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PLAYING IT SAFE

Companies need formal agreements to protect themselves from potential losses when an employee takes a job with a competitor.

By LISA HOOKER

Your top salesperson resigns and heads for a competitor. Your mind races. Did she take customer lists, strategic product plans or pricing data with her? Surely she wouldn't do that.

Would she?

A 2012 study by Symantec, the computer security software company, shows that half of employees who left or lost their jobs in the previous 12 months kept confidential corporate data. Forty percent planned to use it at their new jobs and 56 percent didn't believe it's a crime.

"Restrictive covenants such as non-disclosure, non-solicitation and non-compete protect a company's legitimate business interests. It's a very hot area now. People are more mobile and less loyal to their employers. Employers are concerned that they may be losing proprietary information, despite having covenants in place," says Steve Loewengart, regional managing partner at Fisher & Phillips.

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>
> KELLY KAUFFMAN
> partner at Dinsmore & Shohl

More and more companies are using all three agreements, especially in states like Ohio that are amenable to protecting legitimate business interests, says Thomas Metzger, shareholder at Littler Mendelson.

A mention of these issues in the employee handbook isn't adequate. Restrictive covenants offer varying degrees of legal protection for companies. A formal all-encompassing employment contract or a freestanding agreement for at-will workers may contain any or all of them. These binding contracts can be presented at hire or at some point later in their employment.

Before presenting employees with any paperwork, though, firms must carefully document what their legitimate business needs are.

"Take the time to define them and determine exactly what about your business you wouldn't want a former employee to use against you in the competitive arena," Metzger says.

Companies need to think about what protection they need and "then develop documents in the least intrusive way," says David Johnson, partner at Taft.

Would your company survive if your trade secrets landed in the lap of the competition? Are your restrictive covenant contracts properly drafted so they stand up in court? Area attorneys explain the different options and how they can protect businesses.

TYPES OF AGREEMENTS

Non-disclosure, or confidentiality, agreements are the least restrictive.

"You should have a non-disclosure agreement with any employee, not just executives. Confidentiality restrictions make sense for trade secrets, marketing plans, pricing strategies, customer orders and anything else that's proprietary. It's necessary to proactively take reasonable measures to protect that kind of information, otherwise it's hard to show in court that it's actually proprietary in nature," says Kelly Kauffman, partner at Dinsmore & Shohl.

Non-solicitation agreements allow an employee to continue working in the same industry—even work for a competitor.

"But for some period of time, say one to two years, the employee agrees not to solicit or accept business from former customers. They can work and compete, but not pirate customers away from their former employer," Johnson says.

The option places "reasonable restrictions" on former employees, says Metzger.

"An employee is free to go to the marketplace and stay in the same field, but it prevents the company's customers from dealing with their former contact," he says.

Non-compete agreements are more stringent, in that they usually limit the employee from working in the industry, and therefore competing, against the former employer. Restrictions typically encompass how long an employee must sit out, the geography to be avoided and clients who cannot be pursued.

"In some cases, a company can and should insist on a non-compete covenant. In high-tech companies, for example, the value is the IP. An employee who's in the middle of a project, but suddenly departs for a competitor can cause real damage. Non-competes can be used for sales and marketing employees, but in those cases a non-solicitation clause usually is cleaner," Johnson says.

Savvy companies define 'customer' or 'client' in the documents to avoid future disputes. "If you don't list specific customer names, at least outline what a customer is or the circumstance you're trying to protect," Kauffman says.

Also consider including a statement that prevents the former employee from recruiting former co-workers.

CONSISTENT ENFORCEMENT

Precisely because they're the most restrictive, employers have the most difficulty enforcing non-compete clauses.

"They're state specific. In Ohio, courts don't favor them if it could be interpreted as preventing a worker from earning a living. Some courts even view such agreements as consent under duress; that they must sign it to get the job," Johnson says.

Employers generally run afoul of the

law by overreaching.

"Covenants should be as narrow as possible, because courts will cut covenants that are too broad down to a reasonable restriction. They can decrease the time period, narrow the geography or limit the customers in question. Or they can refuse to enforce the clause at all," Loewengart says.

Kauffman adds, "Ohio courts are looking for reasonable restrictions that are no greater than necessary to protect the employer, but don't impose undue hardship on the employee."

While some employees may purposefully undermine their former employer, others are sincerely surprised.

"Many sign without understanding what it means to them in the future," Johnson says.

Once they remember that they signed a restrictive covenant, employees may be reluctant to tell potential new employers. Full disclosure is recommended.

"Provide a copy for your new employer and review it together," Kauffman says. "The worst case would be that your new employer receives a cease-and-desist order from the former employer."

A new employer that is caught unaware about an agreement could withdraw the job or terminate the worker.

"Sometimes that's how it gets settled," Loewengart says.

Purposeful or not, enforcement is a must whenever violations occur. However, Symantec's study revealed that only 38 percent of employees say their manager makes data protection a priority and less than half say their organization takes action when workers take sensitive information. Developing a culture of security reinforces the importance of the covenants.

"Tell employees you expect them to honor their obligations. If you develop the habit of ignoring enforcement time and again, other employees will assume they're non-enforceable. Being lax will be used against the business in court," Johnson says.

Former employers must not delay. "Injunctive relief may be required, because damage can occur quickly. If the situation goes on and on, it dilutes the strength of the covenant and any relief may come too late because the damage is already done," Kauffman says.

Lisa Hooker is a freelance writer