

## Hiring the Competition

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It is not a secret that you need look no further than your competition when you're seeking to hire a perfectly qualified employee. Your competitors' employees already know the business. Their learning curve is short.

But what happens if you actually decide to hire someone from a competing business? Although adding a highly qualified new member to your team can boost the bottom line, it also can become a legal nightmare if you are careless in the hiring process. While there may always be some risk, there are steps you can take to minimize or even avoid litigation.

First, find out whether the potential employee is subject to any restrictive covenants, including non-compete, non-solicit or confidentiality agreements. Ask the candidate about the likelihood of your competitor suing to enforce the restrictions. If the agreements are in writing, ask for a copy and give your lawyer a call to see if they are enforceable.

If the agreements are enforceable, consider how, and if, the new employee can perform the duties of the new position while abiding by the terms of the agreement, to the extent they are reasonable. If compliance is not feasible, consider modifying job responsibilities during the term of the restrictions. Ways to do this include screening the candidate from a particular line of business or placing the candidate outside the area of geographic restriction. With the candidate's permission, you also might consider calling the competitor and asking for an exemption.

Even if the candidate is not subject to non-compete, non-solicit or confidentiality agreements that would affect his or her duties with your company, you still need to protect your company from claims that you are attempting to steal your competitor's trade secrets. Of all post-employment obligations, courts are most likely to enforce those that prohibit disclosure of a previous employer's confidential information and trade secrets. You should take reasonable steps to prevent an overlap of responsibility between an employee's old and new positions that might result in the disclosure of such information. And you should document your efforts.

Here are some additional steps you can take to reduce the risk of a lawsuit:

- Do not pay above market rates: a high signing bonus or salary increase may look like payment for confidential information rather than payment for skills;
- Require an agreement not to use or disclose confidential information from former employers;

- Warn employees – in writing – not to bring, disclose or use a former employer's confidential information. Be clear that failure to adhere to this requirement may result in termination;
- Require disclosure of inventions or discoveries made prior to a new employee's employment (in a way that does not disclose trade secrets of a former employer);
- Minimize the new employee's role in recruiting or hiring others from his or her former employer;
- Screen all employees assigned to design and develop new products, processes or services for past access to competitors' secrets;
- Monitor computer use and e-mail traffic to ensure there are no uploads or transmissions of outside information in the first months of employment; and
- Create and maintain a virtual "wall" between those assigned to analyze competitive services, processes and products and those formerly employed by competitors.

In short, following these types of procedures will go a long way toward reducing your company's risk of facing litigation when hiring from a competitor.