

Preventing Unfair Competition In The Absence Of A Non-compete Agreement

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You've read the title of this article. There it is, up above. Let me repeat:

Preventing Unfair Competition in the Absence Of A Noncompete Agreement

What I really want you to focus on is the last part. The part that reads: “. . . In The Absence Of A Noncompete Agreement”.

Not every noncompete agreement is enforceable. California, for one, has a public policy against noncompete agreements, except in limited circumstances, such as the owner of a business agreeing to a noncompete as part of selling the business.

Try to enforce a noncompete agreement against employees in California and you run up against the statutory provision against restraint of trade. California Business & Professions Code Section 16600 provides:

Except as provided in this chapter, every contract by which anyone is restrained from engaging in a lawful profession, trade, or business of any kind is to that extent void.

Put simply, noncompete agreements in California are generally illegal.

But there are alternatives to the dilemma of former employees competing with your business.

First, confidentiality agreements that protect trade secret information and other intellectual property may be enforceable and could prevent an ex-employee from competing unfairly by using such information or property for the benefit of a new employer, even in the absence of a noncompete agreement.

Second, courts in California have recognized that if a former employee's new job, job duties and market/customers are similar to the old job, it may be inevitable that an ex-employee will disclose or use protected information or secrets obtained while working for you. In this case, you may have a cause of action to prevent the employee from disclosing and using such under the “inevitable disclosure” doctrine.

There are many practical steps you can take to ensure that unfair competition from ex-employees does not occur. These include proper exit interviews, audits of company computing devices used by the ex-employee, reminders to the ex-employee about enforceable obligations, and cooperation with the new employer (which probably does not want to be caught up in a lawsuit).

This is tricky terrain and each situation is unique. Consulting with an attorney to help you set general company policy, and once again when an employee plans to leave, is vital.

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