

Top Ten Mistakes Made by Departing Employees

Insights

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Recently, I wrote about the top ten things a company should do when an employee resigns to join a competitor. But what about the flip side of that coin? What mistakes should be avoided by departing employees and the firms that hire them? Here are ten things to keep in mind:

1. **Avoid Taking Business Records**

Taking business records and information may be a bad idea for many reasons. It may be a violation of a confidentiality or nondisclosure agreement, and depending upon the content of the records, it may also constitute misappropriation of trade secrets. It may also give rise to a claim for conversion of property. In addition to these possible legal reasons, taking business records angers employers and augments their suspicions. When a company learns that a former employee has e-mailed information to a home e-mail account, or, that a previously full file cabinet is now empty, a number of questions arise. Why did the employee take it? What else did the employee take? What does the employee plan to do with it? Upon asking these questions, employers may begin to “re-think” a previous decision to permit the employee to accept a new job free from litigation. The employee may no longer seem trustworthy, and the company may feel it can no longer rely on assurances that the employee’s new job poses little or no competitive threat.

2. **Sabotaging Records**

Refraining from taking records is a good start, but respecting the integrity of records is a good follow-up. Some employees mistakenly feel they can secure an undetectable advantage by altering company records on their way out the door. For example, departing employees can be

tempted to alter a telephone number in a computer system by one digit simply to gain a head start by slowing down the company's ability to contact clients, or to delete key information, assuming that no one will ever find out. In this time of technological advancements, however, employers are gaining more and more investigative resources that enable them to discover such misconduct, and computer sabotage easily begets claims for a violation of the Computer Fraud & Abuse Act. Departing employees should be reminded that the "gain," if any, secured by sabotaging records is far outweighed by the "pain" that may follow when their misconduct is uncovered.

3. **Soliciting or Telling Clients Prior To Resignation or Departure**

Even if an employee lacks a non-solicitation agreement, it is wise to remind departing employees not to begin soliciting clients until after their departure. Soliciting clients or advising them of the employee's plans prior to resigning can lead to problems. Although the law varies among states as to the propriety of an employee giving clients advance notice of his/her departure, solicitation prior to the employee's departure generally is not permitted. Pre-resignation solicitation may give rise to claims for breach of duty of loyalty and may serve as an aggravating factor for a judge who later considers the equities when contemplating injunctive relief. Departing employees often feel that if they do not advise clients of their impending departure, the clients will hold it against them. Although this is possible, employees should be reminded of the possibility of being enjoined from doing business with clients who were improperly solicited prior to resignation. Moreover, solicitation of clients prior to resignation may result in the employer finding out about the impending resignation from the client, and not from the employee, resulting in a heightened mistrust of the employee. The safest route is for an employee to continue to serve the interests of the employer until the very last moment of employment.

4. **Soliciting/Telling Fellow Employees Prior To Resignation or Departure**

Similar to solicitation of clients prior to resignation or departure, solicitation of fellow employees may also be a bad idea. Departing employees often misjudge whether they can trust their colleagues to keep their impending resignation a secret. Moreover, even if their colleagues do keep the secret, they frequently become witnesses after the employee's departure as the former employer will turn to its remaining employees when it conducts its investigation. Employers resent being the last to know about an employee's departure for a competitor, and they may scrutinize the former employee's actions with greater vigor if they believe the employee was trying to encourage others to join in the move to a new company.

5. **Failing To Segregate Non-Public vs. Public Data**

Departing employees sometimes take information for innocent reasons, unintentionally creating the appearance of an intentional misappropriation of trade secrets or conversion of property. A common example includes employees taking contact data that contains not only personal contact information, but also professional contact information. Other employees remove sales records with the intent of retaining information to enable them to substantiate their entitlement to commissions after they depart. Another common example includes employees taking articles or studies they wrote simply because the employees feel proud of their work product, not realizing that the employer views the work product as belonging to the company. It is wise to remind a

that the employer views the work product as belonging to the company. It is wise to remind a departing employee that the removal of "personal" information and property should be carefully analyzed to ensure that unwanted and allegedly proprietary or non-public information is not inadvertently taken.

6. **Granting An "Exit Interview"**

In some instances, it may be advisable for an employee to resign without giving prior notice. Negotiations concerning the parameters of the employee's subsequent employment with a competitor may well be more successful if conducted by counsel after the employee has resigned. The simple truth is that no matter how well you coach employees about how to resign, they rarely appreciate the legal consequences of their words. Moreover, savvy employers may pick up on evidence of misconduct that later shows up in support of a motion for a temporary restraining order. If delicate legal issues surround the departure of an employee from one competitor to another, the discussion with a former employer may well be left to counsel, and the employee may be well advised to avoid granting an exit interview, unless the employee is contractually obligated to provide such an interview.

7. **After-Hours Access**

Employees planning to leave for a competitor often access their offices or computers during odd hours with the intention of preparing for their departure when no one is around. After-hours access can be detected by security systems, or in some cases, it can be recorded by computer systems. If such access deviates from an employee's normal course of conduct, it may tip off the employer of the impending resignation. Even if such access is not detected until after the employee's resignation, it creates the appearance of impropriety. If coupled with other common mistakes discussed in this article (e.g., after-hours removal of business records), the appearance of impropriety grows stronger.

8. **Badmouthing The Firm**

Any time an employee leaves to join a competing firm, there is likely to be some hard feelings. Nothing compounds these hard feelings like an employee who badmouths the former employer on the way out the door or even after departure. Departing employees should be reminded that badmouthing the former employer to fellow employees accomplishes little -- other than providing motivation for the former employer to make the transition difficult. Moreover, badmouthing the former employer to customers can have the additional effect of backfiring, resulting in the loss of otherwise attainable business and perhaps leading to defamation claims. Employees should be advised to take the high road.

9. **Failing to Work Until The Last Minute**

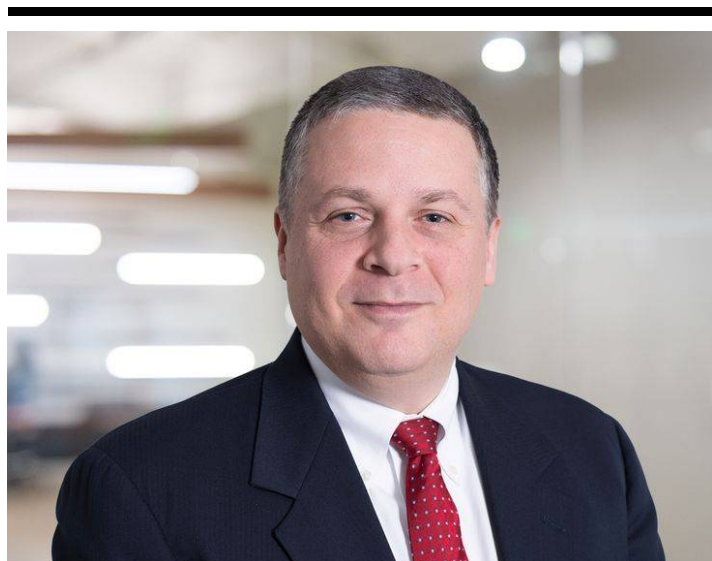
Understandably, it is hard for a departing employee to be motivated when a new job is on the horizon. In some instances, after providing notice of resignation, employers may limit the departing employee's access to information and customers. But a decrease in productivity in the weeks or months leading up to a resignation or departure may tip the employer off about the impending resignation, and worse yet, it may create the appearance that the departing employee was holding off on completing work with the intent to divert such work to their new employer.

10. **Failing To Consult With Attorney Prior To Resignation**

Many hiring managers make the mistake of waiting until after an employee has been hired to get counsel involved, by which time the departing employee may have made many of the mistakes outlined in this post. Counsel should be included early in the hiring process so that departing employees obtain the advice they need. If there are attorney-client privilege concerns, the employee should be advised to consult with an attorney of his/her choosing. No matter what, transitioning employees from one competitor to another is a process filled with tension. Foolish mistakes can increase that tension and may lead to litigation or strengthen a party's desire to litigate. Careful planning and early advice can minimize this risk.

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