

# Eight steps to protect your clients and competitive intelligence during key employee departures

## Non-Compete & Trade Secrets Litigation



**Maria Kreiter**  
414.287.9466  
[mkreiter@gklaw.com](mailto:mkreiter@gklaw.com)



**Maggie Cook**  
414.287.9569  
[mcook@gklaw.com](mailto:mcook@gklaw.com)

## Labor & Employment



**Margaret Kurlinski**  
414.287.9539  
[mkurlinski@gklaw.com](mailto:mkurlinski@gklaw.com)



**Rebeca López**  
414.287.9634  
[rlopez@gklaw.com](mailto:rlopez@gklaw.com)

## Intellectual Property



**Jennifer Gregor**  
608.284.2629  
[jgregor@gklaw.com](mailto:jgregor@gklaw.com)

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When a key employee resigns, immediate, meaningful enforcement of non-solicit, non-compete and confidentiality agreements is vital. Collaborating with legal counsel early in the enforcement process can save time and money. A proactive enforcement plan can prevent the loss of client relationships, unfair competition and disclosure of competitive intelligence. Time is of the essence, including steps an employer takes day one.

These are the immediate steps an employer facing imminent risk should take:

### 1. Demand adherence to restrictive covenants in writing

An employer should provide key former employees with a written demand for adherence to applicable restrictive covenants. This demand can take several different forms depending on the imminence of the risk, and it may be advantageous for counsel to make the demand immediately. Alternatively, counsel can advise in the background while you communicate directly with the employee. An immediate written demand has several benefits:

- It prevents the employee from later claiming he or she was unaware of the covenants or did not think the employer was serious about enforcement.
- It gives the employer the chance to articulate activity that violates the covenants. It may be that the employee is receiving poor advice from a new employer, or independently has an erroneous belief that contemplated plans will not violate the covenants. Articulating actions that will trigger enforcement proceedings may deter the employee's violation, or at least plant a seed of doubt in an otherwise emboldened employee.
- If enforcement proceedings are ultimately necessary, a letter memorializing the employer's position at the outset can form the basis for a court to conclude the employee's subsequent violations were knowing and intentional.

### 2. Request an exit interview

A key employee planning to violate restrictive covenants may not be willing to attend an exit interview. However, some might. If an employee agrees to attend, counsel can assist in preparing talking points and questions that serve the following goals:

- Probe about the employee's new employer, reasons for leaving and plans to compete. An admission that the employee plans to violate a restrictive covenant is compelling evidence in court and can assist an employer that needs to seek a restraining order to prevent unfair competition. If an employee lies about plans to violate a restrictive covenant, the lie itself can bolster the employer's argument that court intervention is necessary.
- An exit interview is an optimal time to deliver the written demand for compliance discussed above, as it may trigger dialogue about the restrictive covenants and the employer's expectations.

- Even if the employee declines the exit interview, or does not respond, those actions are additional facts that may bolster the employer's narrative and inform how the employer proceeds.

### **3. Halt the destruction of information and property**

The preservation of information and property is critical. On day one, all employer property used by, or in the possession of, the departing employee should be retained, and care should be taken not to alter valuable electronic data. In particular, employee laptops and other electronic equipment should be not scrubbed or repurposed for other employees until a preservation plan has been developed with counsel.

### **4. Prepare remaining employees to ask about violations**

Client facing employees are often the first to know if a former employee violates a restrictive covenant. Those same employees are also the most likely to be potential witnesses for the employer if legal enforcement proceedings are required. As such, it is best to equip those employees with talking points that support key legal theories and an action plan for conveying information to company leadership.

### **5. Protect intellectual property and intangible assets**

Consider any involvement the transitioning employee has with intellectual property and other intangible assets. If signatures or documentation are required – for example, for pending patent applications or other intellectual property filings - that paperwork will be much easier to have completed by a departing employee at or near the time of exit. If the employee has access to customer lists, software or content hosted by third parties, access should be terminated and passwords changed, as applicable. Employers should similarly ensure that they have control of any social media accounts, domain name registrations and website content.

### **6. Track losses**

Establishing a plan to track losses is critical, and daily tracking is optimal. A court deciding an enforcement proceeding will want to meaningfully understand current losses and future risk, and the employer should be ready to respond conclusively to that fundamental question. It is far easier to have a system in place at the outset than to retroactively account for losses when time is of the essence. Moreover, the rapidity of loss can itself evidence improper competitive behavior.

### **7. Consider an e-forensic investigation**

An employer should consider an e-forensic investigation, including the engagement of outside counsel to manage activities the employer may want to deem privileged. While the ways an employee can steal competitive intelligence is limited only by the employee's creativity, evidence of theft is invaluable. For that reason, e-forensics are often worth the investment and, in any event, the employer should ask counsel to explain the investigatory tools available and the associated costs.

### **8. Litigation options**

Litigation is often an appropriate step when a key employee violates restrictive covenants. A key decision for the employer who decides to litigate is whether to pursue a suit for damages only or a suit for damages plus a motion for an emergency temporary restraining order or injunction. A damages only suit may have helpful deterrent effect, is less costly and allows time to negotiate a resolution. But, if an employer will be irreparably harmed without an expedited court order requiring the employee to stop improper behavior or return stolen data, an emergency motion may be necessary. Discovery permissible through litigation can also be a valuable tool, as it allows an employer to investigate an employee's competitive plans rather than relying on voluntary disclosures or unaided investigation of an employee's surreptitious conduct.

**For more information on this topic, or to learn how Godfrey & Kahn can help, contact our Non-Competition & Trade Secrets, Labor & Employment Law, or Intellectual Property Practice Groups.**