

Labor: 7 ways to protect your company when hiring from a competitor

Tips for the hiring process and how to behave once they start working for you

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Hiring is no easy task, especially when acquiring an employee from a competitor. If a company is not careful in this regard, there is a good chance it will be on the receiving end of a lawsuit. Therefore, when hiring a competitor's employee, it is recommended to take certain steps to reduce the likelihood of being sued.

1. Investigate the employee's employment background

At the outset, it is advisable to determine whether there is any restrictive covenant limiting the employee's employment rights. If so, it is prudent to discuss this fact with the prospective employee, obtain a copy of the covenant, determine whether the covenant is enforceable and evaluate whether the company should still hire the prospective employee.

2. Ensure that interviews are carefully conducted

The company should make clear to the prospective employee that it is not interested in the competitor's trade secrets and will honor valid restrictive covenants. An employer also should not review or accept any of the competitor's documents that could be considered confidential and that the prospective employee may want to share with the company. Consider such documents "Exhibit A" in any lawsuit filed against the company by the competitor.

3. Limit written communications with the prospective employee

The company should generally not communicate in writing with the prospective employee at his or her place of employment. Therefore, emails should not be sent to the prospective employee at his or her work address since those communications can be easily discovered by the competitor.

4. Have the prospective or new employee sign a "no prior restrictions" agreement

The company should prepare, and the new employee should sign, an agreement representing that he or she is not a party to any agreements or other obligations restricting his or her ability to work with the company. The company also may want the employee to warrant that he or she does not possess any trade secrets of the former employer and, further, to indemnify the company if the employee breaches any of the warranties.

5. Instruct new employees not to use prior employer's documents, information or property

Make certain the new hire has "clean hands" before commencing employment. The company should provide a memorandum to the new employee indicating that the employee is not to copy, retain, use or disclose to the company any trade secrets or confidential information of his or her prior employer.

6. Instruct new employee not to "warehouse" deals

The new employer should instruct the new employee not to "warehouse" deals before resigning. Similarly, the company should advise the employee not to inform clients that he or she is leaving to work for the

company until their resignation is effective. Additionally, instruct the employee not to engage in any work for the company before resigning or leaving employment.

7. If possible, assign the new employee to accounts and territories over and above his or her old accounts

An effort should be made to have the new employee work for clients outside of his or her own former clientele, at least at the commencement of employment with the company. In other words, the new employee should not be working for only the clients he or she might have brought over from the prior employer. Similarly, consider a phase in over time of solicitation activities to clients for the new employee.

While it may not be possible to implement all these measures, the more safeguards a new employer uses at the beginning of hiring a competitor's employee, the more protection and options that employer will have in the event a competitor sues it for hiring the employee.

About the Author



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