When employees become competitors: How to prepare & respond

It's a situation that happens more often than you might think: An employer finds out that one of its employees is preparing to leave and set up her own shop.

The discovery can happen in any number of ways: An intercepted piece of mail inadvertently addressed to the new venture … maybe an email flagged during a routine review … or a customer casually asks what management thinks of the employee's upcoming departure. Quite often, office gossip is the giveaway.

But is the employer handcuffed, unable to do anything about the upstart competitor because this employee didn't sign a noncompetition agreement?

Can't serve two masters

There are right ways and wrong ways for an employee to leave your company. Just because employees aren't subject to noncompetition agreements doesn't mean they can't be liable for mistakes made on the way out the door.

Even without noncompetes, an employee cannot serve two masters simultaneously.

What does that mean? While in your employ, an employee has an absolute duty to act in your best interests, and not to act in the interests of anyone else in a way that is contrary to yours.

This duty is known as the duty of loyalty, which every employee owes to her employer, up to the moment she ceases employment.

What employees can do

Your employee can prepare to compete against you while still in your employ without violating this duty of loyalty.

There are many reasons why employees prepare to compete while still employed. Some need the income provided by ongoing employment. Others may be looking for an eventual competitive advantage from continuing to work for their present employer (such as knowledge of pricing or business plans, or ongoing associations with key employees, customers and vendors).

There are certain steps that an employee can legally take to prepare to compete without violating this duty of loyalty, even while still employed and even if done stealthily:

- Incorporating the new firm.
- Arranging for space and equipment.
- Securing financing.
- Making future business plans.

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What employees can’t do

But, those preparations are subject to certain legal limits. The duty of loyalty prohibits employees from doing any of the following while still your employee:

- Using your property (computers, for instance) to prepare to compete.
- Using confidential information or trade secrets to prepare to compete.
- Actually starting the competing operation.
- Soliciting employees or customers for the new enterprise.
- Holding back business opportunities or diverting them to the new enterprise.

What can you do to prevent employees from engaging in these illegal activities? Consider the ideas in the box below.

5 ways to limit damage from employee-turned-competitor

1. Require key employees to sign noncompetition agreements.

2. Consider requiring a wider subset of employees to sign nonsolicitation agreements.

3. Have all employees sign policies protecting confidential information and trade secrets. At a minimum, incorporate these policies into your employee handbook. (For advice on drafting policies and procedures to protect trade secrets, go to **www.theHRSpecialist.com/trade**.)

4. Incorporate statements about employee loyalty into the handbook.

5. Do not accept notice periods upon resignation for any employee you think is a risk to compete.

These five tips won’t magically transform a disloyal employee into your lap dog. They will, however, place you in a position to hold the disloyal employee accountable for her actions.

… 5 ways to react if it happens to you

If you discover that a current employee might be competing, here’s your best course of action:

1. Call your attorney.

2. At a minimum, suspend the employee pending an investigation. Also suspend all computer and network access.

3. Consider conducting a forensic examination of computers and email accounts to uncover any evidence of illegalcompetition. While these reviews can be expensive, if an employee is illegally competing, there will be at least a trace of it somewhere on your network. That evidence is invaluable.

4. Convert the suspension to a termination upon confirmation of the competition.

5. Consider legal action, depending upon the scope of the competition and the harm caused.

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