

Dos and Don'ts of Fair Competition for Departing Employees (and some Insights for Those Who Employ Them Now or Want to Hire Them)

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The basic rule of fair competition for a departing employee is easy to state and appeals to common sense:

Employees owe their employer a duty of loyalty while employed and, absent an enforceable non-competition agreement, the employee is free to go into competition with employer and use his or her general knowledge, skills, and experience.ⁱ

That simple statement becomes a complicated reality when one starts to look at issues such as the skills and knowledge the employee brought to the employer, the discoveries and inventions that may have been made by or disclosed to the employee during employment, and the competitive niche to which the employee proposes to migrate with his or her skills.

Here are a few suggestions -- distilled from the experiences of companies that unfortunately had to litigate these issues -- that will help navigate through the mine field of employment agreements, confidential information, and trade secrets.

1. DO PAY ATTENTION TO EXISTING AGREEMENTS AND OBLIGATIONS

Everyone in the business world has agreements in their files that have not seen the light of day in years.

Individuals should comprehensively collect and review all prior agreements – including employment, non-compete, confidentiality, and invention assignment agreements – to be familiar with ongoing obligations before a change of employment. Most employee agreementsⁱⁱ for technology companies include a clause that states all confidential information of the employer belongs to the company and requires the employee to assign all inventions and other intellectual property to the company. It is good practice for the employee to disclose all such obligations to a prospective new employer.

It is likewise good practice for the new employer to request, in writing, disclosure of any existing contracts and agreements from a prospective employee before making any offer of employment.

Employers should make sure that their employment records are up to date because employers are not immune from the forgotten agreement syndrome. It is a very common occurrence that a long-time, departing employee of the company may never have signed the employee agreement which is now routinely being required of new employees, creating uncertainty as to which, if any, of such terms apply to that person.

In addition, the original offer of employment or acceptance may have identified and excluded pre-existing information and inventions that the employee claims as his or her own. This may be especially true of employees who were already named inventors on a number of patents and have worked for several companies or have done a stint of consulting.

2. DO RESPECT TRADE SECRETS BUT DON'T ASSUME THEY PROTECT THEMSELVES

A. Employees: Respect the Employer's Trade Secrets

Most people think of “trade secrets” as “formula for Coke” type information and it is evident that such types of business secrets can be protected.ⁱⁱⁱ

Even in the absence of a specific “formula for Coke” type of trade secret, an employee who has gained substantial knowledge of the employer's trade secrets during employment and who goes to work for a competing company to perform the same or closely related tasks and duties may be enjoined from employment by a Court because of the “inevitability” that he or she will use the former employer's trade secrets.^{iv}

What separates a company trade secret from an employee's general skill, knowledge and experience? The answer depends on the efforts of the company to protect the information, the state of the art, and the custom of the industry, and the skill level of the employee. That is because a trade secret, unlike other forms of intellectual property such as patents, copyrights, and trademarks which are objectively defined, depends on the circumstances in which it is learned and the duty that arises from those circumstances.^v

A well written confidentiality agreement puts the employee on notice that there is information that is considered confidential and both creates and proves the existence of a duty in the employee who signs it.

However, a confidentiality agreement cannot make a trade secret out of something that is generally known and, for the most part, courts will not restrain competition for alleged, but unproven, trade secrets.^{vi}

B. Employers: Do Vigilantly Identify and Protect Company Trade Secrets

It is not enough – repeat, **not enough** – for a company to assert that it has trade secrets and then assume that the burden is on the employee to prove that it does not.^{vii} A company wishing to rely upon trade secret protection must do three things in an ongoing, affirmative fashion.

First, the company must be aware of what information it considers a trade secret. Before the company can enforce a trade secret the company must identify it. Any company will have a very hard time convincing a Court that it is irreparably harmed by the potential use of some general, internal information if the company cannot point out to the Court what is secret and how it provides a business advantage.^{viii}

Second, the company has to keep the information secret. Trade secret protection is lost when the information is disclosed without restrictions.

There are several ways that companies inadvertently disclose their trade secrets and forego protection. For example, describing a trade secret in a patent application will destroy the trade secret when the application is published and applications are now published whether or not you ever get a patent.

Any type of printed disclosure not subject to confidentiality agreements such as business plans, white papers, and poster sessions at conferences may also destroy your patent rights, a topic beyond the scope of this article but one that is separately worth a discussion with counsel so that you understand the potential consequences of public statements and actions.

Finally, any feature that may be discerned from a product sold or even offered on the public market is no longer a secret, although an indiscernible improvement in the manufacturing process may be.

Third, the company must make its employees conscious that certain information is confidential and is not to be disclosed outside the company. A general confidentiality agreement is insufficient to protect particular trade secrets absent some specific effort by the company to communicate that particular information is considered a trade secret.^{ix}

There are any number of checklists, articles, and consultants who will advise on steps that need to be taken. One such checklist is attached as Exhibit B. Suffice it to say that efforts to demonstrate in an open and ongoing way that the company takes confidentiality seriously – locked drawers and files, locked rooms, employee sign-in and sign out sheets for files and samples, employee security access passes, limited access notices, confidentiality legends, and employee training – will all go far both to protect information and to prove that the company has taken reasonable measures to do so.

3. **DON'T LIE**

This one should be obvious.

Absent an enforceable non-compete agreement, an employee is free to go into competition with the employer including planning to do so with other employees of the company. The employees do not have to tell the employer about those plans. However, if questioned or confronted by the employer with questions about their plans, employees must resist the defensive instinct to deny them.

So many otherwise proper activities have foundered on this principle that it bears repeating.

Don't lie.

The deception will eventually come to light and future credibility with the employer (and perhaps with a jury) will be shot.

A better approach is not to allow oneself to be confronted. As soon as practical, the departing employees should approach the employer and tell them of their plans and offer assurances that they have and will continue to respect their obligations to the company.^x

4. **DON'T TAKE ANYTHING AWAY FROM THE COMPANY THAT HAS NOT BEEN REVIEWED**

For employees, the most powerful way to demonstrate good faith and fair competition, as well as to save a lot of headaches and explanations, is to walk out the door empty-handed. A departing employee should take nothing when he or she leaves: no laptops, thumb drives (an earlier version of this article said "diskettes" at this point!), no paper or electronic files, no books or magazines, no supplies, no diaries, nothing. For any personal property that the employee might have at work, he or she should make a detailed list and allow the employer to review the list and the corresponding materials. The employer should then be willing to provide an acknowledgement in writing that the property was removed with permission.

For employers, it is very important to conduct an exit interview that goes over existing agreements and obligations, the status of projects, the whereabouts of files and information, the personal versus company property discussed above, and the ongoing duty of confidentiality. Having a set format for an exit interview and conducting it consistently via a skilled management level employee is good policy for a company and will make it possible to get through the exit interview even in contentious situations.

5. **DO FULFILL DUTIES AND RESPONSIBILITIES OF EMPLOYMENT WHILE STILL EMPLOYED**

Employees, even at will employees, have a duty to the employer while still employed commensurate with the duties and responsibilities of employment.

Even though planning to compete while still employed is permissible in the absence of a non-compete agreement, the employee takes upon himself or herself the responsibility to insure that preparation activities do not cause the neglect of existing employment duties. Employees must give full attention to the job during working hours and should not use any of the employer's facilities or property (phone or Internet service or accounts which, by the way, the employer has a usage record of, on-line subscription services, support staff, etc.) in planning activities.

It is also extremely important that the employee, especially a management level employee, continues to present all business opportunities and ideas to the employer to the same extent that the employee would if he or she had no plans to enter into competition. If an opportunity is worth pursuing, the employee should say so and give the employer the benefit of a good faith assessment preferably in writing. Whether or not the employer decides to pursue the opportunity, the memo will evidence exactly what the idea was and that the employer had the information necessary to pursue it.

Duties of employment also prohibit an employee from soliciting the current employer's customers or vendors for the new business while still employed, even if their identities are public knowledge.^{xi}

6. **NON-COMPETE AGREEMENTS**

A. Employees: Don't sign non-compete agreements.

The best way to avoid the terms of a non-compete is not to sign one. So, every time an employee changes jobs and before accepting a new position, employees should ask whether there any agreements they will be required to sign as a condition of employment. Insist upon time to review them with an attorney. With the advice of an experienced attorney, the employee may be able to avoid non-compete provisions altogether. Alternately, the employee can negotiate key terms such as the length of the obligation, compensation for periods of non-compete, and a clear definition of the "competitive" activity.

B. Employers: Require tailored non-compete agreements prior to commencement of employment that have been approved by counsel.

The most straightforward way to protect the company against the sudden departure of a key employee, or a group of employees, to a competitor is to have clear, enforceable non-compete agreements in place at the start of employment.^{xii}

As a contractual restraint on competition, non-compete agreements are strictly scrutinized by Courts and their enforceability is a matter of local law. In most states, reasonable non-compete agreements are enforceable. California will not enforce non-compete agreements and several other states have specific limitations regarding them.^{xiii} Therefore, employers must have legal advice of an attorney well-versed in the applicable laws as to what a non-compete may include and when and how the company may impose one on employees.

The nature of the employee's responsibilities, the length of the obligation and the definition of "competing business" are all key terms. By using a generic form without advice, the company exposes itself to a false sense of security and the risk that the Court will invalidate the non-compete agreement. This would leave it with the burden of showing, at a preliminary injunction stage, that the employee had access to trade secrets and confidential information and that his or her use of them in the new employment is "inevitable," and, at trial, that the employee actually took and used trade secrets.

C. Employers and Employees: Negotiate

Since paragraphs A and B, above, appear to be in tension, note that non-compete agreements can be negotiated at the beginning of employment and during the exit process. Prospective employees may have more leverage than they imagine at the outset of employment, especially today where states are requiring more and more advance disclosure of the obligation, and that is a good time to negotiate a specific, non-compete obligation that makes sense.

For example, an employee may be able to negotiate for a non-compete agreement that requires the employer to pay compensation for the periods of non-competition, or for one that has different periods of non-competition depending on the nature of the "competing" business.

Employers may be able to offer compensation for a period of non-competition at the time the employee gives notice even if there is not presently a non-compete agreement. In addition, provided both employee and employer are being forthcoming in negotiation, they may be able to shorten the period of non-competition or narrow the scope of the obligation.

When these issues are broached in a business-like way, differences of opinion are far more likely to be resolved in a mutually acceptable way than by rolling the dice in litigation.

7. DO GET ADVICE (AND FOLLOW IT).

Employees may be realizing that they might need legal or career counseling and coaching and employers may be thinking it is time to review the contents of their “standard” employee, confidentiality, and non-compete agreements. It bears repeating that one should obtain this advice well in advance of changing jobs or making a hire.

Especially for employees, in this day and age, when every individual is a “corporation of one,” obtaining appropriate advice in advance is really the minimum investment to make in an individual career.

Seeking and following competent advice demonstrates good faith and will help to navigate complicated and overlapping obligations.

One last tip for employees: Do not approach the company’s attorneys for legal advice or a referral even if a previous working relationship exists; e.g., on patent applications. Those attorneys represent the company and have a duty to them, not to the employees.

ⁱ Restatement (Third) of Unfair Competition § 42 cmt. D (1995)

ⁱⁱ “Employee Agreement” here refers to any agreement that an employee signs. An “Employment Agreement” usually refers to a contract for a definite term of employment. Most employees are employees- at-will; i.e., they do not have any definite term of employment and may be terminated at any time. Both types of agreements can and should contain provisions relating to confidentiality and ownership of inventions, and may contain a non-compete obligation. A form of one such Employee Agreement is attached at Exhibit A.

ⁱⁱⁱ In Kewanee Oil Co. v. Bicron Corp. et. al., 478 F.2d 1074 (6th Cir. 1973), *rev’d on other grounds*, 416 U.S. 470 (1974). Kewanee had developed, after many years of research and many dollars of investment, a crystal of 17 inches which was substantially beyond what anyone else had been able to do. The information was protectable as a trade secret against a departing group of employees who, in their new employment at a competing company, managed to achieve the same results in a mere 9 months.

In general, financial books and records, engineering drawings, blueprints, and product specifications that are not public are considered evident trade secrets or confidential information even in the absence of a confidentiality legend. That is, their inherent nature is such that an employee **should know** that it is secret. See O. & W. Thum Co. v. Tloczynski, 114 Mich. 149 (1897)(that’s right, 1897, and still a good illustration of the law today) where, despite the lack of

any written employment or confidentiality agreement, the totality of the circumstances of secrecy, known to the defendant, created an implied obligation of secrecy.

^{iv} PepsiCo. Inc. v. Redmond, 54 F.3d 1262 (7th Cir. 1995). William Redmond worked for PepsiCo as the General Manager for California. As part of his employment he had signed a confidentiality agreement and was privy to PepsiCo's confidential marketing plan. The court granted an injunction preventing Redmond going to work for a competitor for a period of time because it was considered "inevitable" that he would disclose PepsiCo's trade secrets as part of his new role.

^v The law of trade secrets is governed by state law and the States fall into two major groups. Most States, with the exception of Massachusetts, New York, New Jersey, and Texas, have adopted the Uniform Trade Secret Act (UTSA). The UTSA approaches trade secrets as a creature of "duty" and defines "misappropriation" as

"(i) acquisition of a trade secret of another by a person who knows or has reason to know that the trade secret was acquired by improper means; or

(ii) disclosure or use of a trade secret of another without express or implied consent by a person who

(A) used improper means to acquire knowledge of the trade secret; or

(B) at the time of disclosure or use knew or had reason to know that his knowledge of the trade secret was

(I) derived from or through a person who has utilized improper means to acquire it;

(II) acquired under circumstances giving rise to a duty to maintain its secrecy or limit its use; or

(III) derived from or through a person who owed a duty to the person seeking relief to maintain its secrecy or limit its use; or

(C) before a material change of his position, knew or had reason to know that it was a trade secret and that knowledge of it had been acquired by accident or mistake."

Unif. Trade Secrets Act § 1(2) (1985)

The Restatement of Torts, which reflects the older, historical approach, is followed by Massachusetts, New York, New Jersey, and Texas. It treats trade secrets as objectively definable

property, but also of necessity makes the same kinds of factors relevant as are considerations under the UTSA:

An exact definition of a trade secret is not possible. Some factors to be considered in determining whether given information is one's trade secret are:

- 1) the extent to which the information is known outside of his business;
- 2) the extent to which it is known by employees and others involved in his business;
- 3) the extent of measures taken by him to guard the secrecy of the information;
- 4) the value of the information to him and to his competitors;
- 5) the amount of effort or money expended by him in developing the information;
- 6) the ease or difficulty with which the information could be properly acquired or duplicated by others.”

Restatement (First) of Torts § 757, cmt. b.

^{vi} AMP Inc. V. Molex Inc., 823 F. 2d 1199, 1206 (7th Cir. 1987)(internal citations omitted):

When an employer has failed to take such a simple step [of obtaining a covenant not to compete] on its own, a court will not raise to trade secret status the fruits of ordinary experience in ... business... thus compelling the former employees to reinvent the wheel as the price for entering the competitive market.”

^{vii} On the contrary, asserting trade secret without a proper basis can be an antitrust violation. In CVD, Inc. v. Raytheon Co., 769 F.2d 842 (1st Cir. 1985) Raytheon asserted that CVD, led by former Raytheon employees, could not manufacture ZnS/cvd or ZnSe/cvd without violating Raytheon's trade secrets. CVD filed an antitrust claim against Raytheon asserting Raytheon was attempting to monopolize the market through a bad faith trade secret claim in violation of the Sherman Act. Evidence at trial revealed that Raytheon has made extensive public disclosures of its “secrets”, engineering diagrams were only marked secret after litigation commenced, Raytheon had refused to provide CVD with a list of its alleged secrets, and finally internal invention disclosures relating to the secret were clearly marked “Do not protect.” CVD was granted treble damages and attorney's fees.

^{viii} The Restatement of Torts and the Uniform Trade Secrets Act provide two different definitions on what constitutes a business advantage. The Restatement, requires that a trade secret must be continually used in business to be protected. The UTSA only requires that the Company derive some value from the secret not being generally known and does not require that it be specifically used.

^{ix} See Motorola v. Fairchild Camera and Instrument Co., 366 F. Supp. 1173 (D. Ariz. 1973). A large departing group of employees had a general confidentiality agreement. The Court held the agreement was insufficient to protect the alleged trade secrets absent

specific advice at some time to employees as to specific trade secrets claimed or some evidence (of which there was none here) from which the Court could find that the employee should know a secret of which his employer did not specifically advise him. . . .

Particularly appropriate in this case is the principle that the protection allowed trade secrets is not a sword to be used by employers to retain employees by the threat of rendering them substantially unemployable in the field of their experience should they desire to resign. This shield is not a substitute for an agreement by the employee not to compete with his employer after the termination of employment. E.W. Bliss Co. v. Struthers-Dunn, Inc. supra, at 1112-1113.

It is further the conclusion of the Court that plaintiff's trade secret claims must fail because as to those in issue at trial no real effort was made by plaintiff prior to trial to keep them secret. They were also either revealed in the marketed product; fully disclosed by issued patents; generally known to those skilled in the industry or trade; or consisted of information easily acquired by persons in the industry from patents, literature or known processes freely available as of August 1968, and in any event prior to any shown use by Fairchild Camera.

Motorola, 366 F. Supp. at 1185-86.

^x A lot of ink has been spilled in the case reports about whether or not a particular employee can be labeled a "fiduciary" and, if so, whether or not the employee breaches his fiduciary duty by planning to enter into competition. This exercise in labeling confuses the freedom to compete with the duty of loyalty while employed. See note 11, below. Any employee, not subject to a restrictive agreement, regardless of level of responsibility, has the right to go into competition with the employer and to plan with others to do so while still employed. See Motorola v. Fairchild Camera and Instrument Co., 366 F. Supp. 1173, 1185 (D. Ariz. 1973), quoted above, for the explanation of why even executives and managers at the highest levels of responsibility are free to go into competition and to do so as a group in the absence of non-compete agreements or identifiable trade secrets that have been misappropriated.

^{xi} While soliciting others to enter into competition is generally permissible, a person's particular responsibilities to the former employer may prohibit such action. In Augat, Inc. v. Aegis, Inc., 409 Mass. 165 (1991), a defendant admitted that one of his job responsibilities in prior employment was staffing, hiring, and insuring the availability of key managerial employees. Therefore, he breached his duty of loyalty to his former employer, not by entering into competition, but by soliciting key management personnel to leave and join his new venture while he was still employed.

^{xii} While many states will permit the imposition of a non-compete agreement during employment, see, e.g., Madden v. Omega Optical, Inc., 165 Vt. 306 (1996)(not against public policy to require at-will employees to sign a non-competition agreement without additional compensation as a condition of continuing employment), the definite trend in the law is to require the employer to disclose the non-compete terms as a condition of employment in writing and before employment commences.

^{xiii} Raymond Edwards II v. Arthur Andersen LLP, 44 Cal. 4th 937; 189 P.3d 295; 81 Cal. Rptr. 3d 282 (Cal. 2008); Or. Rev. Stat. § 653.295 (2007).

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EMPLOYEE AGREEMENT *

In consideration of my employment by _____, the compensation and other benefits of employment received by me from the Company, I agree as follows:

I understand that I am employee at will and that I may be terminated at any time without notice or cause, for any reason or no reason. I will not make any claim that I am other than an employee at will based upon any statements or actions of the Company during my employment.

I agree to disclose and to assign to the Company, and do hereby assign, all inventions, discoveries, and improvements, whether patentable or not, made conceived or first reduced to practice by me, either solely or jointly with others, others during my employment by the Company which arise out of or are related in any way to the business of the Company or to the Company's actual or demonstrably anticipated research and development.

I agree that all documents, drawings, pages, and records of any kind relating to the business of the Company, and all works of authorship, whether or not made by me, are and shall be the property of the Company, and I hereby assign any rights that I may have in same to the Company and will deliver all or any of the same in my possession to the Company at any time upon its request. I agree that I am required as a duty of my employment to attend interviews at any time, including after giving notice of termination of employment, to review the information and property of the Company in my possession, custody, or control.

I will not at any time disclose or use confidential information of or possessed by the Company, except to the extent necessary to perform my duties as an employee. I agree that such confidential information includes any technical, business, or financial information of the Company that existed at or before the time of my employment or that was developed during my employment. I understand that I have the right to inquire of the Company at any time whether or not any particular information is considered confidential.

I agree both during and following my employment to cooperate with all reasonable requests of the Company or its legal representatives to assist the Company to obtain Letters Patent on all inventions for which I am a sole or joint inventor, and any other registrations, certificates or protection that the Company may, in its sole discretion, choose to pursue. I agree to execute all papers necessary to carry out these purposes, without further compensation to me, other than reasonable out of pocket expenses. Such applications shall be filed at the expense of and under the exclusive control of the Company.

I agree that while I am employed by the Company, and for a period of one (1) year thereafter, I will not, alone or as an employee, officer, director, stockholder, agent, consultant, holder of a beneficial interest, creditor, or otherwise, without prior written Company approval, engage in any employment, consulting, occupation or business activity or venture which

* This is a sample for illustrative purposes, not legal advice.

(i) constitutes an actual or apparent conflict of interest with my duties and obligations under this Agreement;

(ii) which is directly or indirectly in competition with the business of the Company or any of its affiliates.

The business of the company shall be defined to be

as well as any other products and services offered by the Company during the term of my employment.

I agree that while I am employed by the Company, and for a period of one (1) year thereafter, I will not alone, directly or indirectly, cause or induce, or attempt to cause or induce, any person now or hereafter employed by the Company or any of its affiliates to terminate such employment.

The law of the State of _____ shall apply to the interpretation and enforcement of this Agreement.

There are no prior or other Agreements between me and the Company, or any of its representatives, and no one has made me any promises to induce me to enter into this Agreement.

This Agreement may only be modified by a writing signed by both parties.

Security Checklist *

Here is one form of a Security Checklist that can guide a review of a Company's confidential information. Note that the very process of involving your employees in this exercise on a periodic and regular basis will go far in giving clear, specific notice of the existence of trade secrets, their importance to the company and the duties of employees with respect to those trade secrets.

1. Identify Areas/Functions of the Company that Involve Important, Non-Public Information and Employees with Access to That Information

Engineering and Product Design: Formulas, Processes, Inventions, Improvements, Development Projects, Engineers Drawings and Plans

Manufacturing: Customization of Manufacturing Equipment, Processes and Methods, Customized Designs and Techniques, Vendors and Suppliers, Manufacturing and Quality Control Processes, Yields, Efficiency and Productivity Information, Bills of Materials, Third Party Information –Customer Information and Consultant/Contractor Information

Marketing: New Business Areas, Marketing Budgets and Plans

Sales: Key Customers, Sales Volume and Sales History, Pricing, Customer Information

Finance: Costs, Profits Margins, R & D Budgets, Indebtedness and Loan Agreements, Inventory

Software: Any software that has been written by or specifically for the Company or customized for the Company that relates to design, manufacturing, internal work flow and scheduling, inventories, orders, pricing, sales, or product quality control and delivery information.

2. With Advice of Counsel, Put Appropriate, Written Contractual Provisions and Notices in Place for Employees, Customers, and Third Parties

3. Physically Segregate and Label, to the Extent Possible, Recurring Items that Contain Trade Secrets

Lab Notebooks: Buy Numbered, Bound Laboratory Notebooks with the Company name and the Legend "Confidential" on the Cover; Require Employees to Use Company Issue Lab Notebooks for All Research and Development; Keep a Log of the Numbered Notebooks Issued to Each Employee, the Date Issued and the Date Returned; Keep Lab Notebooks in a Locked Cabinet

Design documents: Incorporate headers and footers and other legends such as “Company Confidential” in templates for product design, manufacturing, and quality assurance

Software and Databases: Use password protection and electronic logging to limit access to software, such as design software, and databases of information such as customer names, orders, vendors, accounts receivable, product designs, etc. If the information is generated internally and maintained in electronic format, you should be using software that tracks every person who accesses the documents. Access to the code for internal software should be strictly limited to those few persons who maintain the code and it should reside only on secure servers that are password protected and secure backup locations.

Incoming and Outgoing Customer and Vendor Documents: Provide secure fax numbers for customer orders, quotes, and communications. All incoming documentation whether physical or electronic, should be stamped with the date and time of receipt and an indicating who within the Company received the documents.

Encrypt Ongoing Design, Consulting, Marketing, and Development Communications with Third Parties: Create and provide project specific passwords and require their use.

Locked Rooms, Access Codes, and Key Cards: Create locked areas, both physically and through secure servers, for engineering and development projects and require employees to use access codes and key cards when entering AND exiting those areas with a system that will log when the employees were present and for how long.

Employee Passwords: Make sure to change/disable employee passwords and project specific passwords when the employee leaves the company or the project is completed.

Laptops and Use of Personal E-Mail/Working from Home: Do not permit employees to remove confidential information from the company, including lap tops and paper files. Do not permit employees to transfer company files to their home computers. All company laptops should be numbered and encrypted. If employees must access confidential information from home or the road, give employees access to work files through a secure server that prohibits saving the documents to unauthorized computers.

Visitors: Create designated public areas for visitors’ meetings and require log books for everyone who enters or leaves the building. Do not permit visitors into secure areas without an escort and a signed confidentiality agreement.

Archived Files: Develop policies and procedures for document retention and destruction. Be sure to consult with counsel since the existence of litigation or even a dispute, as well as myriad legal record-keeping requirements, may require certain documents to be retained for extended periods of time. However, do try to think critically and methodically about the need to retain old or dead files, including duplicates. It requires discipline to develop good procedures for protecting trade secrets and that includes having discipline about what documents and files you generate in the first place and how and where you keep them.

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