COUNSELOR'S CORNER

Securing Employee Loyalty

Legal Limits and Best Practices

Jonathan R. Breuning, Husch Blackwell LLP

At 4:30 Friday afternoon one of your top people resigns and says he is joining a competitor and taking many of "his" customers with him. At 9:00 Monday morning the former employee and your competitor receive "cease and desist" letters from your law firm. You and your competitor both feel wronged and are angry. Your lawyers are having fun and you're not.

BANKING IS A RELATIONSHIP business, and your customer relationships are entrusted to your key employees. How do you protect yourself? Noncompete agreements have limited power under Nebraska law, but there is more to it than that. Whichever side you are on, there are limits to what you can and cannot do legally, but you can still protect yourself and your business if you are well prepared. This article will summarize key legal issues affecting the competitive loss or gain of an employee, and identify some best practices to protect your position on both sides of the fence.

Key Legal Issues

Most of the legal issues involved in this scenario are determined by state law, and the law varies widely from state to state. As a general rule, Nebraska public policy favors fair and free competition in the marketplace for both customers and employees. Here is a summary of the key Nebraska legal principles defining "fair" and "free" competition in this setting:

1. **Noncompete and Nonsolicitation Agreements.** Nebraska law permits the enforcement of employment-based restrictive covenants only when the covenant is reasonable in the sense that it is (1) not injurious to the public, (2) not greater than necessary to protect the employer's legitimate interests, and (3) not unduly harsh and oppressive on the employee. Unlike many other states, the Nebraska courts have consistently applied this test quite narrowly to mean that such a covenant may be valid only if it restricts the former employee from working for or soliciting the former employer's clients *with whom that employee actually did business and had personal contact*. In this sense, employment-based covenants in Nebraska are essentially limited to covenants not to solicit, rather than covenants not to compete; no covenant under Nebraska law can entirely stop an employee from going to work for a direct competitor. Also, if the covenant purports to go any further it is entirely unenforceable—the Nebraska courts will not revise or partially enforce the covenant; poorly written or overly broad noncompete agreements are completely unenforceable.
2. **Trade Secrets and Confidential Information.** A deep discussion of trade secrets is beyond the scope of this article, but two key thoughts should be kept in mind. First, Nebraska has a Trade Secrets Act that prohibits the improper use or disclosure of a trade secret as defined by statute.[1] Protection is limited to information meeting the statutory definition and, even then, only if there is a strong internal program to maintain its secrecy. This brings us to the second thought, which is that an employer can, through a

well-written employment agreement, broaden the scope of what information can and cannot be used or taken by the employee.

3. **Duties of Loyalty and Fiduciary Duties.** With or without an agreement, every employee has some duty of loyalty and should not actively work against his or her employer's interests by diverting the employer's customers to a competitor (such as the one he plans to work for next) or using the employer's resources to directly compete with the employer. Not all employees understand this, and a well-written policy or agreement can help explain and expand this duty. Second and often more important, corporate "officers," which may extend well down into the management ranks depending on facts, have a fiduciary duty to their employer, which means that so long as they are employed, they must affirmatively act in the employer's best interest. Many corporate managers do not understand this concept, which can lead to serious mistakes during the process of seeking new employment—mistakes such as working on competitive business plans with the new employer, or talking to other employees about joining them. Written agreements can help, but manager training can sometimes do more. As a hiring employer, training of your recruiters and hiring managers is critical if they are to avoid a tortious interference lawsuit.
4. **Tortious Interference With Business Relationships.** Nebraska law recognizes a cause of action for tortious interference with a business relationship where the plaintiff can show (1) the existence of a valid business relationship or expectancy (such as an existing employment relationship or customer relationship), (2) knowledge by the interferer of the relationship or expectancy (which most competing employers would have), (3) an unjustified intentional act of interference (this is often the key issue in a lawsuit), (4) proof that the interference caused harm, and (5) damage. Many times, employers who sue former employees also sue the hiring employer for tortious interference. This issue can become especially problematic for employers trying to hire more than one employee from the same competitor at the same time—especially entire teams—for at least two reasons. First, it becomes almost impossible to know what the co-recruited employees are saying to each other or what information they are sending to each other during the recruiting and transition process. Second, the very act of hiring an entire team will give the appearance of trying to "steal" the book of business the team was handling.

■ **Employee Loyalty**

— continued on page 14

■ Employee Loyalty — continued

5. **Computer Fraud and Abuse.** Federal law is not completely out of the picture in this setting; a key federal statute is the Computer Fraud and Abuse Act (CFAA). Among its many prohibitions, the CFAA makes it illegal to cause more than $5,000 in "damage or loss" by intentionally accessing a "protected" computer without authorization. A "protected" computer includes any computer that is used in or affects interstate commerce (who has computers anymore which do not meet this test?). "Damage or loss" is so broadly defined that the $5,000 threshold can be easily met. The CFAA can be enforced through civil litigation as well as criminal prosecution by the federal government. Civil enforcement does not require a written noncompete agreement, a written confidentiality agreement, that the information taken was a trade secret, or even proof of intentional theft (just unauthorized "access" to the employer's computer systems is a potential violation). As a result, the law has become a formidable weapon for employers who believe their employees have taken electronic information to which they are not entitled (and conversely, a formidable threat for hiring employers who do not make sure the new employee refrains from doing so).

Best Practices

Every employer can take steps to assure that its employees (past, present, and future) conduct themselves properly when it comes to proprietary information, trade secrets, customer relationships, and other goodwill. Following are a few basic "best practices":

- **Recruiting and Hiring**
  - » Develop and document an internal model to be followed by all recruiters, HR staff, interviewers, and hiring managers, which prohibits any requests for, receipt of, or discussion of the candidate's current employer's trade secrets or other confidential information. Train all personnel involved in the hiring process on this model.
  - » Establish with all new hires a written understanding of your ground rules for competition. This should include rules on what information and documents the new employee can and cannot bring to your organization, and the employee's written agreement not to access the prior employer's computer systems beyond his or her authorization or to take company data. This document can be a good place to set the tone for doing business the right way, with ethics and integrity.
  - » Be very careful about recruiting and hiring multiple employees from the same competitor at the same time. These situations can be extremely difficult to control and can easily lead to a lawsuit for tortious interference.

- **Current Employees**
  - » Be sure you have a comprehensive and documented program to maintain the secrecy of your trade secrets.
  - » Consider establishing with every employee a written

agreement to protect your company's proprietary rights. For all employees, it can address basic duties of loyalty such as not competing with you during employment and protecting confidential information (including but not limited to statutory trade secrets). For some employees (such as executives, managers, and sales people), this may include a post-employment nonsolicitation agreement which meets the requirements of Nebraska law. You will want to address with legal counsel the issue of consideration (what is the employee getting in return for the agreement, to support its validity) and how to tailor the agreement for different groups of employees.

» Train your management team on their fiduciary duties to the organization—this may head off some innocent wrongful conduct if and when one of them is tempted by an offer from a competitor.

- **Employee Separation**
  - » Develop standard letters to remind departing employees not to use or disclose confidential information, and to honor any agreement the employee signed.
  - » Be proactive in managing an employee's access to your computer systems and other resources once you know the employee is leaving.
  - » Resist the temptation to withhold final pay or benefits from a departing employee; the law generally punishes this behavior and this is rarely a winning tactic. However, if for any reason there are discretionary benefits or severance pay under consideration, be sure to discuss those with legal counsel before making payment.

The best way for any employer to win the war for talent, maximize employee loyalty, and minimize losses arising from employee movement is to create a workplace culture that attracts and retains the best and brightest, and that models and rewards ethical and legal business conduct. But even the best employees in the best workplaces will benefit from clearly defined expectations and good training.[2]

(ENDNOTES)

[1] In essence, this is information that derives independent economic value, actual or potential, from not being known to, and not being ascertainable by proper means by, other persons who can obtain economic value from its disclosure or use, and is the subject of efforts that are reasonable under the circumstances to maintain its secrecy.

[2] Please note that this article is intended to address general employment issues and banks should be aware that other issues relating to or arising from employment with a bank or the bank's confidential information may be covered by state and federal banking law and regulations by such bank's primary regulator. In particular, federal banking statutes may affect the general enforceability of employee agreements under certain conditions. Banks are cautioned to consult with their legal advisors prior to terminating any employee with a non-compete agreement in place.

For more information, contact Jon Breuning at Husch Blackwell LLP at (402) 964-5050 or jon.breuning@huschblackwell.com. Breuning has more than 30 years of experience representing public and private businesses.