

Passover Guide for Departing Employees

HELP FOR THE WISE, WICKED, SIMPLE – AND THE REST

FROM BERMAN FINK VAN HORN P.C.
SPECIAL FOR THE AJT

Most people will face the decision of whether to accept a position with a competitor of their current company at some point in their careers. For those who choose to make the move, they should be aware of several important legal considerations.

So, what is the “right way” to transition into a competitive position and avoid a legal dispute?

Disputes between employers and former employees typically arise because the employee didn’t ask the following questions:

- Am I subject to any restrictive covenants to my former employer, such as covenants not to compete, solicit customers, or disclose confidential information?
- Am I in possession of company

information or documents that need to be returned?

- Can I speak to my customers about my new job?
- What other conduct should I avoid?

Given the upcoming holiday, this article provides a “Passover Guide” for departing employees using the age-old Passover story of the four children.

The Wise Employee

When the wise employee begins to consider leaving his employer, he reviews the documents he signed during his employment – which are neatly organized in a folder, of course. The employee finds his employment agreement and discovers he agreed to covenants not to solicit customers, not to disclose confidential information and not to recruit employees.

The wise employee recognizes the

import of the covenants and decides to consult with an attorney about whether they are enforceable. The attorney explains to the employee that the covenants are enforceable and helps him understand his obligations under the covenants.

Then, when the wise employee meets with a potential new employer and the employer asks if he has any agreements with his current employer, the wise employee discloses his agreement and explains he intends to abide by the covenants. Also, prior to submitting his resignation, the wise employee does not mention his plans to his clients or co-workers.

At the end of his employment with his old employer, the wise employee returns all company papers and files,

as well as his company-issued laptop. At this point, he does not have any company information at home, on personal computers or electronic devices, or in personal e-mail accounts.

The wise employee does not affirmatively reach out to any of his current customers, in light of his covenant not to solicit. However, when he joins the new company, a few of his customers locate him on their own

and contact him about transitioning their business to the new company.

Finally, when the wise employee’s former employer sends him a letter reminding him of his restrictive covenants, the wise employee has his attorney send a letter in response to advise his former employer that he has not violated the covenants and intends to comply with them. The wise employee also advises his new employer that he received the letter.

The wise employee departed from his former employer properly and is in compliance with his legal and contractual obligations. As such, it will be difficult for the wise employee’s former employer to bring claims against him. The wise employee has likely avoided having to defend an expensive and distracting lawsuit.

The Wicked Employee

As the wicked employee thinks about making a career move, he remembers that he may have signed an employment agreement with his current employer. However, the wicked employee is too lazy to search for it. He thus does not know if he has any restrictive covenants.

When a potential new employer asks the wicked employee if he has any restrictive covenants, the wicked employee figures he will increase the chances of getting the job if he answers “no.” Then, after accepting a job offer but before he resigns, the wicked employee stealthily informs his best customers that he will be moving to a competitor and encourages these customers to reach out to him after he leaves.



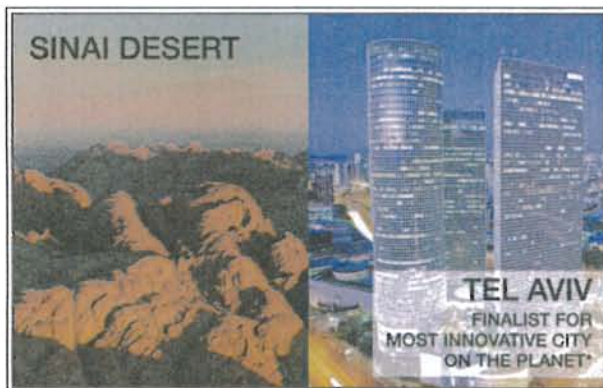
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To better service these customers at his new job, the wicked employee e-mails several documents created by his old company to his personal e-mail account before he tenders his resignation. He deletes these e-mails from his mailbox, mistakenly thinking that his conduct is undetectable. The wicked employee also copies his Outlook contacts to a thumb drive, despite knowing that the use of thumb drives violates the company's computer usage policies.

To "cover up" these transgressions at the end of his employment with the old company, the wicked employee falsely represents to HR that he has not taken any company property and does not have any company information. And as the wicked employee exits the company's parking lot, he calls his best customer to schedule a meeting.

Finally, when the wicked employee receives a cease-and-desist letter shortly after his best customer moved its business to his new employer, the wicked employee discards the letter and does not let his new employer know about it.

The wicked employee has exposed himself to many claims by his former employer. The wicked employee's conduct likely has gotten him – and possibly his new employer – embroiled in contentious and expensive litigation.

The Simple Employee

The simple employee is considering taking a position with a competitor. He recently signed a non-compete but has heard that non-competes are generally unenforceable. He has also heard from co-workers that his current employer does not try to enforce those non-competes.

The simple employee also has a covenant not to solicit customers. However, he has been servicing the same group of customers for more than 20 years, since long before he started his current job. In fact, he brought most of his customers' business to his current employer at his supervisor's encouragement, even though he had a non-solicit with the company that he left previously. Because the simple employee has serviced these customers for so long, he thinks of them as his own and assumes he can solicit their business.

While the simple employee may not have malicious intentions, if he solicits "his customers, he may be exposing herself to claims by her former employer.

The Employee Who Does Not Know

The employee who does not know to ask does not talk about his job much. However, during the seder, he shares that he is thinking about finding a new employer who would compensate him better for the customer base he has developed.

Fortunately for him, there are two lawyers at the seder. While one drafts wills and the other does corporate work, both mention they can recommend employment attorneys

that he should meet with if he is seriously considering changing jobs.

As the Passover story of the four departing employees illustrates, there is a right and wrong way to leave an employer, and even a small misstep can allow the employer to seek recourse and try to stifle competition.

When one is making a transition between competitors, following the "best practices" – those which the wise employee followed – and consulting with an employment attorney regarding contractual and legal obligations can help avoid the costs

and distraction of defending an expensive lawsuit.

If a former employer realizes obligations have been met and competition is lawful, the employer might say "Dayenu!" and focus on simply competing with its former employee, rather than suing him or her.

Editor's note: Benjamin Fink and Neal Weinrich are attorneys with Berman Fink Van Horn P.C. who frequently advise employers and employees on matters involving competition-related issues.

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