

# Hiring from a Competitor: Practical Tips to Minimize Litigation Risk

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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 [Hiring Requirements: State Q&A Tool](#) and [Non-Compete Laws: State Q&A Tool](#).

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, many employers consider their employees to be their most valuable assets and vigorously work to prevent competitors from taking those assets. 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 the litigation risk for various associated claims.

## CONSIDER POTENTIAL CLAIMS AGAINST A HIRING EMPLOYER WHEN HIRING FROM A COMPETITOR

The most common claims arising out of hiring from a competitor are described below.

### TORTIOUS INTERFERENCE WITH CONTRACT

If a new employee's employment violates an enforceable agreement with their former employer, such as a post-employment restrictive covenant (most commonly a non-compete or non-solicitation agreement) or confidentiality agreement, the former 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. This claim generally requires proof that the new employer had knowledge of the employee's agreement with the former employer. 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 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 former employer, the employee may be violating a common law duty requiring all employees to act in the best interests of their 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 or proprietary 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 add a claim against the new employer 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.

For trade secret misappropriation that occurs on or after May 11, 2016, the former employer also may assert a claim under the federal Defend Trade Secrets Act (DTSA), which creates a private cause of action for civil trade secret misappropriation under federal law (18 U.S.C. § 1836(b)). The new law supplements but does not preempt or eliminate existing state law remedies for trade secret misappropriation.

Remedies available under the DTSA include:

- An injunction to preserve evidence and prevent trade secret disclosure, provided that it does not:
  - prevent a person from entering into an employment relationship, and that any conditions placed on the employment relationship are based on evidence of threatened misappropriation and not merely on the information the person knows; or
  - otherwise conflict with an applicable state law prohibiting restraints on the practice of a lawful profession, trade, or business.
- Compensatory damages.
- Exemplary damages up to two times the amount of the damages for willful and malicious misappropriation.
- Reasonable attorneys' fees for the prevailing party for certain bad faith conduct.

(18 U.S.C. § 1836(b)(3).)

The DTSA also permits the court to issue an *ex parte* seizure order, but only under extraordinary circumstances (18 U.S.C. § 1836(b)(2)). For more information on the civil seizure of property under the DTSA, see:

- Practice Note, Employment Litigation: DTSA Claims: Ex Parte Seizure Orders ([W-022-8293](#)).
- Defend Trade Secrets Act (DTSA) Issues and Remedies Checklist ([W-003-6953](#)).
- Article, Expert Q&A on the Defend Trade Secrets Act and Its Impact on Employers: What Remedies Are Available to Employers?. ([W-002-2128](#))
- Article, The DTSA Turns One, But What Has It Done?. ([W-007-9652](#))

For more on trade secret misappropriation under state law, see Trade Secret Laws: State Q&A Tool.

### Computer Fraud and Abuse Act

Employers traditionally asserted claims under the Computer Fraud and Abuse Act (CFAA) as a means to litigating trade secret disputes in federal court (18 U.S.C. § 1030). The CFAA imposes criminal and civil liability for, among other things, accessing a protected computer (broadly defined) without authorization or exceeding authorization (18 U.S.C. §§ 1030(a)(2)(C), (e)(2)).

With the passage of the DTSA, employers have been less inclined to assert CFAA claims because:

- The DTSA gives employers direct access to federal court for trade secret misappropriation.
- The remedies available under the CFAA are more limited than under the DTSA.
- There is a circuit split over the CFAA's scope which increases the likelihood of motion practice about the viability of CFAA claims, though that split may soon be resolved by the US Supreme Court (*U.S. v. Van Buren*, 940 F.3d 1192 (11th Cir. 2019), *cert. granted*, 2020 WL 1906566 (U.S. Apr. 20, 2020)).

For more on asserting CFAA claims, see Practice Notes, Protection of Employers' Trade Secrets and Confidential Information: Computer Fraud and Abuse Act ([5-501-1473](#)) and Key Issues in Computer Fraud and Abuse Act (CFAA) Civil Litigation ([W-014-6206](#)).

### Inevitable Disclosure Theory

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. However, the inevitable disclosure doctrine is not recognized in all states. For more on inevitable disclosure, see Practice Note, Non-Compete Agreements with Employees: Protection in the Absence of Non-Competes: Inevitable Disclosure ([7-501-3409](#)).

For more information about misappropriation of trade secrets generally, see Practice Notes, Protection of Employers' Trade Secrets and Confidential Information ([5-501-1473](#)) and Trade Secrets Litigation ([5-523-8283](#)). For information on the inevitable disclosure doctrine under state law, see Non-Compete Laws: State Q&A Tool: Question 17 and Trade Secret Laws: State Q&A Tool: Question 17.

### UNFAIR COMPETITION

Unfair competition is often asserted as a catch-all claim in an action against a hiring employer. In most cases, an unfair competition claim is derivative of other claims alleging wrongful conduct, 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 or even considering an application of an employee of 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 may impact a decision about whether the individual is a viable candidate and whether the individual's 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. When discussing the restriction concerns with a candidate, specifically ask if there are any relevant agreements. The prospective employer should remind the candidate that although post-employment restrictions are typically found in employment agreements or stand-alone non-competes or non-solicits, they 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.
- 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. An agreement that is likely to be enforceable in New York is just as likely to be unenforceable in California (for more information on state-specific non-compete enforceability issues, see Non-Compete Laws: State Q&A Tool);
  - scope of the restrictions; and
  - nature of the employee's responsibilities and background.
- If the restriction likely is enforceable, consider whether the candidate would violate the restriction by working in 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.
- If enforceability is unlikely or questionable, consider the possibility of seeking a declaratory judgment (see Practice Note, Declaratory Judgment Actions Under Federal Law ([W-002-4396](#))). However, this process is not practical in all circumstances, as the risks of a claim by the former employer may not outweigh the costs and delay incurred by bringing a declaratory judgment action.

### 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 former 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?
- Has the hiring entity hired any other employees from the former employer?
- Have the hiring entity and the former employer been involved in any past litigation?

- 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 former employer's history of enforcing its restrictive covenants. Some employers are quite aggressive and will file a lawsuit to enforce restrictive covenants even against relatively low level employees. Others 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 independent 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 litigation.
- Its potential outcome (both positive and negative).
- Its likely outcome.
- Potential attorneys' fees and costs.
- Whether the candidate is willing to accept the position without indemnification.
- Whether the fact of the indemnification agreement may be used against the hiring employer in any resulting litigation, such as to support a claim for interference with contract or inducing breach of contract.
- Whether 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. For example, the hiring employer may:

- Restructure the position so that its duties and responsibilities do not run afoul of any contractual restrictions (for example, restricting a salesperson or manager from soliciting or servicing certain customers for a period of time).
- Place the candidate “on the bench” (for example, pay them a salary, but do not require them to perform any duties) or place them in a temporary position for the duration of any contractual restriction.
- Ask the candidate to request a waiver of any contractual restrictions from their former employer. Depending on the circumstances (for example, if the candidate was laid off or the former employer is planning to leave the competitive line of business), the former employer may 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 ensure 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 hiring employer should instruct the candidate to:

- **Not use the 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 (such as email, computer system, letterhead, or phone lines) to pursue competitive employment is arguably inconsistent with the employee’s duty of loyalty to the current employer. 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 the employee’s 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. It instead 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 not to 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, and the hiring employer should avoid any conduct that might inflame these emotions. For more information, see Practice Note, Defamation Basics ([W-001-0437](#)).
- **Not recruit other employees.** Before 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 of the former employer’s employees. 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. To the extent the new employer assists the employee in breaching that duty of loyalty to the former employer, the new employer may be liable for aiding and abetting the employee’s breach.
- **Not discuss resignation with coworkers.** The hiring employer should instruct the candidate to avoid even discussing their new employment with coworkers before submitting a formal resignation letter. This reduces the risk of breach of duty of loyalty claims regarding the improper solicitation of employees. Once the employee has resigned, if the employee believes it is important to inform certain co-workers about the departure, the employee should limit the discussion as much as possible to informing co-workers of the employee’s departure date, and sharing information necessary for a smooth and orderly transition of the employee’s duties and responsibilities.
- **Not solicit or appear to solicit clients.** The new employer should instruct the candidate to avoid any communications with clients before the effective date of the resignation that could even arguably be construed as a solicitation for the new employer or any other company. If a former employer can prove that an employee solicited a client while still employed by the former 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 they have 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 them from performing those duties. 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 former employer, and it should require the new hire to confirm their ability to 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 Documents, Offer Letter/ Employment Agreement for a Non-Executive (Short-Form): Continuing Obligations ([0-501-1654](#)) and Offer Letter/Short-Form Employment Agreement for Executive: Drafting Note: Representations ([8-585-1425](#)). 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.** Employers should include a provision in any employee handbook prohibiting the unauthorized use or distribution of confidential information or trade secrets of a third party. This provision can be further evidence of the hiring employer's good faith. For sample language, see Standard Document, IT Resources and Communications Systems Policy ([8-500-5003](#)).

## 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 the employee's 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 any materials from the former employer to the new employer.** On departure, the employee should not take anything from the former employer unless it is unquestionably a personal item (for example, personal photographs, artwork, or shoes). The employee should not take any business-related items, including, among other things, reports and other materials prepared solely by the employee regardless of where the material is physically located. 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 the employee needs this material for a subsequent engagement with a new employer, the employee should ask the client and former employer 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 appointment calendars and contact lists, whether stored in hard copy or electronically. Employers often allow departing employees to take a copy of their personal contacts even if stored on the employer's computer system. Using a monitor avoids claims that the employee:
  - did not have the right to take these items; or
  - improperly downloaded, copied, or forwarded any of the employer's confidential business information.
- **Return materials to the former employer.** All work-related material maintained by the employee both inside and outside the office (including computer files contained in a personal email account, on a home PC, laptop, USB drive, cloud storage, or smartphone, equipment belonging to the employer, and any hardcopy 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. The employer should think like the employee when directing this. An employee's view about who owns a client list, for example, may differ from the former employer's view. Should litigation ensue, if the former employer can articulate a legitimate basis for believing that a former employee's personal computer or electronic storage device 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 the employee retained any proprietary and confidential information after resignation.
- **Determine ownership of social media accounts.** The employee should determine whether the former employer or the employee owns any social media accounts that the employee used while working for the former employer. Many employers define the ownership of social media and related data in their employment policies or agreements with their employees (see, for example, Practice Note, Social Media and Restrictive Covenant Litigation: Social Media Account Ownership ([2-599-2107](#)) and Standard Clauses, Employer Ownership of Social Media Accounts Clauses ([3-531-8025](#))).
- **Tender a written letter of resignation.** The resignation 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) to finish pending projects or help transition the employee's duties, but this depends 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.
- **Not "trash talk" the former employer.** Whether or not the employee is bound by a non-disparagement clause, the employee does not benefit from talking negatively about the former employer, as many litigation decisions are emotionally driven. Doing so also may invite a claim for defamation or tortious interference.
- **Be honest if asked about future plans.** Unless contractually required, the employee is not obligated to disclose the identity of a new employer. However, they should not lie about their future plans (for example, saying that they are retiring, taking some time off to decide on their future plan, or leaving the industry if those things are untrue).

## RESPOND TO ANY "CEASE AND DESIST" LETTERS

Even when a hiring employer does everything possible to ensure its recruitment efforts are proper, it still may receive 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. For sample cease and desist letters, see Standard Documents, Restrictive Covenant Cease and Desist Letter to Former Employee ([W-002-5174](#)) and Restrictive Covenant Cease and Desist Letter to New Employer ([W-002-5171](#)).

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 former 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 can assure the former 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 employer claims it has an enforceable restriction that the hiring employer believes to be unenforceable, the new employer 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 it wants 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 former 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 and 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 ([9-520-5638](#)) and Continuing Obligations Letter to Departing Employee ([5-520-0096](#)).

## AVOID SUBSEQUENT EVIDENCE SPOILIATION CLAIMS

Cease and desist letters frequently trigger a duty to preserve pertinent evidence, and often contain explicit preservation instructions. Where litigation is reasonably foreseeable, the duty may be triggered even before receiving the letter. For example, if an employer independently discovers that a new employee may have improperly taken a former 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 former employer sends a cease and desist letter or even becomes aware of the potential misappropriation.

After receiving a cease and desist letter, the new employer should issue a document preservation notice to all individuals who may have relevant documents or information, as well as to the appropriate information technology (IT) personnel to make certain that relevant emails and other electronic communications are preserved (see Practice Note, E-Discovery in Employment Cases: Practical Considerations for Employers: Employer's Document Preservation Considerations ([W-002-6980](#))). For a sample letter to employees, see Standard Document, Litigation Hold Notice ([0-501-1545](#)). For a hold notice to opposing or third parties and other litigation hold resources, see Litigation Hold Toolkit ([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 those hard drives. In such circumstances, the cost of creating such a forensic image should be weighed against the possibility of evidence spoliation in the absence of such an image.

## CONSIDER PRE-LITIGATION SETTLEMENT OPTIONS

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

- The return or destruction of documents or other information improperly taken.
- Representations and warranties from the hiring employer to the former employer involving topics including:
  - the employee's duties and responsibilities;
  - the hiring employer's lack of knowledge regarding any inappropriate activity by the employee; and
  - the 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. This agreement can be a reaffirmation of existing non-solicitation contractual obligations, or serve as a means for remedying an alleged theft of trade secrets or confidential information.

## Avoid Blanket No Hire Agreements

As an alternative to litigating individual restrictive covenant disputes, employers sometimes enter into "no hire" or "no poaching" agreements, where for a limited time, the new employer agrees not to hire certain specific employees from the former employer. However, these agreements may violate federal antitrust laws. On October 20, 2016, the Department of Justice (DOJ) and the Federal Trade Commission (FTC) issued its Antitrust Guidance for Human Resources (HR) Professionals Employers indicating their intent to

focus on antitrust violations in the employment context. Employers that enter into blanket no hire or no poaching agreements therefore may risk serious civil and criminal penalties (see Practice Note, Non-Solicitation Agreements ([3-600-9465](#))).

For more information on the Guidance, see Legal Update, FTC and DOJ Issue Antitrust Compliance Guidelines for HR Professionals ([W-004-1019](#)) and Article, Expert Q&A on the DOJ and FTC Antitrust Guidance for HR Professionals and Its Impact on Employers ([W-004-8025](#)).

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