

## Keeping Your Assets From Walking Out the Door: Key Checklists

Employee mobility is a major factor in the present economy due to layoffs and forceful recruiting, as well as the usual factors resulting in employee movement. Unfair competition from key former employees who are fully familiar with company "know-how" or with a company's key suppliers and customers can severely damage a company's business. In a marketplace where the use and manipulation of information can be the central ingredient to business success, the protection of that information becomes an extremely important business priority of management and its counsel.

We look at steps that can be taken to lessen the risk of significant loss when an employee departs, and the legal backdrop of those steps. Regardless of the steps taken, some disputes will end up in court. There will be cases of breach of contract, diversion, theft and bad faith. In addition, good faith disputes will exist as to whether particular materials or information are confidential or protectable or whether particular post-employment restrictive covenants are enforceable. Set forth below are checklists designed both to help management protect assets and customers as well as the company in the event litigation arises.

If you have questions concerning this Update, please contact [Abraham \("Avi"\) Y. Skoff](#), co-chair of Moses & Singer's [Employment and Labor](#) practice, at [askoff@mosessinger.com](mailto:askoff@mosessinger.com) or at 212.554.7897.

### Identify What Needs Protection

- Identify which assets and relationships need protection, confidentiality, etc.
- Identify employees that have involvement in these assets and relationships.
- Determine if key employees are subject to Non-Competition, Non-Solicitation, Confidentiality or other agreements or to binding protective personnel policies.
- Determine if the company needs to negotiate protective agreements or otherwise establish protections and proceed accordingly.
- Conduct annual Intellectual Property Audits.
- Consider alternate means of protection: trade secret, confidential information, patent protection, copyright, trademark.

### Establish Overall Program to Protect Assets

- Execute Confidentiality, Non-Disclosure, and, where appropriate, Restrictive Covenant and Non-Competition Agreements at the time of hiring.
- Execute agreements subsequent to inception; need for consideration.
- Create and maintain appropriate confidentiality.
- Implement corporate and personnel policies concerning handling, protection and ownership of information used or obtained in employment: trade secrets, intellectual property, proprietary information.
- Obtain employee acknowledgement and agreement to comply.
- Create a culture that recognizes the importance of company information.
- Access passwords.
- Restrict physical access, where appropriate.

### Monitor Assets

- Implement management training and compliance.
- Decline use of assets owned by others brought in by new hires and direct that such assets be returned or otherwise treated properly.
- Obtain employee acknowledgements of personnel or corporate policies.
- Monitor unusual conduct; consider the possibility of improper conduct.
- Monitor missing files and materials.
- Pay attention to unusually clean work areas.
- Monitor announcements of "new" businesses, methods or deals, which look too similar to those of the company.
- Pay attention to "hunches" of the team.
- Monitor software, where appropriate, for unusual or excessive downloading.

### Protecting Assets and Customers When an Employee Departs

- Limit access, then freeze access.
- Conduct exit interviews.
- Send reminders re employer's expectation of compliance with Confidentiality, Non-Disclosure, Restrictive Covenant and Non-Competition Agreements.
- Preserve and evaluate departing employee's laptop, data, email, email client, inboxes, hard drives, documents, etc. Litigation holds.
- Send reminder letters about employee's obligations.
- Send demand letters demanding return of property, compliance with agreements and legal obligations.
- Implement enforcement actions, where appropriate.
- Issues regarding enforcement of Restrictive Covenants and Non-Competition Agreements after layoffs.
- Continue protection of trade secrets and confidential information under agreements and applicable law.
- Consider severance agreements, releases, and "Garden" leave.
- Energetic and good faith business efforts with customers and business partners.

### Basis for Legal Action – Key Theories

- Breach of Confidentiality and Non-Competition Agreements, other contracts.
- Misappropriation of trade secrets or Uniform Trade Secret Act claim, where applicable.
- Irreparable harm; injunctive relief.
- Unfair competition claims.
- Interference with contract or business relationships.
- Defamation.
- Computer Fraud and Abuse Act claims, where applicable ("CFAA").
- State law claims.

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