

## NEWSSTAND

### **So, You're Thinking About Jumping Ship... How Departing Executives and Employers Can Minimize their Risks**

Winter 2010

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Increasingly in these challenging economic times, executives are leaving their jobs in search of greater opportunities. *See* Dana Mattioli, *Firms Poach Top Talent from Recession-Weary Rivals*, Wall St. J, Feb. 8, 2010, at B6. Many executives are bound by non-competition, non-disclosure, and non-solicitation agreements, however, which impact their ability to effectively compete against a former employer. Even if not bound by such restrictive covenants, an executive's fiduciary obligations may restrict competitive activity both before and after separation.

In an age of stiff competition in a difficult economy, companies are more and more willing to take aggressive steps to prohibit what they perceive as unfair competition by the departing executive. There are also circumstances where an employer may initiate litigation against a former executive even when it knows it is likely to lose on the merits on the theory that the costs of defending such a lawsuit may be enough to convince the new employer that this executive is simply not worth the trouble. The employer may also wish to send a message to its remaining workforce that they can expect a fight should they too decide to jump ship. Thus, when preparing to change jobs, executives should consider several legal and practical issues to reduce the risk of battle down the road.

#### **DO Review All Agreements**

If an executive contemplates competing with an employer, he should carefully review his employment agreement and other contracts, such as non-competition, non-disclosure, or non-solicitation agreements, to determine the parameters of prohibited conduct. Non-competition agreements are enforceable to the extent they are necessary to protect the employer's legitimate business interests and are reasonable in time, geography and scope of proscribed activity. Employers typically succeed in enforcing agreements prohibiting solicitation of clients and other employees because such agreements do not present the same concerns about restricting freedom of employment as non-compete agreements. Although the executive may be able to assert various defenses (i.e. the agreements are overly broad or lack adequate consideration), the scope and likely enforceability of such restrictive covenants need to be thoroughly vetted ahead of time.

#### **DO Understand the Nature of the Fiduciary Duties Owed to the Employer**

Even executives who are not contractually restricted from competing with a former employer are still bound by fiduciary obligations to the corporation, particularly when still working for the

company. The executive's fiduciary obligations – and the duty of loyalty specifically – significantly restrict an executive's competitive activities, as discussed below.

### **DO NOT Actively Compete with the Employer While Still Employed There**

Absent a contractual agreement to the contrary, an executive can prepare to compete with a current employer without violating the fiduciary duty of loyalty to the company. Activities that constitute "preparation" include interviewing with competitors or leasing office space for a new entity. When preparing to compete, the executive should refrain from using any corporate resources, including company time and funds. An executive cannot actively compete with his employer while still employed there; otherwise he risks claims of misappropriating corporate opportunities and breach of fiduciary duty, in addition to any contractual claims the employer may have.

### **DO Inform Customers of Your Departure but DO NOT Solicit their Business.**

Generally, executives cannot solicit their employers' clients while still employed by their employers. The definition of "solicitation" is murky, however. Executives are prohibited from directly asking a customer for business but can inform customers that they intend to open a new business or join a competitor. If the executive brought the clients to the firm, he may be entitled to directly seek their business. Executives who wish to inform clients of their move to a new company should draft a carefully worded letter that is informative in nature. This will minimize any accusations of improper solicitation. Such actions should be taken after the employee leaves the company.

### **DO NOT Solicit Other Key Managers**

Often, an executive's fiduciary duty of loyalty prohibits the executive from soliciting other key managers to join the executive in his or her new venture because the fiduciary duty encompasses an obligation to maintain adequate managerial employees. This restriction protects the former employer from enduring a mass exodus of its critical managerial personnel. Although an executive should still exercise caution in directly soliciting employees of his former employer after departing the company, he no longer owes a fiduciary duty to the employer and his exposure to liability on this basis is significantly reduced.

### **DO NOT Use a Former Employer's Confidential Information to Compete**

An executive can never exploit a former employer's trade secrets or confidential information. If the company has not defined what it considers confidential, the executive should determine whether certain information is readily available to the public and the measures taken by the employer to protect the information. While each case is fact-specific, courts have routinely held that client lists, business models, and financial data are trade secrets or proprietary information. In order to ensure compliance with this element of the duty of loyalty, the executive should return all company information and property to the employer upon separation and refrain from keeping copies for himself. Increasingly, companies are conducting a forensic analysis of an executive's computer following the executive's departure. If the company determines that the executive printed or emailed any confidential information when preparing to leave the company, this can be powerful ammunition in a future lawsuit. In short, the executive needs to leave without putting his hand in the cookie jar.

### **DO NOT Plan Your Move on Company Time**

While courts have consistently held that an employee can plan his move while still employed, that planning should not be undertaken on company time or at company expense. Use evenings and weekends to do the planning. Do not use company equipment (i.e., computers) to plan the move. There should be a clear line of demarcation concerning the executive's work for the employer and his plan to depart.

### **DO NOT Lie During the Exit Interview**

The departing executive should anticipate how he intends to answer various questions during the exit interview. As a general matter, he should respond truthfully to any questions concerning where he is going; an executive who lies about who his next employer is may be telegraphing that he knows he is in violation of his restrictive covenants and wishes to duck from potential confrontation. Most importantly, the departing executive should not sign any documents during the interview; rather, he should take them with him and review such documents with counsel.

### **DO Speak Candidly with Your New Employer About Existing Contractual Commitments**

It is imperative that the executive inform his new employer about any restrictive covenants. The new employer needs this information in order to make an informed decision about the risk of entering into the employment relationship. In addition, depending on the value brought to the table – the executive may be able to get the new employer to indemnify him for legal fees, judgments, and settlement costs, in the event litigation ensues.

### **What an Employer can Do**

An employer can also protect itself from competition from former employees and take steps to significantly enhance its position in a subsequent dispute. Following are some steps that an employer should consider taking:

- Conduct a thorough audit to determine which employees are (or should be) subject to restrictive covenants;
- Determine whether the agreements currently in place adequately safeguard the company in the event an executive decides to leave;
- Determine whether any changes in job circumstances, such as a promotion, require an employee's restrictive covenants to be updated;
- Ensure the employee's restrictive covenants are supported by adequate consideration;
- Confirm that definitions of trade secrets and confidential information are up-to-date in light of any recent company developments, such as recent business plans or product development;
- Implement (or update) appropriate safeguards to protect confidential information or trade secrets, such as limiting access to the information, identifying the information as confidential, or storing the information in a secure location;
- Make sure that such safeguards are complied with by all employees; and
- Develop an exit interview format for all employees to determine the employee's next place of employment and to remind the employee of his contractual obligations.