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Key Issues in Departing Employee Litigation

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This paper highlights five key legal issues that typically come up when an employee leaves Employer 1 and goes to work for Employer 2, a competitor. For each issue, I will provide some practice tips and some suggested recent cases to consider. These are not necessarily the most important cases for each issue, but they do illustrate important points that lawyers should think about when litigating departing employee disputes.

1. Confidentiality Agreements

Usually the departing employee signed an employment agreement that includes a confidentiality clause or non-disclosure agreement. Often the NDA will require the employee to delete or “return” confidential company documents after termination of employment.

But deleting or returning company documents is not always advisable. First, deleting documents could violate the duty to preserve relevant evidence when litigation is reasonably anticipated. Second, the employee might need those documents to prove her own case, especially if there is a dispute about whether the employee is owed compensation. Then there’s the practical problem: how do you “return” electronic files?

Practice Tip:

Exercise judgment about deleting or “returning” company documents. On this issue there is no one-size-fits-all solution. You have to think through the issues and make a judgment call. You may decide, for example, to return that portable hard drive the employee used but to have an expert make a forensic copy that you retain in case of litigation.

If you represent the employer and you are drafting an NDA, be sure to include a clause stating that the employee’s nondisclosure obligations continue after termination of employment. That might otherwise be implied, but it’s a good idea to expressly state it, as the *Vassar Group* case illustrates (see below).

Cases to Consider:

Daugherty v. Highland Capital Management, L.P., No. 05-14-01215-CV, 2016 WL 4446158 (Tex. App.—Dallas Aug. 22, 2016, no pet.) (mem. op.).

In *Daugherty*, evidence that the employee took confidential information supported granting a permanent injunction against the employee, despite the jury's finding of zero damages. *Id.* at *8.

Gallagher Benefit Services, Inc. v. Richardson, No. 6:19-cv-00427, 2020 WL 1435111 (E.D. Tex. March 24, 2020).

This is another case where a breach of a confidentiality agreement supported an injunction. Gallagher claimed that Richardson violated her nondisclosure agreement by emailing herself a “producer report” containing names and contact information for the employer’s clients. *Id.* at *1. Richardson conceded she emailed herself the report and was serving over 60 former Gallagher clients. *Id.*

The court found that Gallagher showed a substantial likelihood of success on its claim that Richardson breached the nondisclosure agreement by keeping and referencing the producer report. *Id.* at *5. The court cited case law holding that there is irreparable harm where the defendant could derive a benefit from a confidential database without first investing the time, expense, and labor necessary to research and compile the information. *Id.* at *6 (citing *AHS Staffing, LLC v. Quest Staffing Group, Inc.*, 335 F. Supp. 3d 856, 873 (E.D. Tex. 2018)).

The court entered a preliminary injunction requiring Richardson to “return” all Gallagher confidential information, including the producer report. As to information in electronic form, the court ordered Richardson to return it to Gallagher’s counsel in electronic and hard copy format, and then to delete all electronic forms of the information. *Id.* at *8.

Vassar Group, Inc. v. Ko, No. 05-18-00814-CV, 2019 WL 3759467 (Tex. App.—Dallas Aug. 9, 2019, no pet.) (mem. op.).

This case illustrates the potential interplay between termination of employment and termination of nondisclosure obligations. The NDA at issue included both nondisclosure and compensation provisions. When the employee sued to recover unpaid commissions, the employer counterclaimed for breach of the nondisclosure provisions. The court rejected the employee’s argument that the employer was estopped from asserting the NDA remained in effect. *Id.* at *4. But the NDA did not contain any provision on when it would terminate, and the court said this created an ambiguity that raised a fact issue as to whether termination of employment also terminated the nondisclosure obligations. *Id.* at *5.

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