

Practical Tips: Employee Mobility and Competitive Litigation

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Companies are increasingly looking to recruit employees working for competitors. Hiring from competitors is often strategically valuable as those employees have knowledge of the industry and skills and talents associated therewith. However, when an employee departs to join a competitor, threatened lawsuits alleging trade secret misappropriation, breach of restrictive covenants, and other business torts often follows. Even in the absence of concrete evidence, companies may file lawsuits to discourage competitors from poaching additional employees and to provide a disincentive for other employees to leave.

Companies hiring from competitors or losing employees to competitors can take proactive steps to increase their leverage with and protection against competitors. Applying the maxim that an ounce of prevention is worth a pound of cure, this article provides practical tips to companies hiring from competitors and to companies who have employees leaving to join competitors to secure their position in the event of litigation.

Every company looks at hiring employees from competitors. Companies can significantly reduce the risk of subsequent trade secret and business tort litigation by following some basic guidelines.

One, companies should be proactive in avoiding improper solicitation. Improper solicitation and raiding often raises the ire of companies that results in a slippery slope to litigation. Employee departures, and the emotions associated with perceived breaches of loyalty, can engender reactions unlike other business litigation. Companies can manage this risk by counseling their employees to avoid improper solicitation of former colleagues at competitors. Starting with orientation and periodically continuing thereafter, companies should remind their employees to honor any non-solicitation obligations they may owe their former employers. Of course, employees bound by non-solicitation provisions should have no

involvement with recruiting any individuals covered by the agreement.

Companies should also implement procedures to document contacts with employees from competitors to avoid any actual or perceived improper solicitation. For example, companies should maintain emails, employment applications, and documents received from placement specialists indicating who initiated contact with whom, and when. These documents can be critical in defusing concerns or defending claims based on non-solicitation agreements.

Two, during the interview process, prospective employers should candidly remind interviewees not to breach any duty of loyalty to their current employer. The prospective employer should tell the candidate not to solicit other employees, to continue work for their current employer and not to begin work for the prospective employer, and to avoid any inappropriate access to or copying of confidential information. Prospective employers should also candidly ask during the interview process whether the candidate has engaged in any activities that may raise suspicion upon their notice of resignation. Unusual access to confidential information that is not a part of an employee's job responsibilities can be circumstantial evidence of inappropriate access to confidential information.

Three, the prospective employer should request and review any agreements the candidate has with her current employer. Agreements that may contain restrictions on employees include offer letters, employment agreements, confidentiality and invention assignment agreements, and stock option or grant agreements. The prospective employer needs to review these agreements carefully and outline any restrictions on the candidate. Confidentiality obligations, non-competition provisions (if governed by the law of another jurisdiction), and customer and employee non-solicitation provisions are some of

the more common restrictions that the prospective employer should analyze.

Once reviewed, and before making any hiring decision, the prospective employer should ascertain what the candidate could reasonably do without violating any of her agreements with the competitor, and without breaching any confidentiality obligations owed to the competitor. After that is determined, a business and legal decision needs to be made on whether the candidate is still a worthy hire. In most cases, the reasonable precautions discussed next are sufficient to minimize risks of hiring. However, there may be extreme cases where the prospective employee's utility is so limited by her obligations that the legal risks are not justified.

Four, upon hiring, the new employee should have a meeting with her manager and representative of the human resources department to outline any restrictions on the employment. The employee, manager, and company should have a clear understanding before any work commences on the limitations of the employee. A written memorandum should be delivered to the employee from the manager outlining any limitations on the employee's job responsibilities or communications within the company. This document creates a record of diligence and affirmative steps taken by the company to reduce the risks of confidentiality breaches or trade secret disclosures. If litigation does occur, this memorandum will be a critical document, and more likely it can be used to successfully defuse threatening demand letters received from a competitor.

Finally, the current employees in the department that the new employee joins should be advised of the restrictions. This will avoid high-risk situations by ensuring that the co-workers understand limitations on the new hire. It will also eliminate pressure on the new employee to impress her co-workers and thereby violate contractual legal restriction she may owe her former employer.

Companies must also prepare for employee departures, as it is inevitable that employees will leave to join or form competitors. Companies can take precautions to minimize risks associated with

employee departures and preserve critical evidence if litigation must be commenced.

One, companies should check all of their employment agreements now. Many companies find only after it is too late that they have failed to have a key employee execute a confidentiality and invention assignment agreement. Companies can require their employees to sign employment agreements while employed, but once the employee resigns, any contractual opportunities to restrict the employee are lost. The employer should also check the employment agreements every time an employee changes position within the company to ensure that the employment agreement covers the scope of the new position.

Agreements should contain tight restrictions on the employee's use of confidential information. The duration of the confidentiality obligation is dependant on the nature of the company's business and should be considered when drafting the employment agreement. Employment agreements should also include reasonable limitations on the solicitation of employees and customers. In contrast to most non-competition agreements, non-solicitation agreement are enforceable in California. See, *e.g.*, *Loral Corp. v. Moyes*, 174 Cal. App. 3d. 268 (1985). What constitutes a reasonable non-solicitation provision depends on the industry, the company, and a host of other factors. Before drafting any non-solicitation provisions, these issues should be discussed with the company's counsel.

Two, the employer should conduct a thorough exit interview once notice is given. During the exit interview, the employer should attempt to identify the new employer and job description, the reasons for switching to the competitor, and any confidential information in the employee's possession. The company should document the contents of the exit interview. Ideally, the employee should sign this memorandum, but realistically the chances of getting the employee to sign an exit interview memorandum are usually low. Often the employee's suspicious behavior during the exit interview, or lack thereof, will reveal how concerned the company should be about the employee's departure. If the employee acts suspiciously or makes demonstrably false statements,

the company must be on heightened alert as to the risks of trade secret misappropriation.

Three, the company should take action to secure their physical and intellectual property. Taking an inventory of the employee's workspace is appropriate. The company must also consider when to freeze the employee's network and email access. The company should preserve the employee's computer hard drive for at least thirty to sixty days after departure. This preservation will ensure that if issues arise after the employee's departure, records are maintained that can be used to assess whether the employee has engaged in any wrongful conduct. Evidence of intellectual property misappropriation is often discovered after computer forensic experts analyze the former employee's computer hard drive and email accounts.

Four, the company must consider whether to send letters to the former employee and new employer. The letter to the new employer should outline the areas in which the former employee has knowledge of the company's trade secrets or confidential information. The letter can also set forth the contractual confidentiality and non-solicitation obligations of the former employee. Such a letter places the competitor on clear notice in the event of subsequent litigation. The letter to the new employer may also request that the new employer avoid placing the employee in situations where trade secret misappropriation is more likely, and seek assurances that the new employer will take steps to avoid any such misappropriation.

Finally, the company should get its lawyers involved early and often if there are any red flags during the exit interview process. Fifteen minutes of consultation with the company's lawyers up front, after any suspicious activity is identified, may preserve critical evidence and avoid irreversible errors.

Following these basic steps will likely assist any company in the event that it is recruiting from a competitor or is concerned about losing talented employees to a competitor, and place itself in the best position in the event of litigation.

Originally published by American Intellectual Property Law Association in Winter 2005.

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