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Can a Former Employee Steal Your Customers?

If you have customers, you might wonder, “can my employees set up a competing business and steal my customers?” From the employee’s perspective, the question is “Can I take customers with me to my new business?” Let me give you a brief roadmap of the relevant issues.

No-Compete Contract Isn’t Worth the Paper It’s Written on. After termination of employment, a contractual non-competition clause usually is not enforceable. Under California law, an employee ordinarily may compete with his or her prior employer, even if the employee signed an agreement that prohibits competition. Of course there are exceptions to this rule. In brief, a non-competition clause can be enforceable if it was (i) entered into as part of the sale of a business; or (ii) entered into pursuant to a partnership agreement or shareholders agreement that prohibits a withdrawing employee’s competition in a limited geographic area.

Who Gets the Customers? Although a prohibition on competition may be unenforceable, the departing employee still may not unfairly steal customers. What is unfair? In general, the law will prohibit an employee from using the customer list of the former employer *if*: (i) the customer list was a trade secret; and (ii) the former employee misappropriated the list.

As to the first element, a customer list can be a trade secret when the employer has invested much time and effort in creating it and has kept it secret. A protected customer list can contain, for example, information about the particular needs and interests of the customers.

As to the second element, once the employer has proven that the customer list is a trade secret, it then must prove that the employee misappropriated the list. Here the issue is whether the departing employee *solicited* the customers, as opposed to merely announcing a change in professional affiliation. In other words, the employee may announce his or her new status to the employer’s customers, but may not go any further. To go further would be to solicit the customers, which is prohibited. The distinction between solicitation and mere announcement is a shifting line, and the departing employee must take great care not to cross it.

Who Gets the Rank and File Employees? The rule on the solicitation of office managers and other employees is similar to the rule for the solicitation of customers. In general, California law protects the right of employees to change employment. A departing employee, however, may not solicit or ask other employees to leave the former employer. Rather, the departing employee may only announce his or her plans. The employee must then back off, and permit other employees to initiate the next contact – by requesting to join the departing employee in the competing business.

Finally, please keep in mind that the law of competition is by its nature fluid and gray. There are few hard and fast rules, and no guarantees can be given on the outcome of any dispute. Moreover, employers and employees become quite emotional about these cases. Even “innocent” parties get dragged in, for example, a company that hires the departing employee likely will be named as a defendant in the case. The costs of litigation (let alone losing in litigation) can get high. So keep this common-sense advice in mind: at all times be sure that you are acting in a decent and fair manner, and well within the boundaries of the law. Remember that, in the final analysis, courts try to protect persons who have acted with decency.

This article only gives a short roadmap of issues. There is a lot more to this subject than introduced here. Before you do anything, get competent legal counsel to help you. Please feel free to call me if you want to talk more about this topic.

Ideas

Speak when you are angry and you will make the best speech you will ever regret. – *Ambrose Bierce.*

If ideologues were reflective, they would realize that bad *people* are what causes bad political arrangements. Ideologies rest on the mistaken assumption that changing political arrangements will change people. But human nature remains what it always was; only the ways it expresses itself change. Good and bad motives, virtues and vices, excellences and defects—all have characterized and will continue to characterize human beings. The ideologues’ efforts to change human nature aren’t just futile; they’re also calamitous, since they’re marked by the very flaws that they seek to eradicate. The gruesome crimes of Robespierre, Mao, and other despots testify to this truth. – *John Kekes, from “Words to Die By,” Winter 2007 issue of the City.*

Funny Papers

Some Rodney Dangerfield lines:

It's tough to stay married. My wife kisses the dog on the lips, yet she won't drink from my glass!

My wife is such a bad cook, if we leave dental floss in the kitchen the roaches hang themselves.

Oh, I was an ugly kid. My old man took me to the zoo. They thanked him for returning me.

I haven't spoken to my wife in years. I didn't want to interrupt her.

When I was a kid my parents moved a lot, but I always found them.

When I was born the doctor took one look at my faceturned me over and said. Look ... twins!