A Practice Note describing the steps an employer can take to minimize litigation risk when hiring from a competitor. This Note discusses potential statutory and common law claims when hiring from a competitor, the need to identify any existing contractual restrictions a potential new hire may have, how to avoid potential issues during the recruitment process, ensuring the new hire is a “good leaver” during the resignation process, responding to cease and desist letters, and potential pre-litigation settlement concepts. The Note is jurisdiction neutral. For information on state-specific hiring or non-compete issues, see State Q&As: Hiring Requirements and Non-Compete Laws.

In most industries, competition is not limited to battles over customers and clients, but also includes efforts to recruit, employ and retain the most productive and talented workforce. In fact, most employers consider their employees to be their most valuable asset and vigorously work to prevent competitors from taking that asset. For that reason, litigation between competitors arising out of the recruitment of employees has become increasingly common. When a hiring employer becomes embroiled in such a dispute, the time and expense necessary to defend itself can easily outweigh the benefits of hiring the employee.

Fortunately, there are a number of steps a hiring employer can take to minimize the risk of litigation when recruiting employees from a competitor. This Note provides a number of practical suggestions for recruiting individuals from a competitor and significantly lowering litigation risk for various associated claims.

**CONSIDER THE CLAIMS THAT CAN BE ASSERTED AGAINST A HIRING EMPLOYER WHEN HIRING FROM A COMPETITOR**

The most common claims arising out of hiring from a competitor are:

**TORTIOUS INTERFERENCE WITH CONTRACT**

If a new employee's employment violates an enforceable agreement with his prior employer, such as a post-employment restrictive covenant (most commonly a non-compete or non-solicitation agreement) or confidentiality agreement, the prior employer will often assert a tortious interference claim against the hiring employer by alleging the hiring employer wrongly induced, encouraged or assisted the employee's breach of the agreement. The damages for this type of claim are typically measured by the losses caused by the employee's underlying breach. Tortious interference claims are tort claims, so a plaintiff could seek punitive damages in addition to compensatory damages.

**AIDING AND ABETTING BREACH OF FIDUCIARY DUTY OR DUTY OF LOYALTY**

Even when a new employee is not subject to a valid post-employment contractual restriction, the hiring employer may still face a risk of litigation if the new employee engaged in misconduct rising to the level of a breach of his fiduciary duty or duty of loyalty to the former employer. For example, if an employee solicits clients or employees on behalf of a new employer while still working for the prior employer, the employee may be violating a common law duty requiring all employees to act in the best interests of his current employer.

When an employee violates that duty, the employer can, and often does, accuse the new employer of encouraging that violation by “aiding and abetting” or “inducing” the new employee’s breach. Even if the new employer had no idea that the new employee was violating
a duty of loyalty, the new employer can easily become embroiled in a dispute involving the new employee’s conduct.

MISAPPROPRIATION OF TRADE SECRETS
As with an aiding and abetting theory, if a departing employee misappropriates a former employer’s trade secrets or confidential information, the hiring employer faces a significant risk that it will be accused of participating in that misappropriation. For that reason, when a former employer asserts a misappropriation claim, it is not uncommon for the former employer to include the new employer in that claim by alleging that the new employer acted in concert with the employee. Once again, an employer can be dragged into a dispute regarding a new employee’s misconduct, even if it played no active role in that misconduct.

Additionally, even if there is no actual misconduct, a hiring employer can be sued for misappropriation of trade secrets under a theory of inevitable disclosure (meaning that despite the hiring employer’s best efforts, the new hire will inevitably disclose trade secrets). The inevitable disclosure of trade secrets theory is often used where an individual had access to an employer’s trade secrets, joins a competitor in a similar position to the one held with the former employer, and the circumstances suggest a lack of trustworthiness of the individual. For more information about misappropriation of trade secrets generally, see Practice Notes, Protection of Employers’ Trade Secrets and Confidential Information (http://us.practicallaw.com/5-501-1473) and Trade Secrets Litigation (http://us.practicallaw.com/5-523-8283). For information on state-specific inevitable disclosure doctrines, see State Q&As: Non-compete Laws: Question 17 (http://us.practicallaw.com/1-505-9589) and Trade Secrets: Question 17 (http://us.practicallaw.com/5-505-9592).

UNFAIR COMPETITION
Unfair competition claims are often asserted as catch-all claims in an action against a hiring employer. In most cases, an unfair competition claim is derivative of other claims, such as tortious interference or aiding and abetting a breach of fiduciary duty.

IDENTIFY ANY EXISTING CONTRACTUAL RESTRICTIONS
One of the first things a hiring employer should determine when recruiting from a competitor is whether the candidate is subject to any post-employment restrictions, such as non-competition and non-solicitation provisions. Since the existence of an enforceable restriction could impact a decision as to whether the individual is a viable candidate and whether his anticipated duties would violate a restriction, a prospective employer should:

- Ask the candidate about any restrictions as early as possible during the recruitment process.
- Examine all nooks and crannies where restrictions may be found. Post-employment restrictions are typically found in employment agreements, but can also be found in a variety of other agreements, such as stock option agreements, deferred compensation agreements, bonus plans, and purchase and sale agreements. When discussing the restriction concerns with a candidate, make sure to specifically ask if there are any relevant agreements.

- Have any applicable post-employment restrictions reviewed by a legal expert. The scope of enforceability of restrictive covenants varies broadly, depending on the:
  - state in which the restrictions would be enforced;
  - scope of the restrictions, and;
  - nature of the employee’s responsibilities and background. An agreement that is highly likely to be enforceable in New York could be just as likely to be unenforceable in California (for more information on state-specific non-compete enforceability issues, see State Q&As, Non-compete Laws).

- If the restriction is likely to be enforceable, consider whether the candidate would violate the restriction if he was hired for the position at issue. Potential employers should compare the contractual restriction with any written job description, and discuss the requirements of the position with the candidate’s prospective manager.

ASSESS THE LIKELIHOOD OF LITIGATION
When assessing the likelihood that a particular hiring decision will result in litigation, the hiring entity should put itself in the prior employer’s shoes and consider:

- What are the circumstances of the employee’s departure?
- What are the similarities between the new and old positions?
- How competitive are the two businesses?
- What is the likelihood of customer or co-worker flight?
- What is the value of the trade secrets or proprietary information to which the employee had access?
- How sensitive is the position held by the employee?
- Do the circumstances justify the cost of litigation? For example, might there be a need for the former employer to send a message to the new employer or to other employees?

Similarly, when assessing the likelihood of litigation, it is helpful to gather intelligence about the prior employer’s history of enforcing its restrictive covenants. Some employers are quite aggressive and will file a lawsuit to enforce restrictive covenants of even relatively low level employees. Others, meanwhile, will only litigate in rare circumstances. Knowing a particular employer’s enforcement history helps employers weigh the litigation risks and can inform decisions about potential protective steps.

SEEK LEGAL ADVICE AND CONSIDER INDEMNIFYING THE CANDIDATE
Because of the potential consequences to the candidate, potential employers should encourage the candidate to seek his own legal counsel regarding the enforceability of any restrictive covenant. However, provided that the candidate and the potential new employer have a common interest and there are no non-waivable conflicts, they can jointly seek advice from an attorney regarding enforceability issues.

In appropriate circumstances, a new employer can also agree to indemnify the candidate against any potential litigation. Any such decision should involve an assessment of various factors, including:
The likelihood of any such litigation.
Its potential outcome (both positive and negative).
Its likely outcome.
Potential attorney’s fees and costs.
Whether the candidate would be willing to accept the position without indemnification.
Whether the fact of the indemnification agreement could be used against the hiring employer in any resulting litigation.
Whether any such indemnification is consistent with other corporate policies and procedures.

Any agreement to indemnify (or not to indemnify) a candidate should be clear and should exclude indemnification for intentionally dishonest or fraudulent conduct. It should also allow the employer to modify or terminate the agreement in appropriate circumstances (for example, if the employer later learns that the candidate was not honest).

CONSIDER POSSIBLE PROTECTIVE STEPS IF THE CANDIDATE HAS AN ENFORCEABLE RESTRICTIVE COVENANT
If a candidate is subject to an enforceable restrictive covenant, and if the position for which the candidate is being considered would require the candidate to violate the terms of that restrictive covenant, there are steps the hiring employer can take to minimize the litigation risk associated with the hire, including:

Restructuring the position so that its duties and responsibilities do not run afoul of any contractual restrictions (for example, walking off a salesperson or manager from certain customers for a period of time).
Placing the candidate “on the bench” (for example, paid a salary, but not required to perform any duties) or placing them in a temporary position for the duration of any contractual restriction.
Asking the candidate to request a waiver of any contractual restrictions from his former employer. Depending on the circumstances (for example, where the candidate was laid off or where the former employer is planning to leave the competitive line of business), the former employer might be willing to waive the contractual restriction. Given the potential consequences of such a request, however, this needs to be the candidate’s decision, and the candidate should be the one to make any such request.

MINIMIZE RISK DURING THE RECRUITMENT PROCESS
Once a hiring employer has decided to proceed with an offer, it should make sure its recruitment of that employee does not give rise to any potential claims against itself or the incoming employee. To help minimize the risk of legal claims, the new hire should instruct the candidate to:

Not use current employer’s facilities to communicate with the hiring employer or discuss employment opportunities at the hiring employer with anyone else at the current employer. The use of an employer’s facilities (for example, email, letterhead, phone lines) to pursue competitive employment is arguably inconsistent with the employee’s duty of loyalty. In addition, in the event of litigation, any evidence that the employee used the former employer’s resources for any purpose other than the performance of his normal duties (particularly in connection with the pursuit of employment with a competitor) can undermine a legal defense.

Not disclose or volunteer competitive information. When recruiting from a competitor, the hiring employer should not ask for or accept any information regarding the competitor’s business, clients, strategies or finances. Rather it should focus on the candidate’s qualifications and suitability for the position, not the current employer’s operations. If the candidate offers to share any information about the current employer, the hiring employer should politely decline and remind the candidate that he should not disclose any of the employer’s confidential or proprietary business information.

Not disparage the current employer. Not only are disparaging remarks unprofessional, they can lead to defamation claims. Litigation in this area is frequently driven by emotions such as anger and fear, any conduct that might inflame such emotions should be avoided.

Not recruit other employees. Prior to the effective date of resignation, the employee should not encourage any other employees to resign for any reason. This could be construed as improper solicitation and may be actionable even in the absence of any contractual restrictions against solicitation. In most jurisdictions, employees have a common law duty of loyalty (and often a fiduciary duty) to act in the best interest of their current employer, even after tendering a notice of resignation. Violation of this duty of loyalty can result in substantial damages against the employee, including, among other things, forfeiture of the wages paid to the employee during the period of disloyalty. Even further, to the extent a subsequent employer is found to have assisted the employee in breaching his duty of loyalty, there is potential exposure to the new employer for aiding and abetting the employee’s breach.

Not discuss resignation with co-workers. Instruct the candidate to avoid even discussing his new employment with co-workers before a formal letter of resignation has been submitted. This discretion reduces the risk of breach of duty of loyalty claims regarding the improper solicitation of employees. Once the employee has resigned, if he believes it is important to inform certain co-workers that he is leaving, the employee should limit the discussion as much as possible to the date he will be leaving.

Not solicit or appear to solicit clients. Instruct the candidate that, prior to the effective date of resignation, he should avoid any communications with clients that could even arguably be construed as a solicitation for the new employer or any other company. If a prior employer can prove that an employee solicited a client while still employed by the prior employer, the employee (and the new employer) could be liable for substantial monetary damages for breach of the duty of loyalty in addition to any contractual restrictions against soliciting clients. As stated above, those damages can even include the return of any salary or bonuses paid to the employee during the period of alleged disloyalty.

Attest to the disclosure of all employment agreements and restrictions. In any offer letters or employment agreements provided to the candidate, employers should include a
representation to be signed by the candidate that he has disclosed to the new employer all agreements or other post-employment restrictions that may apply. The representation should also include a statement that the candidate has reviewed the duties and responsibilities of the new position and is not subject to any contractual restriction that would prevent him from performing them. The offer letter or agreement can also instruct the new hire not to bring, distribute or use any confidential information, trade secrets or property of a prior employer, and it should require the new hire to confirm he can perform the duties and responsibilities of the new position without using or disclosing a former employer’s confidential or proprietary material. For a sample offer letter containing this language, see Standard Document, Offer Letter/Employment Agreement for a Non-Executive (Short-form), Continuing Obligations (http://us.practicallaw.com/0-501-1654). Offer letters frequently become litigation exhibits. Accordingly, employers should write them with a judicial audience in mind (for example, the tone should be professional and respectful of the legal rights of others).

- **Review relevant handbook policies.** Include a provision in any employee handbook which prohibits the unauthorized use or distribution of confidential information or trade secrets of a third party. Such a provision would be further evidence of the hiring employer’s good faith. See, for example, Standard Document, IT Resources and Communications Systems Policy (http://us.practicallaw.com/8-500-5003) (stating, “this policy also prohibits use of the company’s IT resources and communications systems in any manner that would infringe or violate the proprietary rights of third parties”).

**ENSURE THE EMPLOYEE IS A “GOOD LEAVER” DURING THE RESIGNATION PROCESS**

Once an employer has extended an offer to an employee working for a competitor, the hiring employer can further reduce its risk of legal exposure by doing its best to ensure the employee behaves appropriately throughout the resignation process, also known as being a “good leaver.” As a “good leaver,” the employee not only reduces his own risk of exposure, but also reduces the risk of a claim against the hiring employer.

To be a “good leaver,” the employee should:

- **Not bring over materials from the former employer.** On departure, the employee should not take anything with him unless it is unquestionably a personal item (for example, personal photographs, artwork, shoes). Items not to be taken include, among other things, reports and other materials prepared solely by the employee regardless of where the material is physically located. Even further, any non-personal material should not be removed from the former employer’s premises and all copies should be returned to the former employer. Even if the material technically belongs to the client rather than the former employer, it still may represent work product of the former employer and may even be subject to copyright protection. If this material is needed for a subsequent engagement with a new employer, the client and former employer should be asked to voluntarily provide a copy. Former employers will often comply with a client’s request for relevant material to maintain goodwill with that client.

- **Find a monitor.** Ask the employer to designate someone to monitor the employee’s departure and approve the removal of any non-personal items such as rolodexes and appointment books. This can effectively limit the employer from later claiming that the employee had no right to take those items.

- **Return materials to the former employer.** All work-related material maintained by the employee both inside and outside the office (including computer files contained on a home PC or laptop, smartphones, files) should be returned to the employer. An employee’s retention of any proprietary or confidential information or material following resignation is one of the single most damaging pieces of evidence in restrictive covenant and unfair competition cases. Should litigation ensue, if the former employer can articulate a legitimate basis for believing that a former employee’s personal computer contains the former employer’s proprietary and confidential information, a court may permit a forensic examination of the former employee’s personal computer to determine if proprietary and confidential information was retained by the employee after resignation.

- **Tender a written letter of resignation.** That letter should not contain any disparaging or critical comments. Instead, the letter should be brief and courteous. It may also include an offer to remain with the current employer for a reasonable period of time (for example, one or two weeks), but this will depend on the circumstances of the resignation, the existence of any enforceable notice provisions in the employee’s agreement and the business needs of the current employer. In practice, employers often require resigning employees to leave the premises immediately.

**RESPOND TO ANY “CEASE AND DESIST” LETTERS**

Even when a hiring employer does everything possible to ensure its recruitment efforts are proper, it still can find itself the recipient of a letter from the competitor, or the competitor’s counsel, complaining about the circumstances of the employee’s departure or threatening legal action. In most circumstances, the hiring employer should respond to any “cease and desist” letter that it receives. There are steps a hiring employer can take to defuse a possible litigation even when it receives a particularly hostile letter. Hiring employers should:

- **Use an appropriate tone.** Using a reassuring or sympathetic tone when responding to a cease-and-desist letter (for example, a tone suggesting the new employer takes the concerns of the prior employer seriously, but believes there is no basis for concern). Resist the temptation to respond in an adversarial manner even where the former employer’s allegations are completely unfounded.

- **Provide assurances.** If the former employer alleges that the employee misused or misappropriated confidential information, for example, the new employer could assure the prior employer that it has no interest in this information and that it has investigated the allegation and found it meritless. However, if it turns out that the employee does possess this information, the new employer can offer to return or destroy it.

- **Avoid legal debates.** Do not include in the letter legal debates over the enforceability of restrictive covenants. In most cases, it is useless to try and persuade an employer that its restrictive covenants are overbroad or otherwise unenforceable. If the former
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employer claims it has an enforceable restriction that the hiring employer believes to be unenforceable, it should focus instead on its commitment to free and fair competition.

- **Maintain an open dialogue.** Keep the door open for further discussion. Any response letter should state that if it has not addressed all concerns of the former employer, or if the former employer has additional information that it would like to share about its concerns, the hiring employer is open to discussing the matter further.

- **Find a similarly situated author.** To avoid escalating the dispute, if possible, the response should come from someone in a position similar to the sender of the cease and desist letter. For example, if the cease and desist letter came from the prior employer’s in-house attorney, the response should come from an in-house attorney. If the cease and desist letter came from outside counsel, the response should come from outside counsel.

- **Write for a judicial audience.** Cease and desist letters and any responses are frequently used as exhibits in any resulting litigation. Accordingly, authors should draft these letters with a potential judicial audience in mind.

- **Not respond to reminder letters.** Unlike true cease and desist letters, reminder letters do not allege misconduct; therefore a response is generally not required. For sample reminder letters to departing employees and hiring employers, see Standard Documents, Continuing Obligations Letter to New Employer (http://us.practicallaw.com/9-520-5638) and Continuing Obligations Letter to Departing Employee (http://us.practicallaw.com/5-520-0096).

**CONSIDER PRE-LITIGATION SETTLEMENT CONCEPTS**

Resolution of disputes involving the movement of employees between competitors may require more than a mere exchange of letters. Potential settlement considerations may include the following:

- The return or destruction of documents or other information improperly taken.
- Representations and warranties from the hiring employer to the prior involving topics including the:
  - employee’s duties and responsibilities;
  - hiring employer’s lack of knowledge regarding any inappropriate activity by the employee; and
  - hiring employer’s pledge to return any documents or information that it subsequently learns was inappropriately taken.

- A hiring protocol governing how the employee should respond to employment inquiries from former colleagues.

- An agreement that for a limited period of time, the employee will not solicit certain designated customers or employees. Such an agreement can be a reaffirmation of existing non-solicitation contractual obligations, or it could be a means of remedying an alleged theft of trade secrets or confidential information.

- A “no hire” agreement, under which for a limited period of time, the new employer agrees not to hire certain specific employees from the former employer.

**AVOID SUBSEQUENT EVIDENCE SPOILATION CLAIMS**

Cease and desist claims frequently trigger a duty to preserve pertinent evidence. Where litigation is reasonably foreseeable, the duty may be triggered even before the receipt of such a letter. For example, if an employer independently discovers that a new employee may have improperly taken a prior employer’s proprietary information and concludes that there is a reasonable likelihood of litigation over that conduct, the new employer and the employee may have a duty to preserve potentially relevant information even before the prior employer sends a cease and desist letter or even becomes aware of the potential misappropriation.

After receiving a cease and desist letter, employers should issue a document preservation notice to all individuals who may have relevant documents or information, as well as to the appropriate information technology personnel so as to make certain that relevant e-mails and other electronic communications are preserved. For a sample letter to employees, see Standard Document, Litigation Hold Notice (http://us.practicallaw.com/0-501-1545). For a hold notice to opposing or third parties and other relevant litigation hold resources, see Litigation Hold Toolkit (http://us.practicallaw.com/0-501-1545). Where litigation is reasonably foreseeable, and where certain employee hard drives are likely to contain evidence that would be relevant to the litigation, it may also be prudent to take a forensic image of certain employee hard drives. In such circumstances, the cost of creating such a against the possibility of evidence spoliation in the absence of such an image.

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