLC. All rights reserved.

Objectives of Program

- The objectives of this program are to:
- (a) Provide practical insights into current rules regarding non-compete, non-solicitation, and non-disclosure agreements; and
- (b) Offer tips and tools that can be immediately put into practice when you return to your offices after our program today.

Welcome to Our Program

- **Summary of Program**
- **(1) Types of Protectable Information**
- **(2) General Overview of Legal Framework**
- **(3) Top 10 Recommended Defensive Strategies**
- **(4) Questions and Answers**
- **(5) Conclusion**

What Company Secrets Are Protectable?

- **Customer Lists**
- **Know-How**
- **Financial Projections**
- **Marketing Plans and Strategies**
- **Pricing information**
- **Relationships with Customers**
- **Trade Secrets**
- **And More**

General Legal Framework for Protections

- **Non-Competes**
- **Non-Disclosure**
- **Non-Solicitation**
- **NY subjects non-competes to the overriding limitation of reasonableness**
- **Weigh employer's legitimate business interests against the employee's concern regarding the possible loss of livelihood, which is strongly disfavored by NY public policy.**

General Legal Framework for Protections

- In general, a covenant that is reasonable in time and geographic scope will be enforced to the extent necessary:
- (1) to prevent an employee's solicitation or disclosure of trade secrets;
- (2) to prevent an employee's release of confidential information regarding the employer's customers; and
- (3) in those cases where the employee's services to the company are deemed special or unique.

General Legal Framework for Protections

- **NO black and white lines**
- **Based upon specific facts, duties, and confidential information**
- **Duration:**
- **3 years has been deemed reasonable**
- **6 months has been deemed unreasonable**
- **Geographic**
- **Worldwide has been deemed reasonable**
- **50 mile radius has been deemed unreasonable**

General Legal Framework for Protections

- **What is reasonable?**
- **(1) it is no greater than what is required for the protection of legitimate interests of employer**
- **(2) does not impose undue hardship to the employee**
- **(3) is not injurious to the public**

General Legal Framework for Protections

- **General Rules**
- **(1) Employer solicitation of customers that he serviced, but did not develop is prohibited**
- **(2) Misappropriation of information for use at competing business**
- **(3) Stealing contacts and information during employment**
- **(4) Soliciting business and employees during employment**

Industry Specific Issues

- **Internet**
- **Telecommunications**
- **Cosmetics**
- **Banking**
- **Investigative**
- **Collections**

Top 10 Defensive Strategies

- 1. Prepare a Company Employment Manual
- Every employee should sign on first day of employment
- This will provide framework for company protections
- Should be carefully reviewed by counsel to ensure that no additional employment obligations are created

Top 10 Defensive Strategies

- 2. Sign Written Agreements for Every Employee and Consultant
- In every case that deals with this issue, written agreements that clearly define obligations and restrictions have better chances of enforcement
- “Blue Penciling” - the courts have the power to limit duration and geographic scope of agreements, if too long

Top 10 Defensive Strategies

- 3. Include Thorough Non-Disclosure Provisions in Employment and Consulting Agreements
- Define specific confidential information
- Tie confidential information to investments and competitive concerns

Top 10 Defensive Strategies

- 4. Include Specific Non-Compete Provisions
- e.g., employee may not work for company that competes with employer in market for widgets
- Clearly define geographic scope
- Clearly define duration (6 - 24 months best bet for enforceability)
- Tie to protection of confidential and proprietary information

Top 10 Defensive Strategies

- 5. Include Non-Disparagement Provision
- It is often helpful to include provision prohibiting employee from bad mouthing the company and its employees
- This restriction should be tied specifically to strategic harm to company that could result and potential harm to customers, clients, and partners

Top 10 Defensive Strategies

- 6. Include Non-Solicitation Provisions
- Non-solicitation provisions are held to similar test as non-competes; e.g., reasonableness
- Employees may not solicit employees and consultants for certain period following termination of employment

Top 10 Defensive Strategies

- 7. Remember the Employee Choice Doctrine
- Under this doctrine, where an employee or consultant continues to receive benefits of employment in exchange for non-compete or non-solicit (e.g., severance), the courts view this as the employee waiving the entire reasonableness analysis
- Whether an employee receives continued consideration for his loyalty and good will post termination

Top 10 Defensive Strategies

- 8. Remind Employees of NDA Provisions in Customer Agreements
- Each time a new NDA is entered into with a new customer, it is critical that all relevant employees are notified of such NDA and understand that they are bound by such NDA

Top 10 Defensive Strategies

- 9. Remember Inevitable Disclosure
- This is a useful doctrine which states that where there is a risk that an employee must, by way of anything that is done for a future employer, utilize confidential and proprietary information of the prior employer, then a court may find an even longer non-compete valid
- A court may also enjoin an employee from certain jobs at competing companies

Top 10 Defensive Strategies

- 10. Duty of Loyalty
- When all else fails, e.g., no written agreement, etc.
- There is a common law principle known as the duty of loyalty pursuant to which an employee or consultant may not compete with their principal, may not misappropriate trade secrets and confidential information

Reality Check: Cost Benefit Analysis

- ✓ Litigating these issues can be VERY costly
- ✓ State and country specific laws; e.g., California; Israel may favor employee freedom to work
- ✓ Sometimes, new employer pays former employee's legal bills
- ✓ No one but the employer for the departing employee takes the legal bills
- ✓ Litigation is lengthy and disruptive
- ✓ Strong policies and carefully drafted agreements are invaluable

Wrap Up Summary

- (1) Types of Protectable Information
- (2) General Overview of Legal Framework
- (3) Top 10 Recommended Defensive Strategies
- (4) Questions and Answers
- (5) Conclusion

Thank You

For more information, please contact:

Mitchell C. Shelowitz
Shelowitz & Associates PLLC
11 Penn Plaza (7th Avenue at 32nd Street)
5th Floor
New York, NY 10001
Tel: +1-212-655-9384
Cell: +1-917-669-8427
Fax: +1-646-328-4569
Email: mshelowitz@salaws.com
Web: www.salaws.com