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COMPETITION BY EMPLOYEES AND FORMER EMPLOYEES

By Jay D. Fullman, Esq.

In today's employment market, employee loyalty to companies, and vice versa, is less common than in years past. Thus, the question often arises: To what extent can an employee or a former employee compete with the employer? As with many areas of the law, the answer is different for current employees and former employees. And, the terms of the employment agreement can have a major impact on permissible competition.

Restrictions on Current Employees

Generally, an employer has the right to completely prohibit a current employee from engaging in a business in competition with the employer. This right exists whether the employment agreement is written or verbal. This right is based upon the employee's duty of loyalty to the employer, which is imposed by law. Therefore, if the employee engages in action in competition with the employer, and the employer has explicitly advised the employee (preferably in writing) that such competition is prohibited, the employee may be terminated.

Restrictions on Former Employees

Whether an employer can limit or prohibit a former employee from engaging in competition depends on the nature and extent of the restriction the employer desires to impose. California Business and Professions Code, Section 16600, sets forth the basic public policy: a contract that restrains anyone "from engaging in a lawful profession, trade or business is . . . void." Therefore, contracts, which declare that an employee may not quit, and work for a competitor or start his own competitive business, are generally not enforceable. Former employees are usually free to use whatever knowledge, skills, or experience they have on a new job, even if the special knowledge, skills or experience, was gained from the prior employer. However, contract provisions prohibiting competition may still be included in contracts and may be of benefit to the employer. A covenant against competition may be enforceable in other states, or may discourage an employee from moving to work that competes with the employer. Also, covenants prohibiting competition by former employees may be enforceable against partners or shareholders of closely held corporations.

Non-Solicitation

Although contracts which attempt to prohibit competition by former employees are generally not enforceable, employers may legally restrict certain competitive activities of former employees.

Employees may be prohibited from later using certain information learned during the employment. An employment agreement may prohibit an employee from taking customer lists, from soliciting actual or prospective customers of the employer for a reasonable period of time, or from soliciting fellow employees to also leave the employer. In most situations, however, an employee cannot be prevented from sending a job change/re-location announcement when he goes to a new job.

Non-Disclosure

It is also possible for employers to prohibit former employees from disclosing the employer's trade secrets or other confidential information. Under the Uniform Trade Secrets Act (California Civil Code, Section 3426), former employees may not use or disclose confidential or secret information that (1) is developed by or for the employer, (2) confers a competitive advantage (i.e., provides economic value) and, (3) is generally not known outside of the company, if the employer has taken reasonable steps to maintain the confidentiality of the information. The information protected from disclosure is usually in the following form: customer lists, vendor lists, business and marketing plans, processes and procedures, products, and technology.

Remedies

The remedies available to an employer for unfair competition and violation of the Uniform Trade Secrets Act include damages, disgorgement of profits, injunction, and recovery of attorney fees. These remedies may be available against the new employer or company as well as against the employee.

If you would like more information regarding unfair competitive business practices or establishing a program to restrict harmful solicitation or use of confidential company information, please contact Jay D. Fullman A Professional Corporation at 562-694-6005, or Jay@FullmanLaw.com.