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Noncompete agreements help employers keep trade secrets

With the turnaround in the industry, hotels are placing more emphasis on keeping and attracting the best employees. What happens, then, when your star employee—the one you've invested heavily in and entrusted with your company's best-kept trade secrets—decides to join the competition? Is there anything you can do to stop that?

The answer might depend on whether your employee has signed a noncompetition agreement restricting his or her ability to work for the competition. In a recent case, a hotel amenities supplier hired its competitor's former senior v.p. for sales and marketing, whose responsibilities included high-level product development and marketing. The competitor sued to prevent the employee from working for the new company on the grounds that the employee had, or would inevitably use, confidential trade secrets acquired during his employment, which would cause irreparable injury to the competitor.

The court denied the request. While acknowledging that the misappropriation of a trade secret could give rise to the irreparable harm, the court noted that there was no proof that the employee had actually disclosed any proprietary infor-

mation and, in the absence of a noncompetition agreement, said it was unwilling to create an "implied-in-fact restrictive covenant."

The court specifically noted that the employee had an expired employment contract containing a covenant not to compete and a provision stating that any breach or threatened breach of the covenant would give rise to injunctive relief. Because the competitor had executed a new confidentiality agreement with the employee that did not contain a restrictive covenant, the court concluded that it was "clearly anticipated" that the employee might change his employment after acquiring confidential information.

In another recent case, the court held that restrictive covenants contained in two former employees' employment agreements were enforceable to protect the former employer's client relationships and goodwill. Although the court recognized that there were competing concerns in balancing an employer's right to protect the fruits of its labor against an employee's right to freedom of employment, the court concluded that "... it is not the court's province to determine the best way to balance the parties' interests."

When an employer is not seeking to prevent an employee for working for the competition but suing to recover damages for the theft of its trade secrets, a noncompetition agreement might not be necessary. In the mid-1990s, Radisson brought an action against Westin and its then-c.e.o., Juergen Bartels, alleging that Bartels, a former high-level employee of Radisson, wrongfully used Radisson's proprietary and trade secret information concerning its travel reservation marketing system to assist Westin in developing a competing program.

Although Bartels was not subject to a noncompetition agreement, Radisson claimed that Westin and Bartels had wrongfully acquired and used trade secret and confidential information. The court upheld these claims in the face of Westin's motion to dismiss.

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