

PROTECTING BUSINESS

September 2006

It is now increasingly important to take proactive steps as an employer to protect your business interests in situations where former employees set up in competition with your business. Given the unprecedented value of confidential information and intellectual property, these disputes can mean the difference between success or failure of your commercial venture.

Confidential Information

All employees owe their employer a duty to maintain the secrecy of all the employer's "confidential information" obtained during the course of their employment. This is a duty implied by the law into all employment contracts (unless the duty is expressly removed by way of a written contract). However, the duty extends only to "confidential information" which would be regarded as essentially a trademark secret of the employer. It may not extend to what is commonly thought to be "confidential" information. For example, the fact that your business may keep a client database or client list does not necessarily mean that it is protected by the duty. It will not be protected if the database or list is not treated by your business as a secret document or is sometimes disclosed in full or part to your customers and clients in the course of your business. Similarly, if an employee is not made aware that a particular piece of information is to be treated as highly confidential, then protection from the implied duty may be lost. It is very important to examine what information your business considers confidential and take steps to protect it.

Confidentiality Agreements

Confidentiality agreements are a very effective way of protecting confidential information of a business and providing you with a remedy should you find yourself in the unfortunate situation of a former employee setting up business in opposition and utilising that information against you.

Confidentiality agreements are binding contractual agreements which can be enforced in the Courts, including obtaining injunctions to prevent your former employee using the information, as well as claiming damages that may have arisen as a result of the wrongful use of that information.

An employee is entitled, however, to use the skills and knowledge acquired in the course of his or her working life and it is important to obtain advice as to what information can be protected and what cannot be protected and to make sure the confidentiality agreement is properly drafted.

Restraint of Trade

Increasingly, employers are utilising restraint of trade clauses or non-competition clauses within their employment contracts in an attempt to prevent a former employee setting up in competition against the business.

Generally there are two types of restraints in place. The first is a restraint which prevents a former employee from soliciting business or custom from the business's existing clients, customers or suppliers whom the employee dealt with during the course of their employment. The second type of restraint is more broad and attempts to prevent the former employee themselves from working with a competitor of the business for a period of time in a certain geographic location.

Generally, in New South Wales a restraint of trade will be valid so long as it is clear and reasonable. It is very important to have such clauses drafted carefully so that they are not subject to be being struck out by a Court just when you are trying to enforce them. Restraints of trade can be very effective tools in protecting your business and are a relatively low cost investment which may save the business completely at the end of the day.

Intellectual Property

Your business may also have a trademark or other intellectual property such as a training guide, portfolio guide or related publication which should be protected from other businesses. This also extends to material on the internet which could prejudice your business if it is not properly protected. It is important as part of a review of your confidential information to examine whether further statutory protection is necessary.

Carroll & O'Dea is offering a free half hour consultation with Michael Selinger in the month of October upon mentioning this newsletter. Please contact Leanne on 9291 7144 to arrange a meeting at either our City or Parramatta office.

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