ISSUE 22 - OCTOBER 2012

WL UPDATE

WHITTEN & LUBLIN
Employment Lawyers

EMPLOYEES AND CONFIDENTIAL BUSINESS INFORMATION

Contributed by John Simpson

Recent years have seen a dramatic increase in trade secret theft and misappropriation of confidential business information throughout North America. This increase has been attributed to increased employee mobility, downsizing and layoffs. Departing employees may walk away with proprietary information on termination or misappropriate it in anticipation of being terminated to enhance their value to other prospective employers or to compete with their former employer. Whatever the reason, it is more important than ever for employers to identify and protect their confidential business information ("CBI" for short).

CBI doesn't have to be "secret". Very generally, information can be CBI if it isn't generally known outside of the company, if time and effort would be needed to find it elsewhere and if it has commercial value. CBI includes, or can include, information relating to internal operating procedures, marketing strategies, supplier and customer lists and other critical information that a company, through its employees, may acquire over time, through considerable effort and trial and error, that isn't generally known outside of the company and that can give an employer an edge over the competition. Such information can be among an employer's most valuable assets. But if it isn't identified and adequately protected, its value will depreciate quickly or, worse, it will simply walk out the door.

The first and most obvious step in protecting CBI opposite employees is by including restrictive covenants in employment agreements. Carefully worded confidentiality or non-disclosure covenants can, in some cases, be nearly as effective as non-compete covenants without being as hard to enforce. "Confidential information" can be defined broadly, but simply calling information "confidential" will not make it so. To be most effective, a confidentiality or non-disclosure covenant should be tailored to the position. The more context and detail there is, the less likely it is to be breached, at least unwittingly. And, in the event of a dispute, courts are far more likely to find that information is confidential if the information, the manner in which it's used and the places or persons where it resides are specifically contemplated in the agreement and accompanying materials. Schedules are a good idea, as are manuals or binders that are marked "Confidential".

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Whitten & Lublin is a team of legal experts who provide practical advice and advocacy for workplace issues.

UPCOMING EVENTS

OCTOBER 24TH

Daniel Chodos will be speaking at the Canadian Payroll Association about the importance of distinguishing between employees and independent contractors for payroll purposes.

OCTOBER 30TH

Daniel Lublin will be speaking at the Law Society of Upper Canada about benefits and potential risks of social media in litigation.

NOVEMBER 9TH

David Whitten will be presenting at the CGA's Annual Conference.

NOVEMBER 26TH

David Whitten will conduct the program at the HRPA on the topic of Executive Employment Agreements, where he will discuss how to structure the relationship, the various aspects of effective executive compensation, executive severance packages and much more.

DECEMBER 7TH

David Whitten will be speaking about taxation and law at an upcoming seminar "Employment Law 101" organized by the Certified General Accountants of Ontario.

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Timing is key. If confidentiality is not adequately communicated to an employee before or at the time of disclosure, it will be difficult or impossible to restrict the employee's use of the information after the fact or to sue them for breaching any duty of confidence. Not only must CBI be identified as confidential in a timely manner, but an employer must also treat it as confidential at all times. If an employer fails to do so, by implementing and enforcing policies for how its CBI is to be handled, it may lose its proprietary rights in the information.

Departing employees should be reminded of their duties in relation to the employer's CBI in exit interviews or termination letters. This will, again, minimize the risk of breach and, in the event of a breach, it will help the employer make the case to the court that the information was confidential, was communicated in confidence, was treated as confidential at all times and that a duty of confidence was breached.

In short, employers should think about identifying and protecting their CBI at all stages of the employment process - from hiring through termination. Depending on the nature of the job, including pro forma confidentiality language in an employment agreement may not be enough. Once it is identified, CBI should only be disclosed on a need to know basis to those with a need to know. Information disclosed by the President at an industry conference is free for any employee to take to their next job, no matter what an agreement might say.

John Simpson is an intellectual property lawyer and the Principal of Shift Law

LAW BLOG

Buying a business with long term employees

Will hiring contractors save your company money?

Where is the line between being a contractor versus an employee?

Read more at
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