



EDUCATION AND ACCESS FOR WOMEN
IN FEDERAL CONTRACTS





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WIPP is a national nonpartisan public policy organization, advocating on behalf of nearly 1 million women-owned businesses representing 61 business organizations. WIPP provides timely economic policy information and identifies important trends and opportunities to its membership.

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Give Me 5

- National program from WIPP & American Express OPEN designed to educate women business owners on how to apply for and secure federal procurement opportunities.
- Give Me 5 works to increase the representation of Women Business Owners that win government contracts. We provide accessible business education tools to assist both new and experienced federal contractors.
- Women Business Owners could gain more than \$5 billion in annual revenues if the 5% contracting goal set by Congress was reached.



Give Me 5: Covering Your Assets

Presented by: Pamela J. Mazza, Managing Partner, PilieroMazza PLLC



Today's Session Will Cover:

"COVERING YOUR ASSETS"

- **Protecting your company's assets in dealings with your employees and business partners:**
- **confidentiality agreements; and**
- **non-compete agreements.**

CONFIDENTIALITY & NON-COMPETITION AGREEMENTS

WHAT DO YOU HAVE TO LOSE?

- **Loss of Confidential Information**
- **Loss of Employees**
- **Loss of Customers**

CONFIDENTIALITY & NON-COMPETITION AGREEMENTS

HOW CAN YOU MINIMIZE YOUR EXPOSURE?

- **Understand/Identify the Legal Issues**
- **Limit Dissemination of Confidential Information**
- **Use Written Agreements, Where Feasible**
- **Be Cautious of the "Trust Me" Approach**
- **Take Prompt Action to Enforce Your Rights**

CONFIDENTIALITY & NON-COMPETITION AGREEMENTS

WHAT REMEDIES DO YOU HAVE?

- **Trade Secret Act**
- **Common Law Torts**
- **Contractual Remedies**
- **Intellectual Property Statutes**

WHAT IS A TRADE SECRET?

- **Formula, pattern, program, compilation, device, method, technique or process that is used in one's business**
- **Derives independent economic value from not being known to others**

FACTORS TO DETERMINE WHETHER SOMETHING IS A TRADE SECRET

- **The extent to which the information is known outside of the employer's business**
- **The extent to which it is known by employees and others involved in the business**
- **The extent of measures taken by the company to guard the secrecy of the information**
- **The value of the information to the business and its competitors**
- **The amount of effort or money expended by the business in developing the information**

EXAMPLES OF TRADE SECRETS

- **Indirect rates and multipliers**
- **Source code for software programs**
- **Certain types of client or customer lists**
- **Marketing plans, sales strategies**
- **Business and financial information**
- **Bidding policies and procedures**
- **Price lists**

GENERALLY NOT TRADE SECRETS

- **General knowledge-information that is known generally in an industry**
- **Skills and abilities necessary to perform the job**
- **Publically available information**

PURPOSE OF AGREEMENTS

- **Minimize Uncertainty**
- **Deterrence**
- **Contractual Remedy**
- **Added Litigation Benefits**

NONDISCLOSURE AGREEMENTS

- **Restraints upon the disclosure of confidential, proprietary and trade secret information by an employee**
- **Who should sign – anyone who has access to company confidential and proprietary information**
 - ⚡ **Employees**
 - ⚡ **Consultants**
 - ⚡ **Potential Business Partners**
 - ⚡ **Potential Customers**

NONDISCLOSURE AGREEMENTS PROVISIONS TO INCLUDE

- **Definition of Confidential Information**
- **Exclude Information that is not “Confidential”**
 - ⦿ **Already in the Recipient's Possession**
 - ⦿ **Available for Public Use without a Breach of the Confidentiality Agreement**
 - ⦿ **Obtained from any Other Person having No Obligation of Confidentiality**
- **Restrict Dissemination on a Need to Know Basis**

NONDISCLOSURE AGREEMENTS PROVISIONS TO INCLUDE





- **Duty of Care**
- **Mutual**
- **Prohibit Disclosure, Copying or Use of Confidential Information**
- **Protect Written and Oral Proprietary Information**
- **Return Material**
- **Remedies – Injunctive Relief**
- **Laws & Choice of Jurisdiction**

NON-COMPETITION RESTRICTIONS

- **Attempt to preserve the employer's business relations and goodwill with customers; prevent employees from working for competitors; taking the employer's secrets, customers, employees ("non-solicitation" or "anti-employee raiding") after the employment relationship ends**
- **Generally Disfavored by Courts as Against Public Policy**
- **Must be Narrowly Drafted**

NON-COMPETITION RESTRICTIONS

LIMIT TO KEY EMPLOYEES

-  **The Extent to which the Employee Possesses Confidential Information**
-  **The Extent of Employee's Contacts with the Company's Customers**
-  **Employee's Position and Duties**
-  **The Length of Time the Employee was with the Company**

NON-COMPETITION RESTRICTIONS

➤ CONSULTANTS – MAY REQUIRE
SPECIAL CONSIDERATIONS

NON-COMPETITION RESTRICTIONS

- Courts will apply a Three Part Test to Determine whether a Covenant not to Compete is Enforceable.
 - From the Employer's Standpoint - is the agreement no more restrictive than is necessary to protect the employer in some legitimate business interest?
 - From the Employee's Standpoint - not unduly harsh or oppressive in curtailing the employees legitimate efforts to earn a living
 - Sound Public Policy

NON-COMPETITION RESTRICTIONS

- The burden of whether an agreement is reasonable is on the employer. The employer must have some legitimate interest to protect.

NON-COMPETITION RESTRICTIONS

- How Must a Non-Compete Agreement be drafted to be Reasonable?
 - Duration of the Restraint
 - Geographic Scope
 - Extent of the activity being restricted
 - Consider further restricting to customers with whom the employee came in contact with, identified, or learned of, during his/her employment
 - Consider including a statement that a list of customers will be supplied upon request at the termination of the employment relationship

NON-COMPETITION RESTRICTIONS

➤ Which Law Governs?

- **Generally courts will follow choice of law placed in the contract (but not always)**
 - **Make sure chosen state law is favorable**
 - **If not specified, will be the state in which the employee is providing the majority of the employment related services**

NON-COMPETITION RESTRICTIONS

Enforcement

-  Failure to promptly enforce could be deemed a “waiver”
-  Failure to promptly enforce could trigger other employees to breach
-  Failure to consistently enforce

NON-COMPETITION RESTRICTIONS

- Severability/Blue Pencil Provision
 - ⌄ **Severability**
 - ⌄ **Blue Pencil Provision**
 - Courts will not always “blue pencil” even if the parties agree
 - Don’t draft overbroad restrictions in reliance on blue pencil
 - ⌄ **Attorneys Fees**
 - ⌄ **Assignment**
 - Don’t assume non-compete signed by an employee while they were working for one employer is automatically enforceable by a business that buys the company’s assets

NON-COMPETITION RESTRICTIONS

- Hiring an Individual under a Non-Compete, Nondisclosure or Non-Solicitation Agreement
 - Enforced against employer
 - Tortious interference with contractual relations
 - Economic Advantage

NON-COMPETITION RESTRICTIONS

➤ What should you do to Prevent Litigation?

- ⌂ Obtain employee's written agreements with former employers
- ⌂ Debrief employees prior to employment
- ⌂ Covenants
- ⌂ Similar line of business
- ⌂ Departing Employees
 - Emphasis on company's policies
 - Inform the new employer in writing of employee's duties
 - Make sure an employee knows they can't take documents with them

Questions???



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