

THIS WAY FORWARD

SMALL BUSINESS SOLUTIONS



Competing With Your Former Employer

>>> *What you can and can't do when going up against your old boss.*

By Daniel W. Zappo

So, you plan to compete with your (soon-to-be) former employer. To avoid a lawsuit, consider what you would do in your employer's shoes.

What would you do to protect your business? Your dream is to have your own business with a distinguished product or service, employees who sell it, and loyal customers. What would you do if one of your former employees started a competing business? What actions would cause you to sue? What actions are fair game?

Non-Competition Agreement Situation

To understand how the law resolves a non-competition or solicitation agreement dispute, one should understand the balance the law attempts to maintain. Non-competition agreements are good because they protect a business's investments, such as its customers. They are bad because they stifle competition and keep people out of work. The law balances these interests by allowing

businesses to stop employees from competing for a short period. This provides the business with time to have a new employee shore up the customer relationship.

To maintain this balance, the law limits non-competition agreements. For example, the law generally will not stop an employee from contacting customers, if the employee worked with the customers before the employer hired the employee. Similarly, the law generally won't enforce a non-competition agreement that is longer than two years. In these tough economic times, some judges will only enforce shorter periods.

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Competing Without A Non-Competition/Solicitation Agreement

You might think that all bets are off if you don't have a non-competition or -solicitation agreement. Not exactly.

According to the law, every employee owes a duty of loyalty to his employer. For example, a loyal employee does not begin to compete with her employer until after she resigns. She might identify office space, work on a business plan, and project expenses while still employed, but not while on the clock for the current employer. She does not speak to customers and convince them to hold their orders until she starts her own business.

Where does the law draw the line? No one knows until a judge addresses a dispute.

Using The Former Employer's Confidential Information

Regardless of whether an employee has an agreement, the law protects an employer's confidential information and trade secrets.

Of course, the law only protects truly secret information. For example, a company selling paper cannot protect a customer list one could recreate with Google. But, the law will protect a list of customers that includes secret information like customer buying habits, past pricing, etc.

Put yourself in your employer's shoes to help decide what information your employer will sue to protect.

Good counsel will help forecast your employer's potential responses and how a court could respond. **NJB**

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