EMPLOYMENT LAW

RESOLVE TO SAFEGUARD COMPANY INFORMATION IN 2012

For many businesses, employees are the biggest investment and the primary safeguard of their confidential, proprietary and competitive information. For some employees, however, a slowly rebounding economy presents increased opportunities to join a competitor looking to capitalize on the specialized knowledge of an experienced industry insider. As employers plan for 2012, the inherent risk posed by departing employees presents an opportunity to reevaluate measures used to protect confidential information and trade secrets from the high cost of misappropriation. To that end, the following steps may be helpful.

1. Identify what business information is a "trade secret" versus "confidential information"

All "trade secret" information is confidential, but not all "confidential information" is a trade secret. A trade secret is any highly confidential information related to your business – whether a fact, process, program, technique or other collection of information – that is independently valuable because it is neither known to, nor readily ascertainable by, competitors or the public through lawful means. "Confidential information" includes any other information that an employer wants to protect from disclosure, but that is not so critical to the company's profitability as to have independent financial value if disclosed.

The distinction may seem subtle, but it is significant for a company seeking to protect its informational assets. The law prohibits employees from disclosing their employers' trade secrets, both during and after employment, regardless of whether they sign a contractual agreement to that effect. To protect other, non-trade secret information the employer deems confidential, however, an employer generally must have a contractual agreement in place with its employees that imposes an obligation to maintain confidentiality.

2. Determine which contractual agreement best suits the company's business needs

If an employee has access to a company's trade secrets or confidential information, there are several types of agreements, collectively known as "restrictive covenants," that may help protect the company's informational investment in the employee. These restrictive covenants include confidentiality, non-competition and non-solicitation prohibitions.

Confidentiality agreements are used to protect specified confidential information from disclosure, both during and after employment. Employers may also include a contractual agreement not to disclose trade secrets. Although not legally required to protect trade secrets, these provide the benefit of identifying the types of information considered trade secrets and represent a contractual remedy for the employer if a court determines the information falls short of meeting the legal definition of a trade secret.

As the most narrow of restrictive covenants, confidentiality agreements are generally the least burdensome to enforce. However, they still require careful consideration and drafting. Importantly, an agreement that defines the information protected too broadly may be considered by a court to be a veiled covenant not to compete that prevents employment in the industry altogether, thus inviting more heightened scrutiny by courts.

Non-competition agreements are generally the broadest type of restrictive covenant, precluding employees altogether from working for competitors after their employment regardless of whether the employee uses any confidential or trade secret information. Because these covenants place considerable restrictions on employment and are not limited to particular information, they must be narrowly tailored with specific geographic and time limitations. Non-competition agreements are the most difficult to enforce, typically surviving only when the employee's role is closely intertwined with the profit-making center of the business and the breadth of the restriction is only as broad as necessary to protect the employer's business interests.

Finally, non-solicitation agreements generally protect information that employees learn about specific customers by prohibiting employees from soliciting those customers for a certain period of time post-employment. Because non-solicitation agreements are less restrictive and limited to identifiable customers, they need not be geographically limited to be enforceable and are thus best suited for employees whose primary value is in developing and maintaining valuable customer relationships. But to be enforceable, a non-solicitation covenant must be narrowly drafted to prohibit solicitation of those customers with which the employee interacts during employment and not necessarily all customers of the business.

Restrictive covenants can provide employers with financial remedies and injunctive relief against former employees who may breach their contractual agreements. As such, they can be effective tools for companies to safeguard confidential, proprietary and trade secret information. However, determining which, if any, covenant to employ depends on a number of factors, including the information to which the particular employee has access and the costs that may be involved with executing a valid contract.

3. Implement employment policies that encourage information security

Regardless of whether employers use restrictive covenants to protect information from departing employees, employers should also consider establishing practices and implementing policies that identify the information considered confidential and place restrictions on the means by which it can be disclosed or transmitted. These steps not only make employees aware of the expectations related to confidentiality, but they also reflect the employer's efforts to maintain the secrecy of their information – an important requirement for protection of trade secrets. For example, computer and email use policies that restrict or prevent the download or transfer of information outside the employer's computer network can help prevent the improper transfer of confidential information off site.

The physical security of confidential information is also important to trade secret protection and preservation of confidentiality in general. Identification cards, computer passwords, keycards, security guards and other typical means of physically preserving information security emphasize the importance of confidentiality to employees in addition to securing the information. Conversely, a lack of sufficient physical security surrounding information deemed to be a trade secret can strip the information of trade secret protection if a court finds that the absence of security is indicative of a lack of value.

Conclusion

A new year brings a new opportunity for employers to ensure that the information that makes their business successful is protected from unfair competition and unwanted disclosure. Many options are available to safeguard information, but the law imposes a fine line between legitimate measures to protect information from departing employees and anti-competitive measures that restrict the free flow of employment. For more information on how to evaluate and protect your confidential information, consult your labor and employment attorney.

This Employment Law Update is published as a service to our clients and friends. It is intended to be informational and does not constitute legal advice regarding any specific situation.

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