

COVID 19 – Restrictive Covenants and Trade Secret Protection During the “New Normal”

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Many employers are facing the difficult realization that layoffs might be necessary to save their business in the short term. Additionally, with many employees working remotely from home, employers face new challenges for safeguarding confidential business information. What can be done *now* to help protect the success of the company in the long term? In an ideal world, an employer will re-hire the same valued employees when this crisis passes and maintain the competitive advantage from its confidential information. However, the reality is that many of these laid-off employees will understandably try to seek new employment as fast as they can - likely with a competitor.

Remember that involuntary terminations may still trigger obligations under non-compete or non-solicit agreements. Enforceability of these agreements varies widely state-by-state. Some states have voided them entirely, while others still recognize an employer's legitimate business interest in protecting confidential business information and customer goodwill. Some states only enforce agreements if the employee's termination is voluntary or with cause. Some states have vastly different rules for non-competes, which are more restrictive, as compared to non-solicits. Employers should consult an attorney to determine what protections may still be available in their states.

Departing employees should be reminded of their post-employment contractual obligations and provided a copy with their agreement. If possible, these restrictions should be cited and incorporated in a severance agreement and release. This may be an appropriate opportunity to narrow the existing terms to increase the individual's future employment opportunities. Such modifications can increase the likelihood of enforceability and potentially garner goodwill with the former employees.

These are unprecedented times. Even in states that have traditionally favored restrictive covenants, employers should be aware that courts may take into account equitable considerations, public policy, and extenuating circumstances when determining whether to enforce an agreement.

Moreover, access to the courts is limited or may be completely unavailable at this time. Temporary restraining orders may be difficult to obtain in an emergency, even when the courts fully re-open, due to a backlog of already pending matters. Employers should not delay in seeking to protect their business; the line for hearings will be long.



Employers should also be mindful of protecting their confidential data, client contact lists, and other valuable business information while employees are working remotely from home. Consult IT professionals about whether it is possible to restrict access to or transfers of certain types of data.

Notably, even if employees do not have non-compete or non-solicit agreements, state and federal laws still provide protection against misappropriation of trade secrets and other confidential information. And, while the various state trade secret laws and the Federal Defend Trade Secrets Act of 2016 (DTSA) differ in their definitions and remedies, here are a few things that all employers should keep in mind during this unprecedented time in the "virtual workplace":

- If you believe something constitutes a trade secret, then you need to take reasonable measures to maintain the secrecy of that information;
- If you have policies on the confidentiality of your trade secret information, now is a good time to remind your employees of these policies;
- If you are unsure or don't have any policies covering what you believe to be trade secret information and don't have the time to create the policy now, make sure you send an email out to employees setting forth your expectations for the protection of your data;
- Policies and emails are great to notify your employees, but you need to take steps to train your employees on these policies and procedures;
- Limit the accessibility of your trade secret or other confidential information - only those that need it for their jobs should have access;
- Consult with your IT professionals to put measures in place to monitor whether confidential data has been misappropriated in any way;
- If you believe data has been misappropriated, immediately contact counsel so that you can determine the best venue (either state or federal) to seek enforcement and redress.

This is a critical time for protecting the health and personal safety of the workforce. It is also a critical time for taking steps to maintain the long-term health and viability of the company. Restrictive covenants and trade secret law can play an important role in this process.

For more information, please contact Kate O'Hara Gasper, Jennifer Hannah or your regular Lathrop GPM attorney.