

PRACTICAL CONSIDERATIONS WHEN EMPLOYEES RESIGN TO JOIN A COMPETITOR

Handling the Resignation: When an employee is leaving for a competitor, the employee's departure is often immediate. Sometimes, however, an employee will provide advance notice in deference to a company policy or an employment contract (or perhaps in the hopes of appearing to act in good faith). Although advance notice of an employee's resignation is helpful in most other circumstances, it can present unique problems when the employee is leaving to join a competitor.

In most cases, the employee should be immediately relieved of any duties that would expose him or her to additional company information or customers. This may mean that the company terminates the employment relationship immediately; however, termination by the employer may allow the employee to argue that the equities of the case should shift in his favor.

When an employee announces that he or she will be joining a competitor after a short notice period has expired, another option is to keep the employee on the payroll during the notice period while suspending any meaningful job duties. This tactic can gain the employer some additional time to assess the situation and prepare for the appropriate response. Employers might also consider offering the employee a severance package in exchange for contractual restrictions.

At the very least, the employer should attempt to hold an exit interview. The sudden nature of many resignations may make this impracticable or impossible, but exit interviews can help the employer develop information about why the employees are leaving and where they will be working. Employees who are planning to violate non-competition agreements have an incentive to be less than forthcoming at an exit interview; however, an individual's willingness to lie or bend the truth in that context may later damage their credibility before a judge if litigation results. Because ill-advised statements by company representatives at an exit interview can also be used against the company in litigation, employers should consult with counsel before scheduling an interview in the context of a sensitive resignation.

Prevent Further Access To Company Information: Before investigating whether the employees have already taken company information, prevent them from having further access to that information. Disable all of the former employees' passwords and e-mail accounts, in addition to requiring the return of keys or building passcards and notifying security that the individual should not be on the premises. The company should also request the return of any company-owned equipment (such as a laptop or PDA) that may contain business information.

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Protect The Evidence: Employers should preserve all evidence of the employees' pre-resignation activities, such as copying or downloading of company information or communicating about the move to a competitor. Electronic evidence plays a prominent role in many noncompetition disputes, so a former employee's computer is often the best place to start (subject to state-law privacy protections).

What employers may not realize, however, is that careless efforts to extract information from a computer can destroy or compromise critical evidence. The well-intentioned manager who logs onto a former employee's computer to investigate could render evidence useless or irretrievable. Even starting up or shutting down a computer can alter electronic data, including metadata that provides critical information about when certain files or programs were last accessed. Instead of hasty efforts to gather electronic information, management should quarantine any computers so that counsel can direct the appropriate analysis by technology experts.

If the employer's computer network systematically purges documents or electronic information -- especially e-mails -- such activity should be suspended. Even apart from the duty to retain information that the employer knows is likely to be at issue in litigation, the regularly scheduled destruction of information could cost the employer evidence that it needs to protect its business interests through litigation.

Consider evidence in a departing employee's possession as well. A letter placing the employee on notice that he or she should preserve all related information (electronic and otherwise) may be appropriate as the company evaluates its legal options.

Determine What Information The Employees Know: Begin steps to articulate what trade secrets or confidential information the employees know from their employment. For example, if the employee attended meetings where company plans or business strategies were discussed, determine if any documentation exists to confirm the employee's attendance, or if any handouts were provided that might contain sensitive information.

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