

Labor and Employment 2019 Symposium

Managing Legal Risks in the Hiring and Departures of Employees

Speakers

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Materials

1. PowerPoint Presentation

ahead of the curve

Workplace law trends for today and beyond.
Come up to speed to stay ahead.

Legal Risks in the Hiring and Departures of Employees

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Agenda

- **EEO Concerns:**
 - Non-discrimination
 - Non-retaliation
 - Affirmative Action
 - Recruiting Sources
 - Community Outreach
- Non-competition and Confidentiality Agreements
- Intellectual Property and Protecting Trade Secrets
- Miscellaneous Legal Issues

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Equal Opportunity Employment

- **State and federal laws prohibit discrimination against employees on the basis of the employee's:**
 - Sex
 - Race
 - Color
 - National origin
 - Religion
 - Age
 - Disability
 - Sexual orientation
 - Marital status, including identity of spouse
 - Family status
 - Status with regard to public assistance

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What Does It Mean to Discriminate?

- **To make employment decisions (take adverse employment action) based on, or because of, a person's race, sex, religion, age, disability, etc.**
- **To treat employees differently or less favorably because of race, sex, religion, age, disability, etc.**
- **To make employment decisions (take adverse employment action) based on stereotypes and assumptions about the abilities, traits, or the performance of individuals based on their race, sex, religion, age, disability, etc.**

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What Does It Mean to Retaliate?

- **To make employment decisions (take adverse employment action) because an employee:**
 - **Made a complaint inside the company of discrimination**
 - **Filed a lawsuit or an administrative charge or complaint with a state or federal agency**
 - **Cooperated in the investigation of another person's allegation of discrimination**

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Affirmative Action

- **Consider “pipeline” affirmative action by engaging with organizations that work with underrepresented groups for recruiting**
 - **Minority job fairs**
 - **Tribal colleges**
- **Circulate job postings widely**
- **Review hiring requirements and eliminate qualifications that are not actually necessary to do the job**

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Hiring & Departure of Employees

- **Avoiding allegations of wrongdoing following hiring of new employees:**
 - Tell potential new hires to “leave clean” – the company does not want and does not need information from their former employer
 - Review any non-competition, non-solicit, or trade secret agreements with counsel before new employee starts working (and preferably before any offer is made)
 - Instruct candidates for new employment that they cannot recruit their colleagues until they have quit their old job (subject to post-employment contractual restrictions)
- **Prospective employees should do their best work for their former employer until they quit**

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Non-Competes – Overall Enforceability

- **Montana – generally disfavored**
- **North Dakota – generally not enforceable**
- **Colorado – generally disfavored**
- **California – generally not enforceable**

***All states require reasonable terms, and many states impose statutory time restrictions.**

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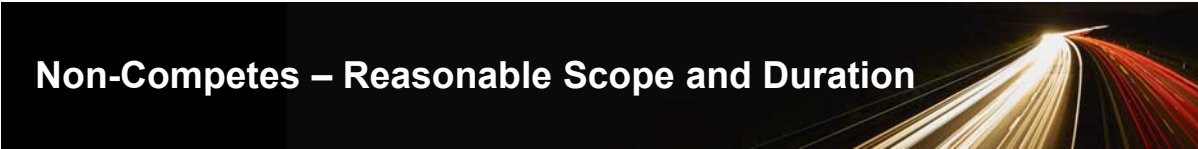




Non-Competes – Employer’s “Legitimate Interest”

- **Employers generally have to show legitimate reason for needing a non-compete**
- **Examples:**
 - **Employer paid cost of specialized training for employee**
 - **Employee learned trade secrets while working for employer**
 - **Employee developed customer relationships while working for employer**
- **Often harder to enforce non-compete against employee who was fired**

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Non-Competes – Reasonable Scope and Duration

- **Courts generally look at duration of non-compete and its scope together to decide reasonableness**
- **Non-competes can be focused on:**
 - **Geographic area**
 - **Customers of the employer**
 - **Customers serviced by the employee**
- **Generally, longer non-competes are more likely to be enforced if they have narrow scope**
- **Courts will consider hardship to employee so helpful to think about what *could* employee do if non-compete was enforced?**

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Reasonable Terms & The “Blue Pencil”

- **Some states will decide whether to enforce a non-compete as written**
 - **Designed to encourage employers to write reasonable non-competes**
 - **Employer assumes risk that non-compete won’t be enforced at all**
- **Other states will modify a non-compete that is unreasonable to make it reasonable (this is called “blue penciling”)**

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“Consideration”

- **The law requires one to give to get (a valid contract)**
- **Examples of consideration to support non-compete:**
 - **Hiring for new job**
 - **Promotion**
 - **Bonus**
 - **Raise**
 - **Continued employment in same position (but beware!)**
- **In most states (not MN), continued employment is enough, but judges still like to see employees “getting something” for signing a non-compete**
- **Consider tying non-compete for current employees to raise, promotion, or bonus**

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Fiduciary Duties – Loyalty and Care

- Employees owe some duties to their employers, but lower level employees generally owe duty only to support their employer while on company time
- Employees are usually allowed to prepare to compete against current employer so long as they do not actually compete and prepare on their own time
- Higher-level employees (directors and officers) can owe higher duties, but can be hard to enforce
- Difficult to prove damages from employee's breach because employees are generally not liable for just doing a bad job

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Interference with Contract and Business Relations

- In a dispute between an old employer and a former employee, the new employer is often accused of:
 - Tortious interference with contractual relations
 - Tortious interference with prospective business relations
- “Tortious” means extra damages can be awarded
- New employer's interference can be with old employer's contract with former employee (the non-compete) or with old employer's contracts or business relationships with its customers

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Terminating Employees

- In most states, employees can be terminated for any reason (or no reason at all) so long as reason is not illegal (for example, sex or race)
- In Montana, employees generally cannot be fired without good cause
- Exceptions:
 - Employees with written contracts for set term
 - Employees in probationary period (cannot exceed 6 months)
- **All** reasons for terminating a Montana employee should be documented in writing and given to terminated employee upon departure

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Types of Intellectual Property

Types of Rights	Scope of Coverage	Examples
Patents	New and useful inventions	Mechanical (tool for cutting or shaping metal), electrical (circuits for connecting memory to a computer bus), chemical (formulation for inks to make them water soluble) and biotechnological (immunological assay); design (shape of chair); plant (asexual reproduction of distinct and new variety of plant)
Trade Secrets	Secret information with economic value	Manufacturing processes, business plans, databases, customer information
Copyrights	Unique expressions of ideas	Software code, website content, musical compositions, audio recordings, movies, books, articles, diagrams, photos
Trademarks	Identification of source for product or service	Brand names, logos, domain names

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Protection of Trade Secrets



- **State and federal law protects trade secrets**
- **Trade secrets are any information that:**
 - **Owner has taken reasonable measures to keep secret, and**
 - **Is valuable because it is secret**
 - **(Information can be re-compiled relatively easily through proper means is not a trade secret)**
- **Trade secrets are easier to protect in litigation if owner has identified and protected its trade secrets before a dispute arises**

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Protection of Trade Secrets



- **Who owns the invention?**
 - **Check your employment agreements. Did your employees agree to assign patent rights to their employer?**
 - **Even absent a written agreement, employer may own the invention if employee was hired to invent**
- **Document development process**
- **Don't disclose any know-how that you may later want to patent without filing patent application or obtaining a non-disclosure agreement**
- **File application as soon as practicable**
- **Extend application to key foreign markets**

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Information Governance

- Once litigation seems likely, parties are required to preserve all evidence
- Reviewing and producing evidence in litigation can be very expensive
- Limit places where employees can keep data and documents
- Companies should be careful about which records they choose to keep – large volumes of records might have to be searched as part of a lawsuit
- Make a policy about how long the company will keep certain types of documents and enforce it
- Stop any destruction once a dispute exists

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Questions



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Thank you



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