ASK THE EXPERT: Proactively Protect Confidential Information

If you are an employer, then protecting the confidentiality of your proprietary information – whether that information is stored in written materials, electronic form or memorized - can be critical to the success of your business.

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Benjamin Franklin once said, “Three can keep a secret if two are dead.” If you are an employer, then protecting the confidentiality of your proprietary information – whether that information is stored in written materials, electronic form or memorized - can be critical to the success of your business. In the employment context, there are several steps employers can take to guard against unauthorized disclosure of their intellectual capital and unfair competitive business practices by existing or former employees.

During an employee's employment, and in the absence of a written agreement of nondisclosure, he or she generally has an implied duty to treat the employer's information with confidence which gives rise to an employer's rights and possible remedies. In addition, the employer may be able to enforce its rights against misuse under one of a few legal theories.

If the information was acquired by the employee during a confidential relationship with the employer, then it may be protectable even if a written agreement has not been signed. In addition, if the information qualifies as confidential information (i.e., it is only known to a select few employees and not generally within the company or industry and the information was shared in confidence or in a confidential relationship), then it may be protectable as well. New Hampshire courts have determined that a confidential relationship exists between two persons whenever one has gained the confidence of the other and purports to act or advise with the other's interest in mind. Again, without a written agreement in place the employer risks having a court decide whether the confidential relationship existed and whether the information itself is, in fact, confidential.

If the employer's information qualifies as a “trade secret,” then it may be safeguarded from unauthorized disclosure. A trade secret is defined broadly under the Uniform Trade Secrets Act as information that is valuable, is not generally known or generally ascertainable by proper means and is the subject of reasonable efforts to maintain its secrecy. Determining the types of information that fall within this definition can be tricky and an employer may be at the mercy of having a court decide whether its valuable business information falls within that statutory definition. The New Hampshire Supreme Court has taken a restrictive view of this approach and specifically rejected an employer's attempts to rely on this theory and in its final opinion directed employers to protect their information contractually.

Given the uncertainty of the outcome through common law claims against former employees, the best way for employers to protect their valuable information is to be proactive about having employees sign confidentiality agreements as a condition of employment. Another step is to mark all classified information “confidential” and to advise employees upon disclosure of sensitive information of its proprietary nature. A nondisclosure agreement should contain provisions that, among other things, state clearly the employer's ownership of the information and that the information is protected both during the term of employment and after the employee has been hired to work for someone else.

In addition to nondisclosure agreements, employers can enter into non-competition agreements with employees which place restrictions on an employee's ability to compete against its employer or former employer, directly or indirectly, for a certain period of time and within a particular geographic range. Over the years, New Hampshire courts have more narrowly construed these agreements and limited enforcement by increasingly showing less favor to agreements that are broadly worded. As a result, employers must ensure that their agreements are drafted to meet the following standards:

The restriction is no greater than necessary to protect the legitimate business interests of the employer; The restriction does not impose an undue hardship on the employee; and The restriction is not injuries to the public interest.

If the agreement fails to meet one of these prongs, then it will be rendered unenforceable. In addressing these criteria employers must carefully tailor their documents to their specific circumstances and craft them so they clearly and unambiguously detail each and every restriction sought to be imposed upon employees in a reasonable manner. Employers should regularly update these agreements to ensure they address the employer's and the employee's current situation.

I look forward to responding to your questions and comments.

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