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Rights and Duties of Departing Employees It affects all companies.

By John Mullen

An ever-present risk when an employee leaves is that they take with them certain real assets of your organization – trade secrets, critical business information, unique processes and know-how and start to solicit your customers. Sometimes, the more that a company depends on personal relationships with customers, the more likely it is that losing employees will mean losing business.

Fair competition

What can you do to protect your interests when a long-term, trusted employee is leaving and setting up shop to compete against you, or join forces with one of your competitors?

You may be vulnerable to competition from this person who is uniquely in a position to hurt your business.

Well, competition itself is a good thing, and is not something that you can simply eliminate – however, competition must be fair competition. A former employee should not be able to use an unfair advantage or springboard effect to start up their own business or unfairly assist your competition.

What are the rules of the game?

A lot depends upon how the basic playing field is arranged – whether there is any agreement in place that gives you legitimate protection for your interests before the situation rises.

In other words, is there an employment contract in place and what does it say? You may be able to protect your legitimate interests if a properly drafted employment contract is in place that protects your trade secrets and confidential information and prohibits your employee from competing with you, or at least soliciting your customers, for a reasonable period of time post-departure.

Courts are very reluctant to enforce straight non-competition clauses, particularly with respect to former employees (as opposed to someone you may have just purchased a business from and paid them good money for the goodwill of their business). The court will not enforce overly broad non-competition clauses that seek to operate for an unreasonable period of time and over an unreasonable area.

However, a properly drafted non-solicitation clause that operates for a reasonable period of time (i.e. long enough for you to get your new replacement employee in and establish a rapport with your customers) will be enforced. An ex-employee who sets up shop, or joins one of your competitors, and seeks to entice away your customers will be ordered by a court injunction to cease and desist, along with the company that employs them, or which they own.

Your ex-employee is entitled to generally compete and advertise in the industry, but direct solicitations will not be allowed if they have contractually agreed not to do so for a reasonable period of time.

What if you don't have a contract?

Well, the former employee doesn't have a blank cheque to do as they wish.

All employees have an implied promise of faithfulness to their employer during the course of employment. It means that they can't compete secretly with their employer while they are still employed – nor can they set up their competing business and approach your customers while they are still hired by you. That's the unfair "springboard effect" which will be subject to an injunction if the employee subsequently makes good on their plans. During the course of their employment an employee may be allowed to moonlight (if there's no explicit prohibition against this in their contract), but competition against their employer is definitely forbidden. Nor can the employee steal your property – customer lists, paperwork, plans, documents, or anything else that belongs to you. Trade secrets will also be protected.

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Even if paperwork isn't taken, or an item isn't a trade secret, the information can't be copied and taken – things like customer lists are considered confidential information that cannot be taken and used against you by your ex-employee.

Just what is a “fiduciary”?

Certain top-level employees will be prohibited from soliciting customers for a reasonable period of time (usually not more than a year post-separation). This occurs even if there is no employment contract, and the employee hasn't done anything improper prior to leaving, or taken anything of yours. These high-level employees are said to have a duty of trust, or a “fiduciary” duty to the company, that prohibits solicitation.

Just who is a “fiduciary” can be a hard question to answer – the term has included not just officers and directors of the company, but also “top management”, “senior management”, employees of a business “vulnerable” by reason of their personal contacts with clients, “key personnel”, or staff members “key” only to a department.

Essentially, a fiduciary is able to unilaterally exercise some discretion or power so as to affect the employer's legal interests. In this regard, the employer is especially vulnerable.

This is a protective concept – it may be of some assistance to you if you have an ex-employee who you believe will take unfair advantage of the position of trust that they have held in the past. However, sometimes it can be difficult to predict whether a particular employee should be branded with the label of “fiduciary” by the court, and secondly hold them in breach of that duty. It will often be difficult for you to prove, particularly when their actual behaviour has been hidden. However, this may afford you some sort of self defence mechanism even if you don't have a non-compete or a non-solicitation clause in your arsenal.

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To avoid exposure – consider these steps:

- Have your new employees in senior or sensitive positions sign written contracts.
- Have the written contracts contain clauses spelling out that they will be coming into contact with confidential and sensitive information and that such information cannot be used by them after they cease their employment with you.
- Consider a reasonable clause restricting their post-employment behaviour – a non-solicitation clause that prevents them from approaching your customers for a reasonable period of time post-employment will be the most easily enforceable.
- Keep your ear to the ground and maintain regular contact with long-term important customers so that hopefully you are aware if one of your employees is considering attempting to make a move and taking your customers with them.
- Spell out company policies with respect to faithfulness of employment and non-competition during employment – also spell out a clear policy with respect to moonlighting. If the position is sufficiently senior, then consider outlawing moonlighting, as well, so that there can be no confusion about the employee spending their efforts on anything other than your business.
- If you want to rely upon a non-solicitation clause, get it signed early – before employment commences, if possible.
- If you want to be able to rely upon a non-solicitation clause after employment commences, then you must show that there has been some additional consideration or benefit that the employee has received – a promotion or increase in pay – or possibly a particularly generous severance package that goes beyond your legal obligations – if the clause is sought to be incorporated into part of a severance agreement.

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