Safeguarding your company from poachers

February 7, 2011 | Curtis Smolar

A reader asks: My business is in an industry where sales people and software engineers are often recruited by competitors. How can I protect my company from being raided?

Answer: Employers use what are called restrictive covenants to protect trade secrets and prevent employees from unfairly stealing clients and/or information. Courts heavily scrutinize these covenants so it is imperative to have a seasoned attorney assist you with writing one that will be enforceable under the laws of the state where your company is located. (Just missing a few words can create tremendous grief for an employer.)

There are a variety of these available, but let's look at the most common:

Non-disclosure agreeements: Non-disclosure agreements ("NDAs") are one of the most effective and commonly used solutions to this problem. An NDA protects information that is a trade secret – data that has economic value (actual or potential) due to its exclusivity and is something you're making efforts to keep secret.

Taking trade secrets without the owner's consent is called misappropriation and if an employee misappropriates a trade secret, a company has the right to recover:

- Actual damages it suffers from the theft

- Repayment of the money made by the employee (or his new employer) as a result of the trade secret theft
- Injunctions requiring the return of the stolen property
- Attorney's fees

To ensure the full protection of an NDA, you'll need to require the employee to sign a confidentiality agreement when they come on board that defines the scope of information your company is trying to protect. This can be anything from a company's secret sauce to pricing, lists and business processes.

Additionally, the NDA should contain a proprietary inventions assignment agreement (PIAA), which ensures that all work products created by the employee belong to the company and not to the employee – and the employee has no right to take them when he or she leaves the company. This can include everything from software programs to customer lists to website designs to pricing.

Covenants not to compete – Better known as non-compete agreements, the enforceability of these varies dramatically from state to state. In the states in which they are enforceable, like New York or Massachusetts, they can be very powerful tools. In other states, like California, they are generally prohibited.

California specifically has a statute stating that restrictive covenants not to compete are presumed invalid unless specific circumstances apply. For example, if the owner of a company sells their business, a non-compete may be enforceable against him or her in California.

For the states where these are enforceable, there are still some restrictions based on the duration of the agreement, geographical location and the breadth of activity prohibited.

Additionally, in many cases it doesn't matter where the agreement was entered into or what the laws are there. If the employee moves to another state, either during or after employment, things can become muddled. So,

it's best to use non-competes with great caution. They may not be as effective as you initially think.

Non-solicitation – There are basically two kinds of non-solicitation agreements – non solicitation of employees and non-solicitation of clients.

Non-solicitation of employees is generally enforceable in most states, but a non-solicitation of clients may be considered an unfair restraint on trade. The exception in those situations is if the non-solicitation agreement is necessary to protect trade secrets.

Non-solicitation agreements are generally less onerous then covenants not to compete and typically more enforceable.

Startup owners: Got a legal question about your business? Submit it in the comments below or email Curtis directly. It could end up in an upcoming "Ask the Attorney" column.