

Hiring From a Competitor? Play Defense to Limit Trade Secret Risk

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When discussing trade secrets and strategies to protect valuable proprietary information, most companies focus on their outbound risk. In other words, companies pay close attention to protecting their own valuable trade secrets and proprietary information by implementing strong protections and policies such as to limit access to this information and to require employees to sign confidentiality agreements. Companies take these steps to address the risks presented when departing employees may be tempted to take key proprietary information to a competitor.

Your company's comprehensive strategies for handling trade secrets and proprietary information should also include guarding against inbound risk, that is, the potential for legal exposure when you hire people who worked with, or had access to, a competitor's proprietary information. Studies have shown that most employees retain confidential information when they leave a job and that most plan to use that information in some way in their new position. New employees typically want to showcase their expertise and to demonstrate immediate value by jumpstarting a product design initiative or similar project. The potential to misuse proprietary information is a very real risk when that person leaves your company. There is also significant risk of misappropriating trade secrets when that person leaves a competitor to join your company.

As we know from watching great basketball during [March Madness](#), it is difficult to succeed without a solid defense. Even if an employer does everything correctly, there is no guarantee that an angry competitor will not file suit when it learns that your company has hired away the competitor's key employee. Being proactive to establish a strong defense strategy can maximize an employer's chances of prevailing in such disputes. Here are a few tips to help you play strong defense when hiring from a competitor.

1. Make clear in the interview and in any offer letter and employment agreement that you do not want the candidate to bring or use any confidential/proprietary information from the candidate's prior employers or consulting clients. Candidates may not appreciate that information they previously worked with could be confidential or proprietary so consider providing general examples or categories of information that could be considered confidential or proprietary.
2. Ask if the candidate is bound by any restrictive agreements. While these are most often

confidentiality or non-compete agreements, restrictions are also found in incentive compensation agreements, employee manuals and codes of conduct. Therefore, do not limit the inquiry to “confidentiality agreements.”

3. Have your lawyers analyze the restrictions so that you fully understand the limitations applicable to the person and the risks to you if they join your company.
4. Ask if the candidate has complied with any applicable restrictions on the use of confidential information and the return of company property.
5. Do not ask the candidate about specific proprietary information. For example, you will want to ask detailed questions in an interview about the candidate’s job responsibilities and accomplishments, but you should not ask about specific product development, marketing strategies or similar information.
6. Make clear when offering the job that the candidate can be terminated for using another company’s confidential or proprietary information.
7. Require the new employee to acknowledge in writing that he or she will not import or use others’ confidential information and has not retained any from their prior employment or consulting engagements.
8. Consider assigning the new employee during his or her first few months to duties and responsibilities that are not substantially similar to their position with your competitor. This will help to negate an inference that you hired the person to immediately leverage the competitors’ proprietary information for your company’s benefit.
9. Monitor the new employee’s activity to satisfy yourself that they are not utilizing a competitor’s proprietary information. This could include inquiring of others on the work team if the new employee has referred to non-public, competitive information that he worked with before joining your company. Another step would be to have your IT team verify whether the new employee has imported information from an external source such as a thumb drive to your company’s system.
10. Document all of the steps taken.

Taking precautions like these will hopefully dissuade your new hires from misusing confidential information that they learned from prior employment or consulting engagements. Since we know that employees often do use such information, these precautions will also help your company defend misappropriation claims if your new hire does not follow your admonitions and misuses a competitor’s information.

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