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Making legal matters easy and economical for your business

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Newsletter, January 2014 Stealing Employees

California law protects the right of employees to change employment, and of competitors to hire one another's employees. Hence a former employee or a competitor may hire your employees. What they can't do, however, is steal your employees. This article explains the difference. I also give you some practical measures to protect yourself.

Employee's Duty of Loyalty. An employee may not solicit your other employees while he is still working for you. While in your employ, the employee owes you a fiduciary duty of loyalty. An employee breaches that duty by soliciting away your other employees to work for a competitor.

The key word is "solicit." The departing employee may not solicit other employees to leave. The departing employee, however, may announce that he is leaving, and other employees may choose to go with him. He may only announce his departure, then back off and wait for other employees to initiate contact and ask if they can go with him. For more on this concept, see my website article, *Can a Former Employee Steal Your Customers?*

Preparing to Leave. Before leaving your employment, the employee may make some preparations to compete, but he still owes you the duty of loyalty. It's a fine line between preparing for a new gig, and breaching the duty of loyalty. In brief, at some undefined point during his preparations, the employee must either resign or make full disclosure to the employer of his plans for leaving. The undefined point is when the employee is actually harming his employer. In most cases, the employee should resign when he can't avoid a conflict of interest.

Workforce Raids. California law protects employers from raiding by competitors. An employee or competitor may not take a large proportion of your employees with the intent of driving you out of business. You must prove the employee or competitor had bad intent. Evidence of intent includes emails, texts, and witness testimony about what the bad employee or competitor did or said when soliciting your employees.

Confidential Information. The departing employee may not take your trade secrets or confidential information, and a competitor may not hire him to gain access to same. For example, the employee might have access to confidential information about your clients or proprietary technology, and your

competitor hires him to get the confidential information. California law prohibits this bad conduct. For more, see my website article, [Can a Former Employee Steal Your Customers?](#)

Protect Yourself from the Departing Employee. You can protect yourself from unfair raids on your employees. When an employee announces his intention to leave, you don't need to let the employee hang around. At that point, the employee is more a liability than an asset.

Consider terminating employment so that you can cut off the employee's easy access to your other employees. Further, by paying salary you just finance his transition to your competitor (although you might have to pay the employee's salary if you have a contractual notice period for termination). In addition, advise the employee that you've retained counsel, and you intend to protect your employees, confidential information and trade secrets.

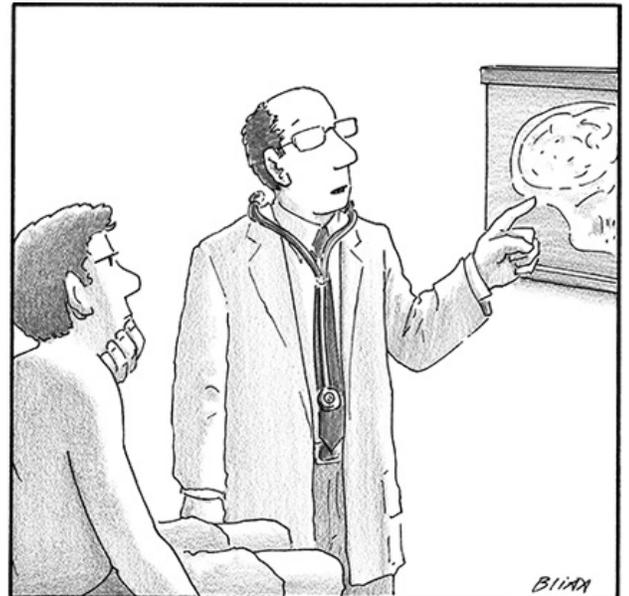
Protect Yourself from New Hires. Imagine that you just hired top talent from a competitor. The roles are reversed -- now the competitor is looking to sue you for raiding its workforce. All of the above rules apply to you.

Be especially careful with the new hire who intends to bring his entire team or group. The new hire might have breached the fiduciary duties we talked about above -- he might have solicited the team to go work for you, a competitor. Don't be complicit in the bad conduct. Instead of targeting the competitor and taking an entire group or office from it, recruit from multiple sources. Certainly don't talk about how the competitor's loss of the entire group will cripple it. Further, interview each new hire to be sure that no illegal conduct occurred in their transition, and that no one brings any data from the old job. Have them all sign written representations to this effect.

You should talk with an experienced attorney whenever you lose or gain a key employee. Do not go it alone. Call me if you want to talk more.

Homer Simpson

- Kids, just because I don't care doesn't mean I don't understand.
- If you really want something in life you have to work for it. Now quiet, they're about to announce the lottery numbers.
- The hardest thing I've had to face as a father was burying my own child. He climbed back out, but it still hurts.
- Homer [to Marge]: It takes two to lie. One to lie and one to listen.
- Bart: Like, sometimes, you could do stuff that you think is pretty bad, so other kids will like you better?
Homer: You're not talking about killing anyone, are you?
Bart: No.
Homer: Are you!
Bart: No!
Homer: Then run along, you little scamp!



"See this area right here—that's where we'd like to open a Starbucks."