

Employment Agreements

LEAVING EMPLOYEES CAN SOMETIMES BE THIEVING EMPLOYEES

by BENJAMIN I. FINK

THE SCENARIO IS ALL too familiar: You return from vacation to find that one or more of your key employees has resigned. You then learn that they are either forming a competing business or have been hired by a competitor. You also discover that they have solicited clients, they are in possession of information that is confidential and extremely valuable to your business, and they have downloaded information concerning your clients and other vital competitive information from your computer system. After further investigation, you find that the employees have been planning their move for months. In the worst case scenario, the employees may even have deleted information from your server, leaving you without information vital to your business.

Two questions immediately come to mind: 1) What legal recourse do you have to minimize the impact on your business; and 2) What could you have done to better protect yourself? While you will never stop employees from seeking what they perceive to be greener pastures, this article will address some of the things that you can do to protect your business, including your relationships with your clients and the confidential information that provides you with a competitive edge in your industry.

The Employee's Duty of Loyalty

Under Georgia law (and most other states), employees owe a duty of loyalty to their employer during employment. Accordingly, prior to the end of their employment, an employee cannot legally solicit clients for a rival business or accomplish similar acts in direct competition with the employer's business.

However, what most business owners don't realize is that employees breach no legal duty to their employer by making plans to enter a competing business while they are still employed. Absent enforceable restrictive covenants in an employment agreement, employees are entitled to make arrangements to compete, even before they end their employment and, upon termination of their employment, immediately compete.

The Best Protection

One way to protect your business against such conduct is to have key employees sign employment agreements containing restrictive covenants that protect customers, clients and competitive information of your business. Such agreements can contain covenants against competition, solicitation of clients, recruitment of employees, and use of confidential information.

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Non-competition covenants can prohibit the employee from performing competitive activities during employment and, in a certain geographic area for a limited time after termination of employment. They are designed primarily to protect your investment of time and money in developing the employee's skills.

Non-solicitation covenants can restrict employees from soliciting business from clients or prospective clients with whom they had contact after termination of their employment. This type of covenant is designed primarily to protect your investment of time and money in developing client relationships. They only require a territorial restriction if the forbidden clients include those with whom the employees did not have a relationship prior to their departure.



Non-recruitment covenants can restrict employees from recruiting other employees to join a competing business during and after termination of employment.

Non-disclosure covenants can prohibit the use of confidential information for any purpose other than the advancement of your business. Confidential information is generally information related to your business which does not constitute a trade secret, but which you have a legitimate business need to protect. Such information can include client contacts, preferences and pricing, for example.

Provisions requiring the return of company property and information upon termination of employment are also critical, so that at a minimum, employees cannot keep tangible documents or information in their possession.

Georgia courts are among the strictest in the country when it comes to enforcement of restrictive covenants in employment agreements. Therefore, professional advice from an attorney familiar with Georgia law in this area should be sought and form agreements should not be used.

Protections Available without Restrictive Covenants

Though the use of an employment agreement containing restrictive covenants is the best way to protect the relationships and information of your business, there are laws that also provide some protection. The Georgia Trade Secrets Act of 1990 protects information that meets the following three-pronged test:

- 1) The information is not commonly known by or available to the public.
- 2) The information has actual potential economic value to you because others who can obtain economic value by using or disclosing it *a)* generally do not know it; and *b)* cannot readily ascertain it by proper means.
- 3) You have made reasonable efforts to keep the information secret.

Many business owners incorrectly believe that the Trade Secrets Act protects most of the important information related to their business; however, the Trade

Secrets Act is rarely sufficient protection for much of the commercially sensitive and proprietary information of your business. Further, while you may be able to obtain an injunction against the use of trade secrets by former employees, it is only in a rare instance that a court will grant an injunction against employees working for a competitor or in a competitive business. Absent the use of non-disclosure agreements for employees who have access to competitively sensitive information, you may have a difficult time making out a meaningful claim under the Trade Secrets Act.

Another weapon in the employer's arsenal is the Georgia Computer Systems Protection Act, which prohibits computer-related misconduct. The Computer Act makes it a crime for any person to use a computer or computer network with knowledge that such use is without authority with the intention of: 1) taking or appropriating any property of another, whether or not with the intention of depriving the owner of possession; 2) obtaining property by any deceitful means or artful practice; or 3) converting property for such person's use in violation of an agreement or known legal obligation to make a specified application or disposition of such property.

The Computer Act also makes it a crime for any person to use a computer or computer network with knowledge that such use is without authority and with the intention of: 1) deleting or in any way removing, either temporarily or permanently, any computer program or data from a computer or computer network; 2) obstructing, interrupting, or in any way interfering with the use of a computer program or data; or 3) altering, damaging, or in any way causing the malfunction of a computer, computer network, or computer program, regardless of how long the alteration, damage or malfunction persists.

Under this Act, employees can be held liable for downloading and taking information from your computer systems. In order to maximize the effect of the Computer Act, strong computer-use policies should be implemented.

Both the Trade Secrets Act and the Computer Act provide for criminal penal-

ties, as well as civil liability.

Responsibilities of Corporate Officers

Finally, corporate officers and directors have heightened responsibilities to the corporation. Under the Georgia Corporate Code, an action may be brought by a corporation against officers or directors, or former officers or directors, for misappropriation in violation of their duties of any business opportunity of the corporation. This duty extends beyond the employment of officers or directors with the corporation.

For example, if a corporate officer or director is presented with a business opportunity which: 1) the corporation is financially able to undertake; 2) is in line with the corporation's business; 3) is of practical advantage to the corporation; 4) is an opportunity in which the corporation has an interest or reasonable expectancy; and 5) is one where the self-interest of the officer or director by embracing the opportunity would be brought into conflict with the corporation's interest, then Georgia law will generally not permit that officer or director to personally seize the opportunity—even in some instances if the officer is no longer employed by the corporation.

As with any potential problem, with proper planning and education you can save yourself significant loss of business and productive time in the future. If you wish to preserve the relationships your employees have developed on your time and using your resources and funds and/or the proprietary and confidential information of your business, employment agreements containing restrictive covenants are crucial. While alternative remedies are available, carefully crafted agreements and policies will maximize and expedite your ability to obtain legal recourse, including injunctive relief, and to minimize the harm any employee or employees can do to your business upon their leaving. ■

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