

## CORPORATE LAW

### PROTECTION OF CONFIDENTIAL BUSINESS INFORMATION

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What do you do when a former employee - who has developed ongoing relationships with customers and has intimate knowledge of confidential business information - obtains employment with a competitor, or starts his own business, and uses this information to solicit former customers? In the absence of a signed confidentiality agreement, you are not necessarily without recourse.

You should first investigate whether the former employee engaged in any conduct adverse to your interests during his employment. This would be a clear violation of the duty of loyalty which binds an employee throughout the course of employment, barring conduct contrary to the employer's interests.

<p>While still employed, an employee cannot:</p> <ul style="list-style-type: none"><li>_ solicit your customers to do business with him in his new employment;</li> <li>_ lay the groundwork to divert business to his new employer by meeting with the prospective new employer and discussing specific customers, accounts, or business which the employee believes he will be able to bring to his new employment;</li> <li>_ induce other current employees to join him in his new employment;</li> <li>_ neglect the duties of his current position to benefit his new employment such as by failing to solicit or place customer orders, thereby "stockpiling" them to be filled by his new employer;</li> <li>_ take any of your confidential and proprietary information for future use including physically removing or copying documents, such as customer lists, taking information by way of computer disk, or intentionally memorizing such information;</li></ul> <p>Such conduct is proscribed even if done after hours when the employee is not actively engaged in your service.</p>
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If the employee is also an officer or director of your company, she would be bound by a fiduciary duty to act solely in its interests. This duty continues beyond the termination of employment with respect to transactions which began during the existence of the fiduciary relationship or if founded on information acquired during the relationship.

### Misappropriation of Trade Secrets

Most courts have recognized a cause of action for the misappropriation of trade secrets by a former employee. To establish this, you must show that: 1) a trade secret exists; 2) you communicated the trade secret in confidence to the employee; 3) the employee disclosed the trade secret in breach of that confidence; 4) the trade secret was acquired by a competitor who had knowledge of the breach of confidence; and 5) the trade secret was used by a competitor to your detriment.

### What is Protectable "Confidential" Information?

The test for defining "confidential" information is whether use of the information would allow a competitor to gain an unfair advantage. Six factors are relevant: 1) the extent to which the information is known outside of the business; 2) the extent to which it is known by employees and others involved in the business; 3) the measures taken by the owner of the information to protect its secrecy; 4) the value of the information to the business and to its competitors; 5) the money or effort expended in developing the information; and 6) the ease or difficulty with which the information could be properly acquired or duplicated by others.

While it is often a fact-specific determination, the more common types of confidential business information which the courts have protected are: 1) customer lists; 2) particularized customer data; 3) pricing information; 4) supplier information; 5) business development strategies.

#### **Necessary Steps to Trigger Protection of Confidential Information**

Some effective steps which you can take to protect information which you consider confidential and proprietary:

have employees sign confidentiality agreements under which they agree to maintain the secrecy of certain information designated therein;

mark documents "confidential," and stating on the document that unauthorized use or disclosure is strictly prohibited;

have employees agree, in writing, upon commencing employment that all documents, materials and information relating to the company's business belong to the company, and that, upon leaving employment, they will return any such materials in their possession to the company;

keep the information in cabinets or rooms which are locked;

prohibit removal of the information from your offices such as by employees taking work home, or to a meeting with a client;

require use of a password or special code given only to certain persons to access information contained in a computer;

restrict outsiders and visitors to the area where the information is retained;

limit disclosure of the information to employees only on a need-to-know basis; and

conduct an exit interview to remind employees of their duty not to disclose confidential and proprietary information to which they have had access during their employment.

#### **Action to Take Against a Former Employee's Wrongful Conduct**

If a former employee is causing harm to your company, you should take quick action to stop that conduct by possibly commencing a lawsuit to restrain the former employee from retaining, using, and disclosing confidential information. Do not hesitate to consult a legal advisor to explore all of your options.

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