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Phone: +1 646 783 7100 | Fax: +1 646 783 7161 | customerservice@law360.com

10 Steps To Take When Hiring From A Competitor

Law360, New York (February 01, 2013, 12:28 PM ET) -- The beginning of the year is a time of high employee mobility, and with that mobility comes a risk of litigation between the hiring employer and the former employer — particularly when the two companies are direct competitors.

When a lawyer is asked to weigh in on a potential hire and to advise regarding the litigation risk, the legal analysis is just one part of the puzzle; the human element is equally important. Not infrequently, raw human emotion — anger, feelings of betrayal, and/or pure competitive fire — serves as the triggering straw for litigation in such situations.

Fortunately, there are practical steps that employers can take to minimize the risk of such litigation. The following are ten suggested ones; some to address the legal elements, others the human ones.

1. Gather All Necessary Information before Making an Offer

As a threshold matter, as part of the interviewing process, the hiring employer needs to gather all pertinent information regarding any post-employment restrictive covenants or confidentiality obligations before making an offer. Questions which should be asked include not only whether the candidate has a post-employment restrictive covenant with her current employer but also whether she has any continuing restrictions from prior employers.

Additionally, because post-employment restrictive covenants can be buried in various nooks and crannies of an employment relationship, the candidate should be specifically asked not only whether she has an employment agreement with such a restriction but also whether any other document contains such a restriction (e.g., an offer letter, separation agreement, confidentiality agreement, incentive compensation plan or purchase and sale agreement).

2. If the Candidate Has a Restrictive Covenant, Determine Its Enforceability

If the candidate has a post-employment restrictive covenant, it should be reviewed by an expert to determine its likely enforceability. Questions to consider include:

- Which state's law will govern enforceability?
- Is the restriction narrowly tailored to meet the employer's legitimate business interests?
- Is it narrowly tailored in terms of its activity restrictions and geographic and temporal limitations?
- Was there sufficient or valid consideration to support the restriction?

- Does the restriction place an undue burden on the individual?

- Have there been changes in circumstances since execution (e.g., an acquisition of a "mom-and-pop" shop by a giant multinational corporation, a material change in duties or responsibilities or a geographic transfer) that might render the restriction inequitable and therefore unenforceable?

- Does the new employer satisfy the definition of a "competitor" in the restrictive covenant?

- Could the candidate adhere to the restrictive covenant and still perform the essential duties of the new position?

Equally importantly, when assessing the likelihood of litigation, the hiring employer should put itself in the former employer's shoes: Is the value of this person's restrictive covenant worth the expenditure of legal fees and the accompanying disruption that litigation would necessitate?

3. Potential Protective Steps When the Candidate Has a Restrictive Covenant

If a candidate has an enforceable post-employment restrictive covenant, determine if the new position would require a violation of the restrictions. Additionally, potential protective steps that a hiring employer can take include: restructuring the position to avoid issues under the candidate's restrictive covenant; hiring the candidate but deferring the start date or putting him or her "on the bench" until after the restriction has run; making a courtesy phone call to the former employer to provide appropriate assurances; or having the candidate request a waiver of the written restrictions.

In an appropriate circumstance, an employee with a restrictive covenant may want to seek a declaratory judgment from a court that the covenant is unenforceable.

4. The Offer Letter as "Defense Exhibit No. 1"

Whenever there is a realistic risk of litigation from a former employer, it is prudent to sculpt an offer letter with the notion that it will be "defense exhibit no. 1" in the event of litigation. Such a "defensive" offer letter (which would be signed by the candidate) could include a representation by the candidate that he or she has reviewed the duties of the position at issue and that no contractual restriction would prevent him or her performance of them.

Alternatively, it could include representations by the candidate that he or she will not perform certain activities (e.g., soliciting certain clients or former co-workers) until any contractual restrictions on such activity have expired.

Regarding trade secrets and confidential information, the offer letter can also memorialize directives given to the candidate not to bring or share any trade secrets or confidential information from a prior employer and to return to his or her prior employer all of its property at termination.

5. Timing Matters

Multiple hires from the same rival within a short period of time may raise more issues than a solo hire. Similarly, if there are contractual gray areas (e.g., clients which may or may not be protected), instruct the new hire to stay away from them until the emotion over the move has subsided. Feelings will be most raw in the days and weeks after the move, and confidential information and legitimate business interests will decrease over time.

Moreover, the less temporal proximity between the new hire's move and, for example, the former employer's loss of a customer to the new employer, the weaker will be the circumstantial evidence of causation between the employee's move and the customer's move.

6. "Loose Lips Sink Ships"

New hires should be instructed to "kill 'em with kindness" on the way out the door: Don't "rub salt" on any wounds; don't criticize former colleagues or managers; and don't criticize the financial performance or prospects of the former employer in speaking with co-workers or customers of the former employer. Any such comments can be grist for a defamation or tortious interference claim.

7. Advise the Candidate to Be a "Good Leaver"

New hires should also be instructed to be a "good leaver" — meaning that they should leave everything (paper or electronic) behind, even if the former employer does not specifically instruct them to do so on the way out the door, and they should not inform co-workers or customers of their intent to resign until they have done so.

8. Loyalty Until the End

An employee's fiduciary duty of loyalty continues through the last moment that she is on the payroll. Many a lawsuit has arisen from client or co-worker solicitations that would have been okay just a few days or hours later.

Accordingly, new hires should be instructed not to engage in any such solicitations or to participate in any meetings or business for their new employer until after the effective date of their resignation.

9. Responding to "Cease-and-Desist" Letters

If a hiring employer receives a "cease-and-desist" letter from a former employer, in most instances, it should respond, and the appropriate person to do so is someone in an equivalent position to the signer of the letter (i.e., if a human resources executive or in-house lawyer signed the cease-and-desist letter, then a human resources executive or in-house lawyer should sign the response).

The notion here is to avoid escalating the dispute or treating the former employer's concerns disrespectfully. Generally, it is not advisable to have an outside attorney respond unless an outside lawyer signed the cease-and-desist letter. The reason for this is that publicly involving an outside lawyer may be seen as an escalation.

The tone of the response should be reassuring, and the response should indicate that the new employer takes the concerns of the old seriously but that: the concerns have no known basis; the new employer has investigated the allegations (especially if any trade secret misappropriation is alleged) and found no basis for them (and if that is not true, corrective action should be promptly taken); and the new employer has created an information or client wall to address the former employer's legitimate concerns (if appropriate and if true).

Last but not least, the response letter should state that if all of the former employer's concerns have not been addressed, the former employer should say so.

A key purpose of the response is to keep the lines of communication open and to avoid an unnecessary escalation to litigation. Simply put, aggression will beget aggression. Should litigation ensue, the letters will be key exhibits and should be written with that in mind.

10. Possible Settlement Concepts

If the former employer has legitimate concerns, counsel should think creatively to sculpt an acceptable resolution. These can include: appropriate representations and warranties; the return of purloined documents or information; creation of a hiring protocol (e.g., to handle employment inquiries from former colleagues received by the new hire); an agreement that for a designated period, the new hire will not solicit certain customers (who are typically listed by name) or former colleagues; a "no-hire" agreement, pursuant to which the new employer would agree for a limited period of time not to hire certain employees from the former employer; or joint venture or revenue sharing settlements for projects or clients who move.

Conclusion

Although not a sure-fire guarantee, taken together, these practical steps will substantially reduce the risk of litigation when hiring from a competitor.

--By Peter A. Steinmeyer, Epstein Becker & Green PC

Peter Steinmeyer is the managing shareholder of Epstein Becker & Green's Chicago office, the co-chair of the firm's noncompetes, unfair competition and trade secrets practice group and a co-author of the blog www.tradesecretsnoncompetelaw.com.

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