

Managing the Risks of a Mobile Workforce

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Retiring after 30 years with the same company is rare today. The symbolism of a retirement party and a gold watch will be lost on generations as frequent employee transition between companies becomes the norm. While growing enterprises may find the availability of vibrant human capital attractive, employee transition can bring significant risk. Critically, departing employees often take with them their former employer's intellectual property or competitive advantages. Some industries, such as several large Wall Street wirehouses, have come together to establish protocols for employee transitions between their businesses. These protocols attempt to establish an orderly process that protects customers while balancing various competing business interests. Other companies, however, must rely on confidentiality and non-competition agreements with employees. In Silicon Valley, tech sector companies sought to stem "poaching" by agreeing not to hire away talent. Those agreements were challenged by 64,000 workers in a class action alleging the pacts are anticompetitive and designed to keep pay artificially low (*In re: High-Tech Employee Antitrust Litigation*, N.D.Ca. No. 5:11-cv-02509-LHK). In April, a \$324,500,000 settlement was tentatively reached, but recently some class members objected to the amount as too low. A hearing is scheduled for June. Engagement and protection of human capital are vital to the success of any business. When an employee departs, the employer should be mindful of protecting its intellectual property and proprietary business advantages. If the facts and law support it, the employer's best option may be to file a lawsuit quickly seeking a temporary restraining order. Regardless, employers should take preventative measures to prevent employee subversion, which will solidify their position should litigation arise. These include ensuring that non-compete agreements are enforceable in a world that is increasingly hostile to them, and implementing policies adequate to protect electronic and other company information from misappropriation. The assessments necessary when on-boarding new employees are equally important. Prudence requires the on-boarding employer to analyze the enforceability of any non-compete or restriction on the employee. Likewise, the company should have policies and agreements regarding its intellectual property and confidential business methods. The hiring employer must also proceed very carefully when recruiting employees, particularly those who may have some legally recognized duty of loyalty to the former employer. Careful consideration of the current state of the fast-evolving law on these and other relevant issues will be key to avoiding or defeating legal claims by the former employer.

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