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Stuart Kane LLP

Hiring Employees From Your Competition?

Perfectly legal, but be careful because you might still get sued!

by Bruce May and Peter Wucetich, Partners, Stuart Kane LLP

Every employer knows the best way to find new talent is to steal employees from their competitors. And every employer longs for a way to prevent their competitors from doing the same to them. This age old dynamic has created a curious body of law in California. Employees generally have the legal right to change jobs, but career moves can still lead to legal hassles for all concerned.

The recent class action involving an "anti-poaching pact" in Silicon Valley highlights these risks. For years, Apple, Google and other tech giants had discretely agreed not to raid each other's personnel, until the Justice Department forced them to abandon the pact as a form of unfair competition. Employees then filed a class action, alleging that the pact deflated salaries to the tune of $3 billion dollars. In August 2014, a federal judge rejected a settlement of $324 million dollars as inadequate. This is a vivid reminder of how far California law has come.

Early Cases on Employee Raiding

In 1853, the Queen's Bench in England ruled that a theater owner was liable for "maliciously" inducing a notable opera singer to breach her contract to perform at a rival theater by offering her more money. But the logic of that case harkened back to the days of serfdom, when servants were considered mere property of their masters.

In 1872, California enacted a law invalidating any contract that restrains anyone from engaging in any lawful profession. The intent was to prevent monopolies, but courts eventually construed the law to protect the free movement of labor.

That law is still very much in force, and California is virtually alone among the states in forbidding covenants-not-to-compete with employees. (Reasonable non-competes are allowed in California upon the sale of stock or assets in a business.)

But even though employers are free to recruit and hire from competitors, the parties cannot engage in other forms of misconduct. This is where the employee, the old employer and the new employer all must tread carefully.

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Employees: Play Nice When You Change Jobs

For example, if the employee jumps the gun and starts a competing business or recruits fellow employees to leave while still working for the old employer, he or she could be sued for breach of the duty of loyalty. If the employee steals proprietary information from the old employer to use in the new job, he or she could be sued for misappropriation of trade secrets. And if the employee disparages the old employer by telling customers that the company was going out of business, he or she could be sued for defamation.

The watchword for employees changing jobs is play nice: Give notice of resignation. Tell your employer where you are going to work next. Don't badmouth your old company. Don't take anything with you that belongs to the company — customer lists, business plans, product designs — and make sure you return all company documents in your briefcase or on your home computer.

Employers: Make Sure Your Employees Sign a Confidentiality Agreement

How can employers in California protect their rights against employees who join a competitor? Make sure you have a valid confidentiality agreement in place with every key employee — one that does not contain any illegal covenant-not-to-compete or covenant-not-to-solicit customers, but which clearly forbids the misuse of trade secrets and requires the return of all company property.

What if the employee signed a non-compete with the old employer while working in another State where they are legally allowed? That's the trickiest situation of all. Confer with legal counsel, but you can probably avoid the non-compete as long as you work in California — the land of the free.