

(Non)Competing in the Knowledge Economy

BY GRAEME MCFARLANE

YOUR LEADING-EDGE, RAPIDLY GROWING software company is doing great. Over the weekend, you receive an email from one of your young, hotshot programmers advising you that she has resigned and will not be in to work. On Monday morning, you arrive to find her email account deleted. Later you learn that she has joined one of your direct competitors. Even more disturbing, one of your other programmers shows you the ex-employee's Facebook page where she seems to suggest that she has kept some of your company's proprietary information.

You call your corporate lawyer who tells you not to worry. He reminds you about the lengthy and complicated non-competition agreement he drafted for you which the departing employee had executed. Relieved, you ask him how to stop the ex-employee in her tracks. He puts you in touch with his litigation partner who starts a court application to enforce the non-competition agreement. A few weeks and many thousands of dollars later the Court delivers its decision – you lost. Except from using confidential information, your ex-hotshot is free to compete directly against you.

Sound scary? The above scenario is now becoming the rule rather than the exception. Courts are very reluctant to enforce non-competition provisions in the first place, and have openly criticized overly legal and “prolix” language found in some non-competition agreements. Given

the way information is now openly shared in many forums, it is more difficult now to protect your information than it once was.

However, all is not lost. While Courts will protect an employee's ability to work in his or her chosen field, they will uphold provisions that prevent “unfair” competition. These provisions must be carefully drafted to protect only “legitimate” business interests. A restrictive provision in the employment relationship is only valuable if it can be enforced. If a provision is too broad, lasts for too long, or is too vague it will be declared invalid by the Court. If such a provision exists in an employment contract, any lawyer specializing in the employment field will advise a departing employee of this fact. The result, as shown by the example above, will be that you are left with little or no protection.

When deciding whether or not to order a departing employee to cease competing with your company, a Court must decide two questions. First, is there a fair question raised by the previous employer, and second, does the balance of convenience favour the grant of such an order? In deciding the first question, the validity of the non-competition agreement will be examined. If it is so slanted against the employee so as to restrict reasonable alternate employment, you will not clear this hurdle. In deciding the second question, the company may have to show

that it will suffer irreparable harm if the restrictive order is not granted. This is a very difficult task indeed.

It is now often better to draft provisions that restrict the potential damage that may be caused by departing employees. Three of the most important items in this category are the use of confidential information, the loss of customers and the loss of other employees. Courts have discussed these items and have confirmed that such concerns represent legitimate business interests.

Confidential information is just that – confidential.

Accordingly, judges will be much more willing to issue a restrictive order to protect against such activity.

However, contractual provisions must also be used with proper information technology management. Confidential information is just that – confidential. If that information is accessible through postings on wikis, blogs or social networking sites, it may be deemed to be in the common domain. When this occurs, it will be nearly impossible to convince a judge that any protection over this information is warranted. Employers should ensure that such Web resources are monitored, and company information restricted, so that any disclosure does not occur unchallenged.

A locked file cabinet just doesn't work anymore.

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