Non-Compete Agreement Nonexistent? Are The Employee's Actions Disloyal Or Unlawful – That Is The Question.

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It is always recommended that you have employees execute reasonable restrictive covenants (or non-compete agreements) and confidentiality agreements when you, as the employer, provide employees with confidential and proprietary business information and clients. However, just because your former employee does not have a restrictive covenant/non-compete agreement, does not mean that the employee can steal your clients and confidential information.

Two scenarios are set forth below and are quite common when clients approach me regarding former employees who have left their job with the client and are now competing with his or her former employer.

Scenario 1: An employee of your sales business has resigned. He did **not** have a restrictive covenant/non-compete or confidentiality agreement with the company. The former employee is now working for a competitor or has started his own business. He is competing with you by using pricing lists and a customer database that he downloaded from your server. He is able to beat your price margins using the pricing information from your business.

Scenario 2: An employee of your sales business has resigned. She did **not** have a restrictive covenant or confidentiality agreement with the company. She has started her own business that competes with your company. She formed the business while employed by your company. She hired an employee and rented office space during the time period she was employed by your company. She is using the same methods for sales that she learned while working at your company. She is contacting a broad range of clients, including some of those that she had managed while employed by your company. All of the clients are in the public domain and easily ascertainable.

Before continuing to read, think about each scenario and what conduct is lawful.

Generally, the conduct in **scenario one** is illegal and will allow you to sue your former employee for money damages and injunctive relief. This is because the employee is directly using information that he obtained while in your employ; information which he would not have received otherwise.

While, scenario two exposes an employee you certainly would not want to hire, all of the conduct is **scenario two** is likely to be regarded as lawful in New Jersey. All employees in the State of New Jersey are bound by a duty of loyalty. What this means is that an employee cannot compete with his employer while he or she is still employed by that employer. Mere planning, without more, is not unlawful. Often, the use of proprietary and confidential information, even without a restrictive covenant or confidentiality agreement, will be perceived as a violation of the duty of loyalty. Furthermore, using this information to compete may result in damages by claims of tortious interference.

Simply the fact that the employee is competing with his or her former employer is not unlawful. Competition is encouraged. In fact, New Jersey law does not prohibit an employee from taking the skills and knowledge they learned from one employer and using those skills with a competitor. It is when the employee takes affirmative steps to harm the employer's business that constitutes a breach of the duty of loyalty.

Similarly, former employees must not ***tortiously interfere*** with the employer's business interests. A former employee engages in tortuous interference when he or she interferes with his or her employer's reasonable expectation of economic gain without justification or excuse. Using an employer's confidential or proprietary information, as in scenario one, may result in damages arising out of a claim for tortuous interference. As a general rule, one must ask whether the conduct goes beyond the rules of the game. If so, you may ask the courts to stop the conduct and seek money damages.

With all of the above being said, it is better to be safe than sorry and always advisable to protect your business from disloyal employees. If one of your employees has left your business and you feel that he or she is unlawfully competing, it is important to contact your attorney and have the attorney put

the former employee and his or her new employer on notice of the unlawful conduct.

Even if your former employee signed a restrictive covenant and it is unenforceable or has expired, you may still be able to protect your clients and confidential information while preventing former employees from looting your business. It is important to take action before the conduct escalates and causes irreparable injury. In certain circumstances, your attorney can request injunctive relief and temporary restraints. Delay can be fatal to your business and even prejudice your ability to seek emergent relief.