

Keys to Protecting your Business when an Employee Leaves

Many employers have trouble navigating the enforceable and effective ways in which it can ensure that its trade secrets and other proprietary information are protected when an employee leaves. In this article, we will briefly describe what you, as an employer, can do upon hiring and in the event of termination to protect your business interests. We are lawyers, so it probably won't surprise you that fundamentally, we are recommending that you put some things down in writing.

Establish the Ground Rules upon Hire

It is important to take preemptive action to protect your business interests upon hiring a new employee who will have access to sensitive, proprietary information. Without a clear understanding of a) what constitutes company property and b) the terms governing a possible separation, you risk being entirely without recourse in the event an employee departs, taking with him or her information that can be used to unfairly compete with your company.

Upon hiring a new employee, make sure your policies and procedures are updated, in particular to define a timeline and procedure for the return of company property upon termination. For example, the company laptop you loaned to the employee may contain customer lists, business plans or financials. Not only should this information be password protected in the first place, but this is the type of intangible content that must be "returned" to the employee upon termination. Your policy needs to be broad enough to cover company property that may not necessarily be in the form of a document. Your employee handbook should also state that confidential, proprietary information in any form belongs solely to the company and shall not be copied or duplicated in any form unless consistent with the business and sanctioned by the company. Likewise, your internal protocol should provide for timely, if not immediate, termination of the departing employee's access to company email accounts, files and other electronic information that is sensitive or could be used against you.

Employee Contracts

Depending on the nature of your business, you may consider asking a new hire to sign a stand-alone confidentiality, non-competition or non-solicitation agreement. Note that non-competition and non-solicitation agreements require consideration to be enforceable. If employment is offered in exchange for an employee's promise not to compete for a year after termination, for example, then the consideration requirement is met. If circumstances evolve such that you need a particular employee to sign onto a non-compete/non-solicitation agreement after he or she joined the company, remember the consideration component. Consideration could be in the form of a promotion, a bonus or the allotment of extra vacation days per year.

Granted, confidentiality, non-competition and non-solicitation agreements are difficult to enforce on the back end. Often the elements of causation and damages are difficult for an employer to prove in court. Nevertheless, such agreements will likely have a deterrent effect.

Most employees understand and abide by their contractual obligations, particularly if these obligations aren't buried in an employee handbook. Before presenting these documents to an employee consult with an attorney to ensure that the provisions are designed to be enforceable within the jurisdiction where the employee works. If your employee works in Colorado, then the scope of non-competition and non-solicitation agreements must be reasonable. As a baseline, you cannot prevent your former employee from making a living. Yet within a reasonable geographic area that makes sense with relation to your business, and for a reasonable period of time (generally not to exceed 3 years), you can restrain a former employee's conduct to prevent competition.

Talk about It

Finally, from a common sense perspective, it is a good idea to conduct an exit interview with your employee and discuss the parties' obligations to each other upon termination and going forward. For example, we've seen misunderstandings between employers and employees in the insurance business as to which customers the employee was permitted to take with him or call upon on behalf of his new company. The employer, understandably concerned about competition and loss of business, might be quick to call the lawyers and allege a breach of the employee's covenant not to compete. This situation could be easily avoided by reviewing the parameters before your employee goes back out into the field. You may not be parting ways on the best of terms; all the more reason to sit down and go over your soon-to-be former employee's ongoing obligations to you one last time to avoid confusion, at the very least. Who knows, adding other items to this agenda based on your particular circumstances and listening to the employee may go a long way in reducing tension (or your employee's intention to unfairly compete) going forward.

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