

Employer Beware: Considerations When Hiring a Competitor's Employees



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Restrictive covenants, such as non-competition and non-solicitation agreements, typically assist employers to protect their legitimate business interests. When properly drafted and implemented, an employer can use these types of agreements to limit an employee's ability to unfairly compete after he or she concludes employment.

However, restrictive covenants cannot be used to prohibit regular, ordinary competition. While some employers may be deterred from considering an otherwise qualified applicant who is subject to post-employment restrictive covenants, there are steps employers can take to limit their exposure to claims of unfair competition when interviewing and hiring employees subject to these kinds of restrictions.

- **Ask about restrictions at the earliest reasonable and possible opportunity.** Be specific when asking about any agreements in which these provisions might be contained. However, take care to avoid discussing the applicant's former employer's confidential information.
- **Obtain a copy of the agreement or agreements** if a decision to hire is likely and review and analyze the enforceability of the restrictive covenants at issue, as well as whether the applicant can perform the position without

violating the restrictions.

- **Clearly instruct the applicant not to disclose any confidential information**, even if volunteered. Depending on the restrictions at issue, the new employer may also need to instruct the applicant not to solicit any of the former employer's customers, clients, or employees. Consider also including an attestation to that effect in the offer letter or employment agreement.
- **Evaluate the likelihood of litigation.** Assess the circumstances of the employee's departure, the similarities between the former position and the new role, the nature of the industry and proprietary information or trade secrets at issue, the business relationship (if any) between the hiring employer and the former employer, and the former employer's propensity for litigation, among other things.

Employers that determine that hiring an applicant subject to restrictive covenants justifies the risks of doing so would do well to discuss proactive options with an attorney. In some situations, opening the line of communication with the former employer prior to – for example – receipt of a cease-and-desist letter demanding the termination of new hire's employment can be very productive.

The existence of restrictive covenants, standing alone, should not in all cases discourage employers from hiring an otherwise qualified candidate. With careful planning, a savvy employer can substantially limit its exposure to interference and misappropriation claims and position itself with a strong defense should the former employer decide to pursue action against it.

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