Employees 'Jumping Ship': "What Can We Do When We Don't Have a Contract?"

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You are the Assistant General Counsel for Employment with a national company and just learned that the Branch Manager and the entire sales team from your Kansas City branch office have jumped ship and joined your largest competitor.The Branch Manager attended all of your strategic planning meetings in late 2009, which led to the roll-out of your company's 2010 marketing plan.The sales reps control four of the company's ten biggest accounts, and already you have heard that they are calling your customers. Your Regional Vice President's first reaction:"let's go after them."But HR reminds you that all these employees were from the company that you acquired a few years back – the one that didn't have any of its employees sign non-competes. So now you are asked, "what can we do when we don't have a contract?"

Well … you are not necessarily out of luck.Here are some of the key claims to consider:

Misappropriation of trade secrets.For sales employees, the key question is whether your customer list can qualify as a trade secret.It may qualify if it is a "retail" list of individuals.Their names may be in the phone book, but of course the phone book doesn't have any cross reference that identifies names might be your customers.But if your customer base is "institutional" -- well-known companies that obviously would need your product, such as if you sell windshield glass auto manufacturers – your list is easy to figure out and probably isn't secret enough to qualify.*Compare, for example, Merrill Lynch v. Zimmerman*, 1996 WL 707107 (D. Kan. 1996) (retail stockbrokerage customer list is a trade secret) *with Reed, Roberts Assocs. v. Strauman*, 353 N.E.2d 590 (N.Y. 1976) (customer list not a trade secret; plaintiff's consulting business advised companies on unemployment compensation and workers compensation issues).Even if your customer list is not a secret by itself, additional data about customers, such as sales history, preferences, and the like, may qualify, if you can prove it meets the common law or statutory standards.*See, e.g., Zoecon Corp. v. American Stockman Tag Co.*, 713 F.2d 1174 (5th Cir. 1983) (in this case, trade secret customer information included "type and color" of items purchased, "date of purchase," "amount purchased," as well as names and addresses of otherwise obvious purchasers of livestock ear tags).

The Branch Manager has knowledge of marketing and business information. You may be able to argue that the information he learned during your strategic planning qualifies as a trade secret.*See, e.g., PepsiCo, Inc. v. Redmond*, 54 F.3d 1262 (7th Cir. 1995).The question is whether it has been kept secret, or is it now obvious because you rolled out the plan?

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What kind of relief can you get on a trade secrets claim?Listed from easiest to obtain, to hardest, you may be able to get:(1) non-disclosure – an order prohibiting the employees from disclosing information; (2) return of information – requiring them to return it; (3) non-use -- an order prohibiting the competitive use of the information; (4) non-solicit – prohibiting them from soliciting trade secret customers; and (5) non-compete – prohibiting them from working for your competitor.The non-compete order relies on a theory of "inevitable disclosure" of the trade secrets. Such relief is hard to get, and in some states is completely unavailable. Where available, it usually requires evidence that the employee cannot be trusted, and that lesser relief is inadequate.

Breach of duty of loyalty:This focuses on *pre*-resignation conduct.Before they resigned, did they:(a) solicit customers; (b) recruit employees; or (c) divert business opportunities?Soliciting customers and putting a business opportunity in the "back pocket" to pursue at their new place are both out of bounds.Some discussions with employees may be okay, but in certain jurisdictions managers may not solicit underlings to follow them to their new company. This sometimes boils down to a question of whether communication about the new jobs constituted "solicitation" or something less.

Unfair competition / raiding:Unfair competition or "raiding" tends to be an "I know it when I see it" type of claim.This vagueness is both an asset and impediment.The claim is elastic enough to use it in unusual situations, but its vagueness also makes it difficult to assess its chances of success.In most instances, you'll have to prove "malice":an intent by the hiring firm to harm your business, rather than just an intent to help their own business by adding talent.

Computer Fraud & Abuse Act, 18 U.S.C. § 1030:Under the CFAA, you must prove (a) the employees either fraudulently or "intentionally" accessed your computers; (b) they did so without authorization or exceeding the scope of their authorized access; and (c) that they caused damage.Did they go into your computer and take information, such as customer lists or business data?If so, you may have a claim, although the decisions are far from unanimous in applying the CFAA to departing employee cases (including differing interpretations of what constitutes "damage").Advantages of a CFAA claim:(a) no need to prove the information was secret; and (b) no need to prove "malice."*See, e.g., Shurgard Storage Centers, Inc. v. Safeguard Self-Storage, Inc.*, 119 F.Supp.2d 1121 (W.D. Wash. 2000). *But see Condux Int'l Inc. v. Hangum*, 2008 US Dist. LEXIS 100949 (D. Minn 2008). There also are special provisions in the Act that apply in a medical or financial business context. For further discussion, see Heather Steele's blog entry: "Establishing the 'Without Authorization' Element under the Computer Fraud & Abuse Act".

Civil conspiracy: This is an option for multiple employee departures. Generally, co-conspirators may be held liable for all violations of each conspirator, but there must be an underlying and independelty actionable improper act by one of the conspirators.This works well with tort claims such as trade secrets or duty of loyalty, and may apply with statutory claims such as the CFAA.In certain states, it may even work where some employees have contracts and others don't – you may be able to bind them all to the contracts if they all are conspiring to violate.*See, e.g., Catercorp, Inc.*

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v. Catering Concepts, Inc., 431 S.E.2d 277, 282 (Va. 1993). Other states don't recognize claims for conspiracy to breach a contract.

So, there may be some things you can do, even without a contract.To enhance your position, consider taking these steps now:

- Get contracts:sign employees up if you acquire a company that did not use them.Consider whether you should roll out contracts if your company is not using them yet.
- Protect your information:to help establish trade secret status you can use non-disclosure agreements; build computer system firewalls; remind employees of confidentiality (in manuals, log-in screens, memos, bulletin board postings); and limit access to files, lead lists, and other sensitive data.
- Monitor computer activity:make sure you can determine -- quickly -- if someone accessed or removed information via computer prior to their departure.

Related People

Christopher P. Stief
Regional Managing Partner
610.230.2130
Email

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