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Protecting Against Unfair Competition from your Employees

No one wants to plan for a divorce when planning their wedding, nor does one want to think about termination of employment at the hiring stage. Prudent employers, however, should ensure there is a detailed employment agreement that protects their interests at the time of and continuing beyond the date such employment ends.

All employees have an implied duty of fidelity to their employer during the term of employment. As such, an employee is prohibited from competing with his or her employer, or disclosing information that is confidential to the employer, while still employed.

However, in the absence of clear contractual language, it may be less obvious as to what, if any, restrictions will apply to an employee following termination of the employment relationship.

The nature and extent of the obligations of a departing employee will depend largely on the position and role the employee served. Generally speaking, more onerous restrictions will apply to fiduciary employees; namely, employees in a senior position, or other key employees that were engaged in a position of trust, or having intimate knowledge of customers and their preferences. The following are generally regarded to be the characteristics of a fiduciary employee:

1. the fiduciary has scope for the exercise of some discretion or power;
2. the fiduciary can unilaterally exercise that power or discretion so as to affect the beneficiary's legal or practical interests; and
3. the beneficiary is peculiarly vulnerable to or at the mercy of the fiduciary holding the discretion or power.

Throughout the period of employment, and continuing for a reasonable period thereafter, fiduciary employees must avoid conflicts of interest, must act only in the best interests of the employer, and must not profit as a result of their position of trust.

Even those employees who are not fiduciaries are restricted to some degree in their activities beyond the term of employment. For one, all former employees are precluded from using the employer's confidential information. They are also prevented from making unfair use of other information that was received during the course of their employment.

There may, however, be considerable debate as to what constitutes an employer's "confidential information" and what is deemed "unfair use" of other information which the employee acquired during his or her employment.

Such debate can be minimized, however, by incorporating such terms into a written employment agreement. The agreement should clearly define what comprises the employer's confidential information, and in some cases, it may also be appropriate to



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include a reasonable, and time and geographically-limited, non-competition and non-solicitation agreement, to prevent unfair competition by a former employee.

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