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Protecting Your Business When Employees Leave

Legal tips for preventing exiting employees from leveraging your confidential information against you

By: John D. Horowitz - December 13, 2010

One of the more emotional, and financially devastating problems that clients approach me with is when one of their employees leaves the company and starts working for a competitor. Aside from the overwhelming anger towards the "traitor," the reality is that the company likely invested substantial time and money in training the employee, and probably entrusted the employee with a great deal of confidential information.

By leaving the company, the employee could use his/her skills and knowledge of the employer's confidential information to benefit competitors and economically undermine the company. To try and prevent your company from being one of these employers, you should consider whether you want existing employees to sign one or more of the following three agreements.

Non-Compete Agreement

Under a non-compete agreement, you can prohibit an employee from working for a specific competitor or even from working for all companies in a particular industry. This restriction will be in effect during the individual's employment and for a reasonable period of time after his/her termination from your company.

In order for a non-compete agreement to be enforceable against an employee, it must be reasonable in its restrictions so that the agreement is no more restrictive than necessary. Generally, a company cannot prevent a worker from accepting a job with another employer when doing so will not substantially harm your business. Also, the agreement must not restrain the employee for an unreasonably long period of time. Naturally, a determination of what qualifies as “reasonable” depends on the precise factual circumstances, but non-compete agreements are recognized as useful tools.

Confidentiality Agreement

In the day-to-day course of operations, you must often provide employees with confidential information about the business that, if disclosed, could harm your company. Although the exact nature of confidential information varies from job to job, it generally encompasses information about clients, suppliers, products, profits, and revenue-generating programs that is not publicly or generally known. In a confidentiality agreement, your employee acknowledges what information is “confidential,” and your company’s lawful right to protect that information. Additionally, the employee agrees that he/she will not disclose confidential information to a particular employer or entity unless you advise him/her otherwise.

Non-Solicitation Agreement

To prevent employees from leaving your company and then soliciting your current employees and clients, you should consider entering into non-solicitation agreements. A non-solicitation agreement prohibits a former employee from directly or indirectly soliciting your employees and clients for a reasonable period of time. These agreements can be entered into when the employee begins his/her employment or as part of a separation agreement when the individual is leaving your company. Put simply, your company should get proactive and protect itself, before the horse is out of the barn.

While no contract can guarantee success in a litigation, a properly drafted agreement can help better your chances. Contact your legal counsel to discuss whether the agreements are lawful, and helpful, for your business.