



Post-Employment Restrictions

Protecting your greatest assets — human capital and intellectual property



It's not news to anyone that employee mobility is the norm in the workplace. Most employees will change employers multiple times during their working lives. Employees, strategic partners and other insiders may be on your team today, but mobile careers and shifting loyalties can change the situation at any time.

Another significant trend is the decrease in manufacturing and the increase in service jobs. This is true not only in the United States but around the world. The trend does not result solely from transfer of jobs from one country to another, but from the increasing automation and other advances in manufacturing and distribution techniques. In this environment, the business assets with the greatest value are human capital and intellectual prop-

erty. The power of information lies in the hands of those who possess it, regardless of their legal right to use it.

The focus of this article is protection of confidential information; this is the key to enforceable post-employment restrictions. In some states, you can impose noncompetition obligations, but these are usually unenforceable in California. In other words, you have to know your trade secrets.

Trade Secrets Defined

Trade secrets have long been recognized in the United States. They acquired statutory status in California in 1984, with the adoption of the Uniform Trade Secrets Act. The act established the following three components. A trade secret consists of:

1. Information;
2. That has value from not being generally known; and,
3. Is the subject of reasonable protection efforts.

The first component is easy to satisfy. The question of value, however, reveals subtleties; information can be valuable even though it is known to everyone. Consider the telephone directory, or a list of product specifications in a company's catalog. These are full of valuable information, but the information is known to anyone who possesses the book. With a trade secret, the information is known only to a select few — usually the sales or technical staff of the company, and perhaps a few customers who are directly benefited by the information. This much is common sense: a trade secret is, first and foremost, a secret. The group that emphatically must not know the information is the company's competitors.

Finally, the owner of the secret must make reasonable efforts to maintain the secret. What constitutes reasonable efforts varies according to the circumstances. I will suggest some steps that should be on everyone's to-do list in this area.

The most common type of trade secret in the reported cases is customer information. The reason probably is that not every company has a secret formula or a proprietary process, but every company has customers. Customer information is the product of time and effort spent identifying prospects, weeding out the unlikely targets, and developing relationships with the chosen few who will buy what you're selling.

Customer information consists of all the details that help a company maintain a good relationship with clientele:

- Customer names and addresses;
- Contact persons;
- Nonpublic details of bids and quotes;
- Order volumes; and,
- Billing rates, mark-up rates, special financial considerations enjoyed by clients.

A fair number of cases also deal with trade secrets in the form of technical information, including procedures for manufacturing or analysis, software code that is sold only in compiled (machine readable) format, chemicals and materials used in manufacturing process, products in development, and customer feedback about weaknesses in a company's products, which can lead to improvements or development of new products.

A few simple questions help identify information that might be a trade secret: Would you comfortably tell one of your competitors the information? Is this the sort of information that friendly rivals discuss with each other? Is this the kind of information that you know about your competitors? If the answers are no, then the information is a candidate for trade secret status.

Post-employment Restrictions

Employers have tried for many years to use various employment contracts to squelch post-employment competition. These agreements generally have aimed at two vulnerable areas: protecting the company's customers from being poached; and protecting the company's employees from being raided. Agreements in this area express many variations. Some prohibit the departing employee from soliciting customers for a defined period of years. A more restrictive approach prohibits the departing employee from soliciting **or accepting** business from the company's customers for a year or two. Still more restrictive is the agreement that prohibits soliciting or accepting business not only from customers but from the company's prospective customers as well.

Restrictions on raiding of employees follow the same general pattern. The agreement that prohibits soliciting employees does not bar the defection of the employee who initiates the contact himself or herself. But this type of hiring would violate an agreement that prohibits soliciting **or employing** former coworkers.

All of these fine-sounding protections came crashing to the ground in two California cases decided in 2003 and 2006. These cases rendered most contractual post-employment restrictions unenforceable. The current state of the law is that post-employment restrictions are enforceable only to the extent necessary to protect trade secrets.


So why even bother with a contract? The main reason is that, in a trade secrets case, you still have to prove the third element of the trade secrets equation: reasonable steps. A contract talking about trade secrets, and trying to set out some ground rules for post-employment conduct, counts as an important attempt to put the employee on notice of these issues.

So take the following reasonable steps now:

- Make sure your employee handbook contains appropriate language about protection of trade secrets.
- Use employment agreements that place restrictions on competitive practices, and be prepared to update them as the law changes.
- Talk about trade secret protection at staff meetings and employee training sessions, and consider designating a Confidential Information Compliance Officer with responsibility for keeping this issue on the agenda.
- Before giving vendors and strategic partners access to your information, require them to sign a non-disclosure agreement.
- Don't neglect non-legal aspects, such as a security audit of your computer networks, and appropriate monitoring software and devices to detect the unauthorized downloading of data.

The proactive approach might not prevent misappropriation from happening. But it will make you better prepared to deal with it when it does happen. **HR**

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