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How to Protect Trade Secrets, Proprietary Business Information and Employees in a Down Economy

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Given the current economic state and widespread availability of technology, your organization may be exposed to the threat of "corporate raiding": competitors luring employees – and your company's valuable trade secrets and proprietary business information – away. There are plenty of examples to choose from. In May 2009, Lockheed Martin Corp. won a $30 million jury verdict against L-3 Communications Corp. over the use of Lockheed's proprietary data and trade secrets. Also in 2009, a Kansas electronics design and manufacturing company was awarded nearly $17.5 million in actual and punitive damages in a lawsuit alleging misappropriation of trade secrets. And a $5.8 million settlement was recently reached in a corporate raiding case in Delaware between two office supply companies, one of which allegedly hired away a slew of employees and took confidential information from the other. Regardless of the cost, corporate raiding has seemingly become a mainstream business practice. How can you prevent the illegal pilfering of your employees and valuable business information?

In the absence of any agreement between employer and employee to the contrary, employees are entitled to compete in business with their former employers. Covenants not to compete are employment agreements whereby the employee promises not to compete with the employer upon termination of employment for a specific period of time and within a particular geographic area. A growing number of employers use non-competition agreements to protect trade secrets, intellectual property interests, and consumer goodwill. Generally, courts disfavor non-competition agreements because they restrain trade, but they can be enforced in many states if certain requirements are met. Most jurisdictions will enforce a restrictive covenant that's restricted by a reasonable time period – generally one or two years – and geography. However, in states like California and others, restrictive covenants are not enforceable. Non-competition agreements may also be prohibited or limited for certain professions, such as health care providers.

Another way to protect your employees and/or customer relationships is to require employees to sign a non-solicitation agreement obligating the employee to refrain from soliciting your employees for a set, reasonable period of time after his departure. This helps prevent the common corporate raiding scenario of a competitor hiring someone and using that person to recruit other employees. An alternative to traditional restrictive covenants includes a forgivable loan, which acts as a hiring bonus in the form of a loan that does not have to be repaid if an employee remains with the employer for a certain amount of time. If the employee leaves the company before that time, the employee must repay the balance to the company.

To safeguard their trade secrets, companies also use confidentiality and non-disclosure agreements. To do so effectively, employers must be clear with employees that their business strategies, customer lists, software programs, etc. are confidential trade secrets that permit their business to enjoy an advantage over its competitors. This requires them to expend money and effort to guard the secrecy of such information and otherwise ensure that it cannot be easily acquired or duplicated by others.

Baker Donelson can assist you with these and other labor and employment-related challenges. For assistance, please contact your Baker Donelson attorney or any of our nearly 70 Labor & Employment attorneys in the Firm's Labor & Employment Department, located in *Birmingham, Alabama*; *Atlanta, Georgia*; *Baton Rouge*,

Mandeville and *New Orleans, Louisiana*; *Jackson, Mississippi*; and *Chattanooga*, *Johnson City*, *Knoxville*, *Memphis* and *Nashville, Tennessee*.

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