



Business and Employment Law Update

Third Quarter, 2005

NON-DISCLOSURE AGREEMENTS IN SALES, MERGERS AND ACQUISITIONS

By Sallye N. Quinn

One of the key documents in any sale, merger or acquisition of a business is the Non-Disclosure Agreement (“NDA”). Before a seller enters into serious negotiations with a potential buyer or allows a potential buyer to conduct due diligence, the seller should have in place an NDA to prevent the loss of confidential information and key employees as a result of the seller’s discussion of the business and the buyer’s investigation of the business. Because of the importance of the document from the seller’s perspective and because NDAs can often impose highly specific restrictions and penalties on the buyer, both parties need to pay careful attention to the terms of the NDA. Ultimately, however, the seller has the most to lose by not having in place an effective and comprehensive NDA. This article addresses some of the key terms that should be included in any NDA.

- **Who are the parties and who is bound by the NDA?** Obviously, as with any contract, the parties to the agreement need to be identified. In the context of an NDA, however, the obligations imposed by the agreement should extend to agents of the buyer who may be assisting in the due diligence process and who may in the course of such due diligence come across confidential

information. Such parties would include accountants, lawyers and employees.

Continued on page 2

In this Update:

Non-Disclosure Agreements	Page 1
Third Party Investigations	Page 1
Responding to Harassment Complaints	Page 3
Boiler-Plate Series Contract Provisions Force Majeure	Page 4
Personal Note	Page 6

THIRD PARTY INVESTIGATIONS

By Kathy Washatka of The Washatka Group

Supervising employees is challenging on the best of days. When things go awry, it can seem overwhelming. This is especially true when an employee is suspected of misconduct that may be illegal, against company policy, or just plain disruptive. It’s unfortunate, but employees continue to commit sexual harassment, steal from the company, harass others and sabotage work. These are the times when objectivity is most needed and yet, oftentimes, exactly the opposite happens.

Continued on page 5



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Non-Disclosure Agreements, Continued...

- **What is confidential information?** The seller will want to define confidential information as broadly as possible. Depending on the business, specific items such as customer lists, pricing and existing contracts should be listed, but general terms such as “information or material disclosed by the seller” should also be included to make the base as broad as possible. In addition, the seller may wish that the mere fact the parties have entered into negotiations for the sale, acquisition or merger to be kept confidential in order to avoid fallout from third parties, such as customers or suppliers, who may be concerned about a change in ownership. Once a broad description of confidential information is used, it is then typical to carve out exceptions to confidential information such as information that (i) is now or later becomes generally available to the public (other than as a result of a breach of the NDA); (ii) is independently developed by the buyer; (iii) is lawfully obtained by the buyer from a third party who has lawfully obtained such information; or (iv) is later published or generally disclosed to the public by the seller. Generally, the buyer has the burden of proving that confidential information falls within one of the categories listed above.

- **What can or can't the buyer do with the information?** The point of an NDA is to prevent disclosure of information that is deemed confidential. Accordingly, the NDA should prohibit disclosing the defined confidential information except to specifically designated people, such as lawyers and accountants, who the buyer will be relying on in its due diligence investigation. The NDA should also require the buyer to provide a copy of the NDA to such individuals and require that they also agree to the terms of the NDA in writing.

- **What if the buyer becomes legally compelled to release the confidential information?** It is common to release the buyer from its obligation to keep information confidential if the buyer becomes legally compelled, through a subpoena or other court order, to disclose the information. However, in order to obtain some level of protection in such situations, the seller may wish to include a provision requiring the buyer to notify the seller of the court order so that the seller

can attempt to seek a protective order or other remedy to prevent the release of the information.

- **What should the buyer be allowed to do with the information received?** If the parties do not follow through on the sale, merger or acquisition, the buyer should be required to return or destroy all information received, including any copies, summaries and derivative materials.

- **What is the seller's remedy if the buyer discloses?** The seller will want the right to seek injunctive relief in the event the buyer violates the NDA. A seller may wish to have the buyer waive any bond requirements in order to facilitate enforcement of the injunctive relief. The seller may also want to include a liquidated damages provision that specifies the monetary penalty in the event of a disclosure. Both of these remedies must be included in the NDA to be effective.

- **What can the seller do to avoid future competition or the loss of key employees discovered through the due diligence process?** Although not as typical as the provisions discussed above, some sellers may wish to include a non-competition provision in the NDA in order to prevent a buyer that does not follow through on the transaction from moving into the same business in the same territory. If the seller can negotiate this type of provision, it is an effective protective measure, but must of course be reasonable in scope and duration. Similarly, through the due diligence process the buyer will often become familiar with the seller's employees. A seller may wish to protect poaching of key employees by including a provision that prevents a buyer from hiring employees the buyer comes to know through the due diligence process in the event the sale, acquisition or merger falls through.

- **How long should the NDA last?** There is typically no limit on the duration of the confidentiality provisions of the NDA. The buyer is obligated to keep information confidential in perpetuity.

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RESPONDING TO HARASSMENT COMPLAINTS

By Amy Robinson

Just the word “harassment” is enough to strike fear in the hearts of managers, supervisors and business owners. Yet, with all the notoriety that successful harassment claims often garner, far more frequently employers are able to avoid liability for hostile work environment claims by instituting appropriate and effective procedures to discover, remedy, and deter harassment internally.

By having an effective reporting and response procedure in place, an employer faced with a harassment lawsuit can successfully defend that claim by showing that once it received a complaint from the employee, it promptly conducted an investigation and took action that was reasonably designed to, *and actually did*, remedy the situation. See e.g. *Fuller v. City of Oakland*, 47 F.3d 1522, 1528 (9th Cir. 1995) (“[o]nce an employer knows or should know of harassment, a remedial obligation kicks in. That obligation will not be discharged until action – prompt, effective action – has been taken. Effectiveness will be measured by the twin purposes of ending the current harassment and deterring future harassment – by the same offender or others.”).

We suggest you consider the following guidelines for responding to complaints:

1. When an employee raises the issue of harassment¹, you should immediately conduct an intake conference.
 - If possible, have two (2) appropriate company representatives present during the interview.
 - Get a written statement from the employee, if possible.
 - Do NOT promise total confidentiality to the alleged victim; only promise to keep the information confidential to the extent possible, while fully addressing the concerns he or she has raised.

Note: While many employees are hesitant or even totally resistant to participating in an investigation,

¹ It is important to note that although these claims primarily develop in the context of sexual harassment claims, and are discussed here in that context, hostile work environment claims apply to all legally protected characteristics including race, national origin, religion, age, and disability.

they are obligated to cooperate in an internal investigation that is intended to address the concerns they have raised. If they refuse, they will not be able to hold management liable for failing to take appropriate remedial action.²

2. Institute an investigation promptly, and make sure that the person conducting the investigation has been properly trained to respond to harassment complaints. This may be someone within the company, like a manager or human resource professional, or it may be a third party consultant or outside attorney. (Also discussed in Kathy Washatka’s Article “Third Party Investigations” on Page 1 of this newsletter).
3. DOCUMENT, DOCUMENT, DOCUMENT. In the event that the harassment does not get addressed by the remedial action taken, or the complaining employee otherwise initiates an EEOC investigation and/or litigation, the documentation of the investigation and employer’s response to the initial complaint will be crucial in establishing a defense.
 - Take detailed notes of all interviews. You should consider giving the interviewee an opportunity to review the written notes of a conversation and sign in approval.
 - Document any and all discipline and reiterate your position against harassment – express a strong disapproval for the alleged conduct.
 - Remind both the accused and the complainant about your opposition to retaliation and reiterate the obligation to notify you if any occurs. Do this in writing.
 - Conduct and document subsequent monitoring efforts. Be sure to follow up

² See e.g. *Jones v. Gatzambide*, 940 F.Supp. 182, 188 (ND Ill 1996) (“When management attempts to delve into plaintiff’s claim and plaintiff does not cooperate, she cannot later argue that management is responsible.”); See also, *Wallace v. San Joaquin County*, 58 Fed.Appx. 289, 2003 WL 356051 (9th Cir. 2003) (slip copy only) (County employee was not constructively discharged after filing sexual harassment complaint against her supervisor, and thus county could not be held liable for sex discrimination under Title VII, where county had sex harassment policy in place, county promptly initiated thorough investigation when employee filed her complaint, and employee failed to participate in investigation and did not pursue opportunity to transfer to another position under new supervisor.).

Responding to Harassment, Continued...

with the complaining party in the weeks and months following the complaint to confirm that there has been no retaliation or further potentially harassing conduct.

4. Take disciplinary measures against the harasser, if warranted. While discharge is often the simplest way to prevent and deter future acts of harassment, depending on the severity of the conduct and the individual circumstances, there may be a number of other alternative measures you can take, including: (a) transfer or demotion; (b) final warnings or last chance agreements; (c) suspension without pay; or (d) voluntary resignation in lieu of termination.

As an additional reminder, after receiving a complaint of harassment, substantiated or not, you should be cautious about disciplining or terminating the complaining employee. Even if a termination or other action is justified, when they occur close in time to a harassment complaint, it can appear to be retaliatory. In fact, the timing alone may provide enough evidence that is suggestive of retaliation that a civil claim cannot be disposed of by pretrial motion, as many can. Instead, an employer may be faced with bearing the costs and expense of a full civil trial to defend against a retaliation claim if it is not prepared to offer a settlement. Given that risk, before making the decision to terminate an employee who has recently complained of harassment, it would be wise to consult with your employment lawyer.

We hope that this discussion has provided you with information that is useful to you and your business. Please remember, this general information is not intended to provide a total solution to your employment needs, and may not be suitable for your particular situation. In the event you want to evaluate whether your current policies and procedures are adequate, or would like legal assistance to address a specific complaint of harassment, please contact us.

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SERIES – BOILER-PLATE CONTRACT PROVISIONS

By Kirsten Barron

Many times clients will comment that all or a portion of a particular contract is “boiler-plate.” The client’s underlying meaning is often “that does not matter” or “that is for the lawyer to figure out” or “I did not read that part.” This article is the first in a series addressing the boiler plate contract provisions and what they mean – because these clauses really do mean something and can often involve significant negotiation between the parties. We will cover the following types of provisions:

1. Force Majeure
2. Governing Law/Jurisdiction and Venue
3. Entire Agreement/Third Party Beneficiaries/Negotiated Terms
4. Waiver/Severability/Cumulative Remedies
5. Arbitration/Attorneys Fees
6. Entire Agreement and Amendments/ Survival/Headings and Construction/Counterparts

The first clause covered in this series will be force majeure.

FORCE MAJEURE

Force Majeure literally means “greater force”. Force majeure clauses typically excuse a party from performance under a contract due to some unforeseen event beyond a party’s control. Examples of force majeure events are natural disasters “acts of God”, strikes in the labor force, war, or the failure of third parties (i.e. suppliers) to perform their obligations. It is important to remember that force majeure clauses are intended to excuse a party only if the failure to perform could not be avoided by the exercise of due care by that party.

The force majeure doctrine of contract interpretation came out of a very old case in British common law, which we inherited, called *Krell v. Henry*. Henry rented a room at a very fancy hotel with an excellent view of King Edward VII’s coronation parade. He paid dearly for the pleasure of the view. Unfortunately, King Edward suffered appendicitis on the day of the coronation, and the parade was cancelled. Henry cancelled his reservations, and the hotel sued him for payment.

Force Majeure, Continued...

The court held that the underlying purpose of the agreement – the viewing of the parade - could not be fulfilled. Further, the parties had made no agreement addressing what would happen if the parade was cancelled. Due to the unexpected and unplanned event, the court did not require Henry to pay for the room, but held that the purpose of the contract was frustrated or impossible to achieve.

Out of this archaic decision, we now have a force majeure clause in many of our contracts. The clause basically sets forth the parties' agreement that in the event of an unforeseen event that could not be reasonably planned for or avoided, the party who is prevented from performing will not be held liable for non-performance.

When negotiating force majeure clauses, make sure that the clause applies equally to all parties to the agreement. Also, it is helpful if the clause sets forth some specific examples of acts that will excuse performance under the clause, such as wars, natural disasters, and other major events that are clearly outside a party's control. We suggest including examples of events to make clear the parties' intent that such clauses are not intended to excuse failures to perform for reasons within the control of the parties.

Third Party Investigations, Continued...

Supervisors are humans and they have emotions. They are encouraged to build relationships with their staff, which means they may be privy to information that can cloud the issue at hand and blur the boundaries between professional responsibility and personal compassion. The same is often true of human resource professionals. They often see the more confidential side of employees, which makes the issue of neutrality very difficult.

Enter the third party investigator. This person who has no attachment to the organization or the people involved is trained to enter a situation, determine the issue and conduct an investigation that is thorough, accurate, objective and complete. An investigator has no personal stake in the outcome other than to do solid work. It is much easier to stay focused on the matter at hand when there is no personal history with any of the participants involved. The playing field is level and everyone will have an equal opportunity to share his/her

experience and perspective. A competent investigator will dig deep and talk to everyone who has something to add in order to gain as much knowledge as possible.

Hiring a third party investigator demonstrates good faith on the part of the employer. It takes courage to have a stranger come into an organization with a magnifying glass and look at all the possibilities. It sends a clear message to staff – we're all accountable for our actions. In the long run, an investigator may save the company money, and more importantly, pain, by resolving a situation before it goes to litigation.

CONGRATULATIONS!

Litigation attorney, Carrie Coppinger Carter, and husband Matthew welcomed beautiful baby boy, Cian Matthew Coppinger Carter, into the world on:



September 11, 2005

Weight: 9 pounds 1 ounce
Length: 21 1/4 inches



Business Department attorney, Sallye N. Quinn, and husband Chris welcomed beautiful baby girl, Katherine Danielle Quinn (K.D.) into the world on:

October 3, 2205

Weight: 7 pounds 14 ounces
Length: 20 1/2 inches

Kirsten Barron, Sallye Quinn and Amy Robinson, attorneys at Brett & Daugert, provide business, corporate, employment and real estate legal advice.

A PERSONAL NOTE FROM THE DEPARTMENT:

By Kirsten Barron

There is no question that fall is upon us and some may argue that winter has made an early appearance. Folks have settled into school and work routines.

Every day I hear about new development projects, including the progress of the Flora Arts District, the Whatcom Film Association's new Dream Space and plans for a large park facility on Squalicum Parkway. Our business department has seen an upswing in new business ventures – from retail stores and restaurants to clothing distributors to software development companies. It is a very exciting time to be practicing law in Whatcom County. We continue to be grateful for the opportunity to work with and be a part of our clients' visions and goals.



I want to introduce a new series to our newsletter on “boiler-plate” contract provisions. We get a lot of questions on these clauses and thought the newsletter would be a good forum to present some information on these standard contract clauses. We will highlight one clause in each edition of the newsletter.

We want to thank Kathy Washatka for her great article on third party investigations. Kathy and I have both done a lot of this type of work and have been able to share our information and experiences. I think the bottom line is that third party investigations are extremely valuable and, with very rare exceptions only improve an employer's position.

As always, please let us know if you have any comments or questions. We appreciate your feedback on articles that are particularly helpful.

A handwritten signature in cursive script that reads "Kirsten Barron".

CONTRIBUTORS TO THIS PUBLICATION

Sallye Quinn has finished her first year with us after relocating from the largest firm in Boise: Hawley Troxell Ennis & Hawley LLP. Her practice is primarily focused on business and real estate issues as well as commercial litigation.



Amy Robinson brings employment and human resource experience to the firm and has been invaluable to our department and the Litigation team in solving a myriad of complex legal issues. Her practice is focused on employment and civil litigation.

* Guest Contributor *

Kathy Washatka conducts workplace mediations and investigations. She also focuses on interpersonal communication and leadership development through training and consulting. Ms. Washatka earned her BA from Western Washington University and her MA in Applied Behavioral Science from the Leadership Institute of Seattle through Bastyr University. She can be reached at Kathy@washatkagroup.com.

