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# Wilson & Orcutt, P.C.

## Business Law Newsletter

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### Did You Hear The One About The Travelling Salesman And The Portable Customer?

For many reasons, there seem to be more job changes these days. In a market driven economy, salesmen seem especially prone to changing employers. Business lawyers are hearing, as a recurring theme, the complaints of former employers who discover that not only has there been the loss of a key salesman, but also the loss of a customer list and a rolodex.

When can a departing salesman solicit the business of his former customers for the benefit of a new employer?

The answer is that, at least to the extent that the salesman has personal relationships with his customers and can reconstruct a customer list from his memory, those customers are fair game. In other words, a salesman's personal relationships with customers he has come to know are "portable".

Problems arise when the salesman takes with him printed customer lists, generated by computer or otherwise, which clearly are the property of the old employer. While personal relationships are portable, proprietary and confidential information is not.

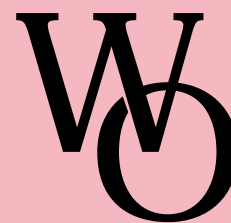
Through careful planning and counselling, the legitimate goals of all concerned can often be met while also minimizing the threat of a lawsuit.

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**It Is With Regret That We Announce That Our Friend, Colleague and  
Partner, Charles E. Orcutt, Jr. Passed Away on February 10, 1996.**

**We Will All Miss Him Deeply.**



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Salesmen planning a job change, and employers planning a new hire with the expectation that the customers will follow, would be best served by seeking the advice of competent counsel in advance.

On the other hand, a business can protect its customer list through the use of a well drafted Confidentiality and Non-Compete Agreement. Again, a little advance planning may avoid the expense and trouble of a lawsuit down the road.

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## Be Careful What You Say During Job Interviews

### • Revised Rules from the EEOC

During a job interview, an employer asks the applicant about a five-year gap in his resume and is told that the applicant had two brain tumor operations which caused some disfigurement, partial deafness and partial blindness. During a second interview, the applicant is asked whether fellow workers or customers would “have a problem” with him because of these factors. The applicant is later turned down for unrelated reasons. Result — a \$45,000 judgment against the employer under the Americans with Disabilities Act (the ADA).

Under the ADA and recent rules promulgated by the Equal Employment Opportunity Commission, any business with 15 or more employees is prohibited from discriminating against disabled applicants. The ADA requires reasonable accommodations to the known mental or physical limitations of a qualified applicant. An employer can't ask whether an applicant has a disability and can't ask a question that is “reasonably likely” to prompt some-

one to mention a disability. You can't discuss a disability with a job applicant **even if the applicant brings it up**, except to discuss what accommodations the applicant would need.

The rules require employers to make some fine distinctions during job interviews.

- You can ask “How many days were you absent last year?” but you can't ask “how many days were you out sick last year?”
- You can ask “How did you break your arm?” but you can't ask “Do you expect it to heal normally?”
- If an applicant has a bad back, you can ask “How much weight can you carry?” but you can't ask “How often does your back go out?”

To avoid problems (and lawsuits) employers should limit the people conducting job interviews to supervisors who are properly educated about the ADA. Prepared interview “scripts” for common situations are also helpful in avoiding problems.

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- **Limited Liability Company Update**

As of January 1, 1996 businesses with two or more owners are able to organize themselves into a new limited liability entity by filing a simple Limited Liability Partnership (LLP) registration or Limited Liability Company (LLC) certificate with the Massachusetts Secretary of State. LLP's and LLC's may be preferable to partnerships and Sub-S Corporations because they are the first form of business entity which combines the limited liability characteristics of a corporation with the tax advantages of a partnership.

While there are potential tax problems with converting existing corporations, all general partnerships should consider conversion to a LLP or LLC.

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- **Nominee Trusts Take Note**

For reasons of convenience and confidentiality, nominee trusts have been frequently used to hold title to commercial real estate in Massachusetts. However, several recent appellate court decisions have made it clear that the trustees, and even the beneficiaries of nominee trusts may have exposure to personal liability if the trust is sued.

Technically, most nominee trusts are not true trusts, but rather partnerships with the beneficiaries as partners and the trustee acting as a "manager". While this form of ownership usually provides the tax benefits of a partnership, it is now clear that it does not provide limited liability.

For that reason, all nominee trusts should immediately consider conversion to a LLP or LLC.

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- **Sexual Harassment is Sexual Discrimination**

Sexual discrimination is prohibited by Title VII of the Civil Rights Act of 1964, and sexual harassment is a form of discrimination. Any employee affected by sexual harassment is a victim entitled to compensation under Title VII. A case for harassment may be based on any unwelcome behavior including sexual advances, requests for sexual favors or any verbal or physical conduct that interferes with an individual's job performance or creates an offensive or hostile work environment.

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What used to be considered an innocent joke, however crude, may now be seen as evidence of a hostile and offensive environment. Employees who used to suffer in silence are now filing lawsuits.

Beware that an employer may be liable for acts of sexual harassment committed by its employees **even if the employer does not know and reasonably could not have known about the behavior complained of.**

The first step in preventing claims is to clearly communicate to employees that sexual harassment will not be tolerated. All employers should have a written company policy addressing these issues, which should include an effective complaint or grievance procedure. Appropriate and immediate action is called for when any employee complains of harassment. All reasonable corrective steps should be taken, and most importantly, a permanent written record of the complaint and the company's response should be maintained.

The remedies available to a victim of sexual harassment include job related relief (e.g., a promotion, reinstatement, and/or backpay) and also future financial losses, mental anguish, punitive damages and the award of attorney's fees incurred in connection with prosecution of the harassment claim. As with other forms of discrimination, most insurance policies do not cover intentional acts, and the employer will have to pay any monetary damages out of pocket, as well as paying for its own legal defense.

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## *In House News*

**Please note our new E-Mail Address.**

### **The Wilson & Orcutt, P.C. Business Law Newsletter**

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