

Ho, Ho, Ho, It's Restrictive Covenant Season!

Labor & Employment Law Update

on December 28, 2018

Early in the New Year we often see employees switching jobs, which can trigger disputes over restrictive covenants in their employment agreements. As 2018 draws to a close, here are some things to keep in mind to protect your company, its customers, and its information against unfair competition from departing employees:

Assume the worst. We tend to assume people will comply with their contractual obligations. Employers should not assume a departing employee will comply with a restrictive covenant. Some employees forget they even have an employment agreement. Some think the employer won't enforce the agreement especially if it has not enforced similar agreements in the past. Some think restrictive covenants are not enforceable. So don't assume departing employees will comply with their obligations.

The exit interview is critical. Provide the employee with a copy of the contract during the exit interview, review any post-employment obligations, and explain that the company intends to enforce its rights under the agreement. Ask each departing employee to return all digital and paper copies of company information. Have them sign a statement that all such information has been returned or destroyed.

Preserve the laptop. If the employee has a company-issued laptop computer, do not "wipe" the device or put it back into service right away. The employee's computer may hold a treasure-trove of useful information should litigation result.

Pay out what you owe. If the employee has earned a bonus based on 2018 performance that would normally be paid out under your policies and procedures, pay it – even if you suspect unfair competition. Otherwise, the employee may argue that the company waived its right to enforce the restrictive covenants by failing to perform its own contractual obligations.

Send out a cease and desist letter. As soon as you suspect improper conduct, have legal counsel send a letter demanding that the former employee cease and desist from any improper conduct and preserve all relevant information. Consider sending the new employer a copy of the contract. Sometimes, this is enough to stop the behavior in its tracks.

Review your restrictive covenants. Does your contract comply with the Federal Defend Trade Secrets Act and applicable state law? Does your contract allow you to recover attorney's fees in the event of a breach? Are the restrictions no greater than necessary to protect your company? Does it contain an "auto-extender" clause that extends the period of restriction in the event of a breach? Do other provisions need to be updated?

If you don't have a restrictive covenant agreement, you still have options.

In most states employers can require an existing employee to sign a restrictive covenant as a condition of continued employment if adequate consideration is provided. Even companies that elect to operate without restrictive covenants may enjoy some level of protection through state or federal trade secret statutes and fiduciary duty obligations inherent in the employment relationship.

So enjoy the holidays but remember, come the New Year, it is "restrictive covenant season!"

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