

Steps to Consider Before Hiring an Employee from a Competitor to Minimize the Likelihood of Litigation

May 09, 2013

Hiring an employee away from a competitor can be a potential legal minefield. It can lead to significant exposure to lawsuits for causes of action including misappropriation of trade secrets, claims of tortious interference with a non-compete or non-disclosure agreement, and unfair competition. These claims may be accompanied by demands for legal fees, damages and injunctive relief. Even if the defendant prevails, a lawsuit will often involve substantial legal fees and costs to defend the claims. To avoid this situation, a potential employer should consider taking the following steps before hiring an employee from a company that might be considered a competitor.

- 1. Before hiring, determine if there is a non-compete or non-disclosure agreement between the potential employee and his current employer.** If so, obtain a copy and review it to determine the risk of a lawsuit by the former employer that could negatively impact your ability to employ that individual and could expose your company and that individual to a lawsuit for injunction or damages.
- 2. Ensure that the employee leaves everything behind.** Most companies have a protocol for returning laptops, cell phones, or other hardware, as well as any confidential documents that pertain to a former employee's work for the company. Do not rely on the employee to comply with that protocol. Review prospective employees' compliance with their prior employers' policies before allowing them to start at your company. Before starting employment, on the first day, interview the employee with a checklist to confirm they have left everything behind, and have no backup tapes, cell phones, computers, thumb drives, or hard copies of anything from their prior employer, either at home or in their workspace. After the employee begins work with you, consider performing an e-mail review, sometime after the employee joins. Search for the competitor's name to ensure none of its documents have found their way onto your computers.

3. **Interview employees before hiring about whether they possess knowledge that their former employers consider trade secrets.** Consider putting the employee in a position that information would not be used, at least for a period of time.
4. **Be careful about provisions that provide for non-solicitation of customers and other departing employees.** These may also be the subject of a lawsuit, even in the absence of a non-compete agreement. Information about customers and customer lists may be deemed trade secrets or other confidential business information entitled to legal protection.
5. **Be very careful about hiring multiple employees from the same competitor.** Related lawsuits are often motivated by a desire to deter other employees from leaving, even if a “raiding” claim is not viable in your jurisdiction. A former employer’s emotions often run high. It may look to exact revenge if it perceives itself the victim of a competitor’s raid.
6. **Realize that your interpretation of whether your company qualifies as a competitor may not be the same as the former employer’s.** Your interpretation of a competitor’s non-compete agreement may make a persuasive argument in a lawsuit, but you will still find yourself in a lawsuit.

Related Practices

[Intellectual Property](#)

[Labor & Employment](#)

©2024 Carlton Fields, P.A. Carlton Fields practices law in California through Carlton Fields, LLP. Carlton Fields publications should not be construed as legal advice on any specific facts or circumstances. The contents are intended for general information and educational purposes only, and should not be relied on as if it were advice about a particular fact situation. The distribution of this publication is not intended to create, and receipt of it does not constitute, an attorney-client relationship with Carlton Fields. This publication may not be quoted or referred to in any other publication or proceeding without the prior written consent of the firm, to be given or withheld at our discretion. To request reprint permission for any of our publications, please use our Contact Us form via the link below. The views set forth herein are the personal views of the author and do not necessarily reflect those of the firm. This site may contain hypertext links to information created and maintained by other entities. Carlton Fields does not control or guarantee the accuracy or completeness of this outside information, nor is the inclusion of a link to be intended as an endorsement of those outside sites.