Breaking Up Is Hard to Do: Dealing With Departing Employees

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When a key employee resigns, an employer may be relieved to escape the costs of often-litigated and sometimes significant termination or severance pay. In some situations, however, a resigning employee can end up costing a company even more than if they'd been terminated. If the employment relationship has soured, a disgruntled employee can do considerable damage to a company's resources and reputation.

Employers should be aware of several legal considerations and developing areas of law that may provide relief when key employees leave:

- **Notice of Resignation**. Leaving on short notice can sometimes render an employee liable to the employer for damages that arise as a result — such as the costs of recruiting or relocating a replacement. The appropriate length of an employee's reasonable notice of resignation will depend on factors such as the nature of the job, the seniority of the role, and the difficulty the employer will face in finding a replacement. As soon as an employee tells you they're leaving, review their employment agreement to confirm they have provided the required notice.
- **Company Property and Confidential Information**. Regardless of whether an employee has a written confidentiality agreement, all employees have a duty to protect the confidential information of their employers, both during their employment and after it ends. Employees should be asked to promptly return all company property and information by their last day — including physical property, such as laptops and phones, as well as non-tangible property, such as documents and client information — and to confirm that they haven't retained any copies of company documents or forwarded anything to their personal email addresses.
- **Restrictive Covenants**. An employee generally does not have freestanding or common law obligations to refrain from soliciting a former employer's clients or employees, or from competing with the former employer's business. However, where an employment agreement contains an enforceable non-solicit or non-compete clause (which is a complex and evolving area of law), these should be reviewed and considered if a former employee is contacting clients or other employees. Further, even without an enforceable restrictive covenant in a contract, a departing employee (and potentially his/her new employer) could be liable for the tort of inducing breach of contract. The latter is proven when:

    - there was a valid and enforceable contract;
    - the departing employee knew or ought to have known about the contract;
    - the departing employee intended to and did cause a breach of the contract; and,
    - the old company suffered damages as a result.
- **Duty of Good Faith and Loyalty.** All employees owe their employers a duty of good faith and loyalty, or fidelity. Generally, this means that an employee must carry out his employment contract obligations in good faith. An employee's conduct immediately *before* departure — for instance, spending working time on new endeavours, or co-ordinating the exit of other employees — may therefore attract liability. After an employee provides notice of resignation, be vigilant to ensure they have not been acting out of line.
- **Fiduciary Duty**. Employees in top management and senior positions owe additional duties to their employers, both during and after the employment relationship. A fiduciary relationship may exist where the employee is in a position of trust, has intimate knowledge of strategic information, and has discretion to exercise power in a way that affects the employer's interests. A fiduciary's duties include: assisting with transition; refraining from taking advantage of opportunities developed from the prior employment; refraining from soliciting clients, business partners, or other employees for a reasonable period of time; and continuing to act in good faith with the former employer. If a C-level employee or an executive resigns, consider whether they are continuing to act in the best interests of your organization.

In addition to the legal considerations above, employers should of course take practical HR and operational steps, such as conducting an exit interview, cutting off corporate email access, issuing tax forms and an ROE, and updating website information as needed.

Good employee management and positive relationship-building will help reduce the risk of the above misbehaviour. To further mitigate risk, consider having your employment contracts regularly reviewed to ensure they contain appropriate protections for your organization.

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