

Employees as Competitors: What Ever Happened to Loyalty?

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What We Will Cover

- Employee Duty of Loyalty
- Non-Compete Agreements
- Protecting Confidential & Trade Secret Information
- Protecting Computers

Loyalty isn't always easy.....



Employee Duty of Loyalty

Unless otherwise agreed, an employee is subject to a duty to its employer to act solely for the benefit of the employer in all matters connected with his or her employment.

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What Conduct Breaches Duty of Loyalty?

- While employed with the employer:
 - Solicitation of customers for competitor
 - Solicitation of employees for competitor
 - Misuse of confidential information

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What Conduct Breaches Duty of Loyalty?

- While employed with the employer:
 - Use or theft of company assets for competitor
 - Not disclosing to employer violations of duty of loyalty
 - Diverting business to a competitor

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Preparing to Compete vs. Competing



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Preparing to Compete

- Purchasing equipment or supplies
- Renting space
- Obtaining loans or financing
- Developing business plan
- Telling others (without soliciting) of plans

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Actually Competing

- Competing on bids and projects
- Soliciting co-workers or customers
- Using employer resources, customer lists, and confidential information to develop business

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Non-Competition Agreements



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When Should Employers Use Them?

- Company has goodwill an employee could misappropriate
 - Often sales, customer service
- Company will consistently enforce them

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Non-Compete Basics: Always Check Your State Laws

- Is a non-compete even allowed?
 - Not allowed in CA, ND, OK
- Is it supported by consideration?
 - Initial employment, continued employment, salary increase, other benefit
- Is it overly restrictive?
 - This assessment varies significantly from state to state

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Nebraska Non-Compete Law

What restriction will Nebraska law allow?

"soliciting or working for any customer with whom employee did business and had personal contact while employed with the previous employer" for a reasonable period of time

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Nebraska Non-Compete Law

The Critical Test of Enforceability Asks:

- Is it injurious to the public?
- Is it greater than reasonably necessary to protect the employer in some legitimate interest?
 - Business Sale/Franchise
- Is it unduly harsh or oppressive toward the employee?

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Examples of Overly Broad Agreements in Nebraska

- Prohibiting:
 - Solicitation from *any* of the former employer's clients

 - Engaging in competitive business within a specific geographic area

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Nebraska Non-Compete Law

- Consequences of An Unreasonable Agreement
 - No “blue-penciling”
 - Severability
- Choice of Law
- Choice of Venue for Litigation
- Remedies

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Nebraska Non-Compete Law

What can employers do to ensure enforceability?

- Get it right! Court will not revise
- Assume only Nebraska law governs
- Be careful of employee non-solicitation requirement
- Regularly review for compliance with the law
- Discharge employees who refuse to sign agreements
- Respect employees' non-compete agreement with old employers

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Iowa Non-Compete Law

- Critical Test of Enforceability
 - Is the restriction reasonably necessary for the protection of the employer's business?
 - Is it unreasonably restrictive of the employee's rights?
 - Is it prejudicial to the public interest?
 - Can have jurisdictional restriction

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Iowa Non-Compete Law

- Big Difference Between Nebraska Law
 - Can have jurisdictional restriction
 - Can blue pencil



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Federal Regulation of Non-Competes?

July 9, 2021 Executive Order:

Encourages the Federal Trade Commission to “curtail the unfair use of non-compete clauses and other clauses or agreements that may unfairly limit worker mobility.”

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Confidential Information, Trade Secrets, and Computers



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Confidential Information

- Taking of company documents or other property even if not a trade secret can constitute conversion or theft
- Property need not be a trade secret for information to be protected under the duty of loyalty
- Taking a customer list, even if not a trade secret, will violate duty of loyalty

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Defend Trade Secrets Act

Trade secret is information that:

- (A) the owner has taken reasonable measures to keep secret; and
- (B) the owner derives independent economic value from the information being kept secret.

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Trade Secret Protection Checklist

1. Execution of confidentiality agreements;
2. Password protection of computer;
3. Disabled printing functions;
4. Disabled USB drives to preclude copying;
5. Secured access to various floors;
6. Limited access to documents; Marking documents as confidential;

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Trade Secret Protection Checklist (con't)

8. Enforce procedures for handling trade secrets;
9. Identify what constitutes trade secrets and how they should be handled –
 - New employees
 - Retrain existing employees periodically
10. Protect electronic data;
11. Limit third-party access and provide only under confidentiality agreements.

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Computer Fraud & Abuse Act



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What is a "Protected Computer"?



A computer that is
"used in or affecting
interstate or foreign
commerce or
communication"

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Exceeding Authorized Access

- What does it mean to “exceed authorized access”?
 - Hacking, stealing password, accessing information that is prohibited
 - In *Van Buren*, Supreme Court ruled:
 - Does NOT include using information you are allowed to access for improper means

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Causing “Damage” to a Protected Computer

- Knowing transmission of a “program, information, code, or command” that causes *unauthorized* damage to a protected
- What is “Damage”?
 - “Any impairment to the integrity or availability of data, a program, a system, or information.”

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