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Don't get caught on the wrong side of a non-competition agreement

By Christopher Aslin and Edward 'Ned' Sackman

Here's a common employer's scenario: A key employee gives her notice. A few weeks later, another employee from the same department gives his notice. You remind the employees that they are prohibited from working for certain companies under the non-competition agreement they signed. Later, you find out that your former employees are working for a competitor. Or, you make two great new hires from within your industry. They assure you they left their employers on good terms. Shortly afterwards, a lawsuit is filed accusing you of helping violate your new employees' non-competition agreements with their previous employer.

What do you do?

1. Know the law, and keep current. Non-competition agreements are enforceable in court, but they are subject to extra scrutiny because they are, as a rule, disfavored. Disputes over non-competition agreements are frequently litigated, and the result is that the rules about what is enforceable and what is not are rapidly changing. The non-competition agreement your top sales person signed three years ago may no longer be enforceable. By staying current on developments in non-competition law, or consulting an attorney who practices in the area, you will have an idea at the outset of the strengths and weaknesses of the non-competition agreement at issue.

2. Get the full story. Hint: You may need to check smartphones and email accounts. The first step when dealing with a non-compete issue is to interview the key employees involved, but don't stop there. Even when you trust your employees, there's no substitute for hard evidence. You will want to know who has been communicating with whom, what they were discussing, when, and how. If employees use a company phone, pull their call history. Look for calls to the new (or former) employer or related parties. Company email accounts are also a great source for evidence. Watch for file transfers or other evidence that employees were reviewing key company documents in an unusual way.

3. Understand whether trade secrets or other intellectual property is at issue. Often the real concern with breach of a non-competition agreement is the transfer of confidential or proprietary information. The law provides varying degrees of protection for information depending on how it is maintained and classified by the company. To qualify for the highest levels of protection as a trade secret, information must be adequately protected from disclosure or discovery by competitors or the general public. It is critical to identify what trade secrets or other intellectual property may be at issue in any breach of a non-competition agreement. Did the employee download or copy confidential files? Did they retain a laptop or thumb drive? Did the employee have critical information in her head that will inevitably influence work with the new employer? These are important questions to ask when hiring a new employee as well – if the new hire will have trade secrets in his possession, are you hiring a lawsuit?

4. Preserve the evidence. As with any litigation, it is vital to preserve evidence that may be relevant to the lawsuit. Once you learn that litigation is imminent, develop a plan to preserve paper and electronic documents and immediately suspend any company policies that call for routine destruction of information. This includes automatic processes such as periodic emptying of deleted e-mails or overwriting outdated servers. Make sure your IT personnel or providers carefully review your system and revise any protocols that will delete information. And inform all employees of the change in policy to avoid inadvertent destruction of evidence. Failure to preserve evidence could cost you the case and even result in court sanctions.

5. Check your emotions at the door. Disputes between competitors related to employees are rarely cordial. Many clients spend a lot of time and money before they realize that these are typically business disputes, and they can only be resolved once the parties start making business decisions. Knowing that going in can put you one step ahead of your adversary.

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