

Enforcing Noncompetition Agreements

Part II: What Can Be Done When an Employee Leaves for a Competitor?

Last month's edition of the *Employment Law Advisor* reviewed some noncompete basics and addressed some of the steps employers should take to put enforceable agreements in place. However, having effective agreements on paper does little to protect an employer's interests unless the employer is prepared to take action to enforce its rights.

This month's edition of the *Employment Law Advisor* focuses on what an employer should do upon learning that an employee is leaving to join a competitor. Employers should treat departing employees with noncompetes in a consistent way by (i) reminding them of their continuing obligations upon termination, (ii) promptly sending "cease and desist" letters upon learning that they are engaging in competitive activities, and (iii) being prepared to take prompt legal action when they do not comply with the employer's demands. Being ready and willing to take appropriate action can preempt a threat to the employer's business interests before harm occurs, and, perhaps as importantly, can send the message to the employer's current and former employees and its competitors that the employer takes seriously threats of unfair competition.

The Exit Interview: Remind Departing Employees of Their Continuing Obligations (and Collect Information)

Conducting exit interviews with departing employees serves two important goals. First, an exit interview presents an opportunity to remind departing employees of their continuing obligations to the employer. We recommend that employers review the terms of the employee's noncompetition agreements with the employee during exit interviews so that departing employees understand their obligations (and understand that the employer takes these obligations seriously). Be sure that managers are trained to properly conduct such interviews so that they do not unwittingly agree to limit the scope of the noncompete in their discussions with departing employees.

When an employee leaves your business do you:

- ✓ Conduct an exit interview?
- ✓ Determine whether or not the employee is leaving you for a competitor?
- ✓ Have an action plan in place if the employee violates a noncompetition agreement?

Then, read on...

Second, an exit interview can be helpful in gathering information to assess the threat posed by a departing employee. Too often employees leave employment stating that they are "pursuing other opportunities" but immediately begin working for competitors in capacities that breach their noncompetes. A former employer may not learn of a breach until weeks later, after much harm has occurred and the ability to enforce the noncompete has been undermined.

A departing employee should be questioned about future plans so that the employer can learn if the employee intends to work for a competitor and what activities the departing employee will perform for the new employer, or whether the departing employee intends to start a venture that may be competitive with the former employer. If a departing employee denies going to work for a competitor and then does so, the employee's misrepresentation may well be held against him or her if litigation ensues.

Employers should also ask departing employees to verify that they are not keeping any company property or documents that contain confidential or proprietary business information. Particular attention should be paid to a departing employee's laptop computer and work station. Employers should assess the need to preserve and/or immediately review emails and other information stored electronically for evidence showing that the departing employee has breached or intends to breach a noncompete.

As a follow-up to exit interviews, employers should consider issuing a letter to the departing employee that outlines the employee's continuing contractual obliga-

tions to the employer and the independent duties owed the employer under statutory and common laws that protect trade secrets.

Additionally, noncompetes sometimes include a provision by which the employee agrees that the employer may forward a copy of the noncompete to future employers. This step can be useful in alerting potential competitors about the existence of the agreement (so that they cannot later claim they were unaware of the employee's continuing obligations), however, this should be done carefully so as not to risk a claim of unlawful interference with the former employee's relationship with his or her new employer or a defamation claim by the former employee.

Along the same lines, when an employee who had contact with customers departs for a competitor, an employer should take steps to protect the customer relationship, such as informing the customer that the former employee has departed and introducing the customer to its new contact at the employer. Keeping the lines of communication open with customers is important for another reason: customers are often the first to report that a former employee is soliciting the former employer's customers in breach of the noncompete. Again, such communications must be handled with care to limit exposure to claims of defamation by the former employee.

Assess the Situation Quickly

Employers must evaluate expeditiously whether the employee's job with a competitor threatens the employer's goodwill, trade secrets and/or confidential information. Employers cannot sit on their rights in these situations because delay may hinder the employer's ability to obtain legal protection. The following are questions the employer should answer as soon as possible before determining its response:

- ✓ Is the former employee's new employer or new business venture competitive?
- ✓ What activities will the former employee be performing for the new employer? (Will he or she be calling on the former employer's customers for the new employer and/or disclosing trade secrets or confidential pricing information?)
- ✓ Will the former employee's activities breach one or more of the restrictive covenants contained in the agreement?
- ✓ How will the former employer be harmed? Will customers be lost? Will valuable trade secrets be exposed?

"Cease And Desist" Letters: A Shot Across the Bow May Achieve the Desired Result

Once the employer has determined (or has a good faith belief) that a former employee is breaching a noncompete, typically the next step will be to engage legal counsel to send a demand or "cease and desist" letter to the employee. A well-drafted demand letter contains an accurate summary of the contractual, statutory and common law restrictions that bind the former employee, a summary of the facts showing that the former employee is in breach of his or her noncompete (or statutory or common law), a description of the harm suffered or potential harm the employer may suffer as a result of the former employee's breach of duties, and a demand for specific actions and written assurances.

In many noncompete situations, it is also appropriate at this stage to send a separate demand letter to the former employee's new employer setting forth the facts and arguments as to why the new employer's engagement of the former employee will

unlawfully interfere with the noncompete between the former employee and old employer. Cease and desist letters must convey the message that the former employer takes the former employee's continuing obligations seriously and will not allow its goodwill, trade secrets or confidential information to be unlawfully misappropriated. These letters are a critical tool because many noncompete situations are resolved by settlement following the exchange of the cease and desist letter and response.

Filing Suit for a Temporary Restraining Order, Preliminary and Permanent Injunction and Damages

If the noncompete situation is not resolved by the sending of cease and desist letters, then the employer must assess whether it will file a lawsuit to enforce the noncompete. Unlike most lawsuits, where the goal typically is to win a judgment awarding money damages after what is usually a lengthy process leading to trial, the goal in most noncompete situations is to obtain an immediate order from the court. This order is called a preliminary injunction (or in certain emergency situations a temporary restraining order). A preliminary injunction will order the former employee (and new employer) to stop taking certain actions, such as working for a competitor altogether, calling on certain customers for the new employer, or using or disclosing confidential and proprietary information. If the former employee or new employer violates the preliminary injunction, they are in contempt of court. The idea is that the preliminary injunction will stop the conduct, preserve the status quo between the parties, and prevent further harm to the former employer. A permanent injunction is issued after trial.

Obviously, the decision to file suit and seek a preliminary injunction must be evaluated carefully given the expense and uncertainty of litigation. This is particularly so in noncompete situations where the outcome of litigation is often influenced to a large degree by particular judges' views on noncompetes generally. In order to obtain a preliminary injunction, the employer must establish that it is entitled to such relief by showing that: the employer is likely to prevail on the merits of the case at trial; the employer faces irreparable harm; the balance of harm (that facing the employer as com-

pared with the harm the former employee could suffer by, for example, not being able to work for a particular new employer) favors the issuance of an injunction; and the public interest is not adversely affected by the issuance of a preliminary injunction. In addition to assessing whether this standard can be met, the employer should pause to consider whether it will come to court with "clean hands" (that is, whether it has acted fairly). The issuance of a preliminary injunction is a matter squarely in the judge's discretion and is a matter of equity (fairness), so it is important that the employer not overreach but rather only seek the protection necessary to prevent the misappropriation of goodwill, trade secrets, and confidential information. Similarly, before embarking on litigation, the employer should evaluate whether it has breached any obligation to the former employee (such as the obligation to pay salary or commissions). Such facts will influence whether the court will grant an injunction, and also will likely result in the assertion of counterclaims against the employer in the lawsuit.

The assessment of whether to file a lawsuit must be made quickly. Delay undermines the argument that the former employee's current actions are actively harming the employer's business, and may in rare cases result in the former employee filing suit to obtain a declaration from the court that the noncompete is unenforceable. Filing promptly protects the employer's interests and secures the advantage of being the first to file.

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