

Gavel to Gavel: Handling the competition of a departing employee

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In today's economy, many companies have reduced their work forces to essential positions. When a key employee leaves to work either for the competition or to start a competing business, it can dramatically affect the bottom line. Don't panic! Even in the absence of a confidentiality provision and an agreement not to solicit customers, employers have ways to fight back.

One way is Oklahoma's Uniform Trade Secrets Act, known as the UTSA. Effective Nov. 1, the Oklahoma Legislature has transformed the UTSA pussycat into a tiger by providing for criminal penalties. If a departing employee steals, embezzles or copies without authorization (including by e-mail) any object, material, device, customer list or business records (including information stored in a computer-related format), he may be guilty of larceny. Whether or not he is guilty of grand larceny or petit larceny depends on the value of the trade secret. In order to constitute a trade secret, however, the item must have an independent economic value that is derived from not being generally known by others and that is not readily ascertainable by them through proper means. It must also be the subject of efforts that are reasonable under the circumstances to maintain its secrecy. Finally, it is no defense that the person returned or intended to return the article he stole, embezzled or copied.

Another relatively new act that may apply to the actions of a departing employee is the federal Computer Fraud and Abuse Act. Under the CFAA, an employee who knowingly transmits a program that intentionally causes damage to a computer or who obtains information from a computer without authorization or in a manner that exceeds his authorized access may be liable for a fine or imprisonment. Courts readily have found violations of the CFAA by departing employees, particularly where the employee tries to prevent recovery of deleted files by loading erasure programs into his company computer. Courts struggle, however, with the issue of unauthorized access when the departing employee downloads information from his computer before leaving – some find a violation of the CFAA; others do not.

Additionally, remember that key employees are in a position of trust and confidence. They owe the employer a duty of loyalty and must act in the employer's best interest. Departing employees who use their employer's computers and telephones to set up a new business, who download customer lists and contact information, or who solicit employees to join them in their new competing business, may have breached their duty of loyalty.

Employees who induce customers to breach their contracts with the employer may be liable for tortious interference.

Finally, don't forget to look at your handbooks and written policies. Some employers have conflicts-of-interest policies that are signed periodically in which the employee affirms he or she has no outside business interest in conflict with the interests of the company. There may be codes of conduct or other ethics policies that are breached when the employee leaves to compete directly or indirectly through employment with a competitor.

While non-compete and non-solicitation agreements may provide the best weapon in your arsenal to deal with the competing employee, you have other, increasingly forceful, alternatives.

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