THINK BEFORE YOU POACH

HOW TO RECRUIT TOP PERFORMERS WITHOUT STEALING THEM

BY PHILLIP M. PERRY

Editor's note:
When a star employee moves from one business to another, any resulting conflicts are often resolved in court. It's up to the employees and employers to make sure transitions happen legally and appropriately. This article from award-winning journalist Phillip Perry summarizes several judicious ways to avoid costly consequences.

A California sales executive jumps ship to work for a competing company. On the way out, he takes a folder of customer lists and marketing plans.

Those items prove valuable resources for his new role — so valuable that his previous employer sues for violation of confidentiality and nondisclosure agreements as well as illegal use of trade secrets. The results were costly cash settlements against the executive and the new employer who had encouraged use of stolen material.

Competing interests

"This area of law is growing quickly," said Ben Mathis, an Atlanta-based attorney and managing partner. "There are two competing interests at stake. The first is that of employers who have a right to protect their information from having people walk off and take it all with them. The second is that of the individual's right to compete against his earlier employer."

Resolving those competing interests can hit profits hard. "Court remedies usually involve financial damages for harm that had been done to the original employer," said Michigan law professor Theodore J. St. Antoine.

"If the losing party ignores an injunction and continues to do the prohibited activity, the result may be additional fines for contempt of court or even jail time in extreme cases," Antoine added.

Door and access control businesses must take steps to ensure that they do not lose valuable information when employees leave for competing firms. At the same time, employers need to protect themselves from costly lawsuits when poaching top performers from competitors.

High level talent is in serious demand and recruiting can be aggressive. Intellectual property — easily carried between companies — is more valuable than ever before. Customer information, pricing data, business plans, and proprietary marketing strategies are all at risk.

Keep trade secrets safe

Businesses have a valuable tool at their disposal: restrictive covenants. These written agreements can keep departing employees from competing against former employers, soliciting the same customers, or using a former company's sensitive information for their own ends.

"Most employers have confidential, proprietary, or sensitive information," said Joon Hwang, a shareholder at a Virginia law firm specializing in labor and employment

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disputes. "Or they may have certain employees with desirable skills, experience, training, or intimate knowledge considered integral and invaluable to their businesses. Restrictive covenants, drafted properly, can be a powerful tool for protecting all of this valuable information."

Employers should also question incoming personnel about restrictive covenants they may have signed at their former company. To protect your company, new hires must be prohibited from bringing in customer lists, marketing plans, financial records, confidential information, or anything else that might be considered the former employer's property.

Implement non-competes

The most powerful restrictive covenant, called a "covenant not to compete" or a "non-compete," prohibits the employee from accepting a position with a competitor. These agreements specify a time period and a geographic area in which the prohibition applies. They also typically restrict the individual from serving as an independent contractor for or having any ownership interest in a competitive organization.

"I generally do counsel my clients to have non-competes, certainly with their higher-level employees," said Jeffrey A. Dretler, a partner at a Boston firm. "I think it's a very important and effective tool for protecting company confidential information and relationships in which they have invested."

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Be aware of loopholes

Covenants are not bulletproof. They may be deemed invalid by a court of law based on the argument that they may limit the capacity of employees to earn their livelihoods.

Employers can help improve the enforceability of their non-competes by ensuring that the terms reflect the concerns of both the employer and the employee. "The wider the covenant goes geographically, and the longer the term of the restriction, the less likely the court will uphold it as reasonable," said St. Antoine.

An example of a very reasonable covenant would be one that calls for a one-year moratorium on working for a competitor, within a radius of one mile of the original employer.

State protections for workers

Achieving the right balance is tricky because no federal law provides a common nationwide playing field for employers and employees. Everything depends on state laws, which differ substantially.

"Fifty states have fifty permutations of what employers can lawfully restrict with written agreements," said Mathis. "Many states allow restrictions for reasonable periods from six months to two years. Some states

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are more employee friendly than others. In California, employers generally cannot have any kind of restrictions."

In many states, the law is trending toward greater worker protections. Dretler said, "States are trending toward limiting non-competes. Many federal, state, and local initiatives, legislation, and news commentaries are asking whether there should be limits put on them. Are they anti-competitive? What's really protectable? There's a lot of litigation about these issues."

Dretler said that employers should avoid over-reach in agreements because they may backfire in court, reduce credibility when seeking to enforce the non-competes that really matter, or discourage a prospective employee from joining your company. If a non-compete fails to hold up in court, the employee who jumped ship is free to conduct business without any restrictions.

Protect your customer lists

Non-solicits offer a less vulnerable option for protection. They are designed to keep an employee who moves to a new business from soliciting a former employer's customers for a specific time period.

"An agreement not to solicit customers is often easier to defend than a covenant not to compete," said Houston law firm founding partner Joseph Y. Ahmad. "That's because it is narrower in scope, allowing the employee to work for a competitor." Courts like the fact that these agreements preserve the ability of the individual to continue to earn a livelihood while protecting the rights of the former employer.

Even if a former customer tracks down the departed employee at his or her new company, the terms of the non-solicit agreement usually hold. "The employee has to say 'no, I can't help you' and the former customer needs to contact another employee," said Ahmad.

"Occasionally one can go further than that and actually specifically direct them to a person who can help them. But the safest thing is to not give the previous customer much direction at all."

Employers should also avoid prohibiting the solicitation of all customers served by the current employer. "There usually needs to be some relationship between the employee and the customers, in terms of previous interactions," Ahmad said.

Discourage "Pied Pipers

Another kind of non-solicit is often called an "anti-raiding provision," which prevents departing employees from luring co-workers to the new employer. "I don't know of anything that triggers litigation more than a high-level employee leaving a company, and then is suspected of being the Pied Piper and causing a bunch of other employees to leave," said Ahmad.

"Many times, that gets articulated as some type of raiding claim, even though not every state has protections specifically for that." Having a well-written non-solicit of employees can help protect against this situation.

"Less is more"

Sometimes the old adage "less is more" can be a smart business posture. Less restrictive covenants like a non-solicit can be more effective than a non-compete. However, the least restrictive covenant — confidentiality agreements — may be the most effective option of all.

> "Any employee who has access to sensitive business information should sign a confidentiality agreement."

"A confidentiality or non-disclosure provision prevents departing employees from disclosing or using the proprietary or confidential information of their ex-employers, or that of their employers' customers," said Hwang.

These agreements state that the signers will take measures to keep the organization's sensitive information secret. "The information in dispute does not have to be a 'trade secret', but must simply be confidential, proprietary, or not publicly available."

Since every state legally recognizes the right of businesses to protect their sensitive information, confidentiality agreements are generally highly defensible in court. Any employee who has access to sensitive business information should sign a confidentiality agreement. They also demonstrate that an employer has taken steps to communicate the importance of discretion to employees.

Lure star performers appropriately

Employers need to be careful about violating a competing business's restrictive covenants. The legal fees and time required to defend one's actions can be costly even if a court strikes down the covenant as unreasonable.

"Some employers draft restrictive covenants knowing they will not be enforceable but will scare people into behaving as desired," said Mathis. "Employers with deep pockets can cause a lot of trouble."

During the hiring process, ask what agreements the employee has signed with his current employer. An individual who never signed a non-compete might have signed an agreement not to solicit certain customers or to recruit coworkers.

"When a new employee is hired it's a good idea to get a verification or agreement the individual is not taking confidential information from somewhere else," said Ahmad. "And also that that employee is not subject to a restrictive covenant that they have not made the new employer aware of."

A better deal

When recruiting employees, continue to examine your intent. If the goal is not to attract a skilled employee, but rather to cripple a competitor by grabbing trade secrets, then hiring the individual can be actionable in court.

"You may simply see a very talented person performing for another firm and you think you can give that individual a better deal," said St. Antoine. "That won't give rise to a cause of action. But you can be the target of litigation if you have some other element in the picture, such as an effort to get insider information."

Employers should also avoid spreading false and damaging information about the employee's current company. "If an employer falsely tells a coveted person that his current employer is going out of business, that is 'trade libel,' a special form of 'libel and slander,'" added St. Antoine.

Changing laws

Non-competes, non-solicits, and confidentiality agreements form a three-legged stool of defense for employers looking to protect valuable business information. However, restrictive covenants must also balance the needs of the employer with those of the employee.

Employers must periodically review such agreements to ensure they continue to comply with state laws, which are becoming more protective of workers thanks to new and tighter restrictions on what employers can prevent them from doing. ■