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Keeping Secrets: Using Agreements To Protect Confidential and Proprietary Information.

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For many start-ups and emerging companies, their most valuable assets are those unique and proprietary things they do that gives them a competitive advantage in the marketplace. Typically, however, the growing business does not have the financial ability to get to market alone. As a result, third parties, such as potential investors, employees, independent contractors, financial advisors and the like are needed. Certain confidential information and trade secrets must necessarily be disclosed within the context of these relationships. It is at this juncture that a carefully crafted confidentiality and non-disclosure agreement can be of assistance. However, companies must be cautious in using "standard" or boilerplate agreements and make certain that the agreement used is appropriate for the particular circumstances.

When employees or independent contractors are at issue, it is critical that both groups be parties to an agreement concerning confidentiality and non-disclosure. The cooperation of key employees is essential to protecting proprietary information, as employees will need to have access to such information to do their job. Among the provisions an employer may want in any agreement with its employees are restrictions on to whom disclosures of information may be made and a clear and precise definition of the type of information the company deems to be confidential. The agreement should also contain the method and manner by which confidential information will be labeled or marked, such as "CONFIDENTIAL" or "PROPRIETARY", and a specific procedure for the prompt return and/or destruction of company property. Other useful workplace procedures, in addition to physically identifying confidential material themselves, include segregating confidential documents, password protecting critical information and adopting and implementing a written policy governing confidential documents.

The risks that employees pose for disclosing information improperly increase upon their departure. Thus, employers should conduct exit interviews to remind employees of their obligations to maintain confidentiality upon termination. Further, a policy or agreement requiring the return of proprietary information upon termination is also essential.

Beyond its own employees, another area that companies frequently overlook in safeguarding information is in their relationships with independent contractors, consultants, advisors and potential business partners. Because information must often be disclosed outside of the company's four walls, a different agreement will be required for third parties. In some cases, the disclosure of information may be mutual, if both sides are exchanging information, or unilateral if only one side is disclosing information. Provisions governing breach and the remedies available in the event of a breach, such as injunctive relief and attorneys' fees, should be addressed. Further, the duration of the confidentiality

obligation must also be considered and defined as precisely as possible. An effective agreement should also describe the information that is deemed confidential, that may be disclosed at some point in time, as opposed to trade secrets, which should never be disseminated or the legal protection for them will be lost forever. The limited purpose for which the party may use the information being disclosed should also be clearly defined.

Confidentiality and non-disclosure agreements are very common and frequently used without sufficient thought or planning. Given the mission critical nature of such proprietary information to a small or growing business, it is imperative that the risks of the disclosure be evaluated with each party that a company does business with in order to protect this vital information from its inappropriate disclosure.