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GUEST OPINION

Avoiding Lawsuits When Hiring From the Competition

You have found the perfect candidate and they have agreed to accept your offer for employment. They have been working at a competing credit union for years and have developed meaningful and longstanding relationships with their members. You are both excited, and thinking about your promising future together and the growth opportunities that will present themselves with this new hire. New members, increased revenues ... the sky is the limit.

While thinking about the future is exciting, hiring a new employee also requires a serious look at the past and the present. Namely, an employer needs to carefully evaluate the contracts that the new hire has executed in the past and develop a present plan for how the new hire



Rosemary S. Gousman
Partner, Financial Services Industry Group Co-Chair
Fisher Phillips

CONTACT
rgousman@fisherphillips.com



David W. Erb
Partner, Financial Services Industry Group Co-Chair
Fisher Phillips

CONTACT
derb@fisherphillips.com



Jeffrey M. Csercsevits
Of Counsel
Fisher Phillips

CONTACT
jcsercsevits@fisherphillips.com

will conduct themselves as they transition their employment.

Below are five key issues that can help to facilitate a smooth transition for your new hire and reduce the likelihood of a

lawsuit being filed by their prior employer.

Review the Contracts

When hiring an experienced employee, particularly those who have worked for credit unions, banks or other financial institutions, it is important for the hiring employer to know what, if any, contractual obligations the new hire may owe to their former employer. These obligations may include restrictions against their ability to solicit customers from their former employer, restrictions against retaining company information from their prior employer, and/or even restrictions on their ability to work for your credit union or at one or more of your locations.

Hiring employers should be aware of any contractual obligations that the new hire may owe

to their prior employer, so that a proper transition plan can be established. This can reduce the likelihood of a lawsuit being filed against the employee and their new company.

Don't Say a Word

Even in the absence of a non-solicitation agreement, it is prudent to advise your new hire that they should not begin soliciting new business until after their official termination date. Your new employee likely has solidified relationships with their members and may feel compelled, both personally and professionally, to let their members know they will be resigning. After all, your new hire has been involved with their members' major financial decisions for years and a unique bond has been formed. However, by engaging in such conduct, an employee can subject themselves and their new employer to liability. This type of pre-resignation conduct may give rise to claims of unfair competition and a breach of the duty of loyalty owed to their prior employer.



Leave Company Information Alone

Employees are often tempted to retain company and/or member information on the way out the door. However, the retention of such information may subject the new hire, and the new employer, to a legal action. The former employer may allege breach of contract, misappropriation of trade secrets, and/or conversion of company property. Employers should remind their new hires not to take hard-copy information or electronic records with them when they resign. This applies to originals and copies.

Many employees may feel that no one will notice if a file is missing, or if they email a member

list from their work computer to their personal email address, or if they just take a copy of a document. However, upon the loss of an employee, particularly one who had access to financial information and is now a competitive threat, many companies will perform a thorough review of the employee's old office, as well as a forensic review to analyze recent email and printing activity from the employee's workstation, to ensure that the employee did not retain company information, in hard-copy or electronic format.

Other employees may be tempted to destroy relevant documents, or alter member contact information in the system, to place their former

employer at a disadvantage and create a leg-up as they compete for that business at their new company. This may open the door for the former employer to allege that the employee engaged in unfair competition and/or committed a books and records violation.

Maintain a Normal Routine

Employers should remind their new hires to maintain their normal schedules and routines prior to their resignations. Co-workers and managers will know your new hire well and will know their routine. Any aberration may trigger that the employee is planning to leave. The following conduct may be a red flag for their employer: The employee moves personal items out of their office; the employee emails personal files from their work email to their personal email; the employee emails company information

to their personal email; the employee takes an unplanned vacation; the employee starts working odd, or reduced, hours; and/or the employee schedules an excessive number of member meetings or accelerates meetings that were scheduled to occur later in the year.

If it's Written, it May Be Discoverable

Employers should remind their new hires that if a legal action is filed against them by their former employer, they may need to produce their written communications with the new employer as well as communications with members, and anyone else with whom they were discussing their resignation and decision to switch companies. This specifically includes text messages, social media messages and postings, and personal emails.

Therefore, the new hire should be very careful with all of their communications, as they may surface in a court action. For the same reason, representatives of the hiring firm should also be mindful of the written messages that they are sending to the new hire, as well as messages that are being exchanged internally regarding the new hire.

While some of these suggestions may seem obvious, failure to consider them may result in a legal action being filed against your credit union and new employee. You want your new relationship to start off on the right foot, without the time, expense and distraction of dealing with a lawsuit. By taking appropriate steps to ensure a smooth transition, you and your new hire can focus on growing your business and reduce the likelihood of defending against a lawsuit. ■