

Exit Stage Left – Tips for When a Key Employee Moves to a Competitor

Labor & Employment Law Update

on February 27, 2019

As with most things in life, you should hope for the best, but plan for the worst in the event that a valued employee leaves to join a competitor. This post contains some helpful tips to keep in mind following such a move by a key employee.

I. Stay On Good Terms With The Former Employee Whenever Possible

Once your employee announces that he or she is making the jump to a competitor, ending the relationship on amicable terms can benefit you down the road. It may very well turn out that the employee's experience and knowledge of past or ongoing projects become critical to the resolution of a future problem or dispute. For that reason, among many others, it is better to remain civil despite the negative feelings that frequently percolate in these kinds of situations.

II. Take Action When Things Get Ugly

Of course, though you may try, it is not always possible to maintain an amicable relationship with a former employee. Most of the time, you will simply move on with business as usual. Unfortunately, it is not uncommon that a former employee attempts to pack up and take your business to the new company. This frequently takes the form of a soon-to-be former employee copying documents and computer files containing the likes of confidential client information or records concerning former and ongoing projects. If this occurs to you, it is time for action.

The law provides you with several methods of redress to prevent other businesses from obtaining an unfair competitive advantage where a former employee has taken proprietary information. Here are some of the most common lines of defense.

- **A Well Drafted Employment Agreement**

An artfully crafted employment agreement with a covenant not to compete can provide the basis for a breach of contract claim against the former employee. Many employment agreements also prohibit solicitation of clients or taking confidential information. An effective employment agreement is a great tool to prevent a former employee from unfairly poaching your business.

Exit Stage Left – Tips for When a Key Employee Moves to a Competitor

- **The Duty of Loyalty**

When it comes to high-ranking employees, always remember that the soon-to-be ex-employee has a continuing duty of loyalty while working for your company. Almost certainly, the former employee will have breached that duty if he or she surreptitiously copied confidential records and computer files during employment.

- **Trade Secret Laws**

It is also illegal to misappropriate trade secrets. For instance, the Illinois Trade Secrets Act (765 ILCS 1065/2) makes it unlawful for the former employee or their new company to misappropriate your “technical” information, “data,” “methods,” “techniques,” “drawings,” and other confidential information that are sufficiently secret to give you a competitive advantage.

- **Copyright Laws**

Copyright laws may further help to protect your business interests. Copyright tends to be particularly important for businesses involved in artistic endeavors, architecture, and software development among many other fields that produce original works of authorship. Usually, the underlying copyright in any work generated for your company by the employee within the scope of his employment will belong to the company. Such laws can, for example, help stop a former employee from taking copyrighted project plans and using them to replace you on a client’s project or passing off the material in a portfolio as their own. Because registration of the work with the U.S. Copyright Office (www.copyright.gov) is required to file a lawsuit for infringement, see 17 U.S.C. § 411(a), and because registration also provides the opportunity for statutory damages and attorneys’ fees, we recommend registering the copyright in your valuable works and include copyright notice on each of the works involved (*e.g., for works first published in 2019, acceptable copyright notice would read “©2019”*).

- **Computer Records**

Finally, the federal Computer Fraud and Abuse Act (“CFAA”), 18 U.S.C.A. §1030, is a vital law that protects you from theft and destruction of information stored on your company’s computer system. In the event your company sustains damage or loss due to a CFAA violation, you may be able to maintain a lawsuit to prohibit the former employee from using the illegally obtained computer files. Damages may also be available under the CFAA. As a measure of cautious practice, you should have your information technology staff check all computer systems after the employee departs.

Through the use of the foregoing business and legal tools, you should be able to protect your business interests in the event those interests are threatened by illicit means. Your attorney will usually start by writing your former employee and/or the new company a “cease-and-desist letter.” However, depending on the

urgency of the matter, events may require an immediate lawsuit to enjoin the former employee and/or their new employer from acting in a way detrimental to your interests.

III. Remember the Flip Side When You Are Hiring

Similar concerns exist when you are on the hunt for new talent. Regarding the recruitment process, you should always:

- Remember that the employee owes a continuing duty of loyalty to his or her current employer for the entire duration of employment.
- Inquire whether the prospective employee may be subject to any post-employment restrictions contained in an employment agreement.
- Take the time to understand whose rights may be implicated by any potentially proprietary information gleaned from the new employee, and refrain from acting upon questionable information.

In short, while a valuable new employee can certainly lead to new business opportunities for your company, you should always act carefully to avoid potential exposure to the types of litigation discussed above.

Exit Stage
Left – Tips
for When a
Key
Employee
Moves to
a Competitor