How to Avoid Liability When You Hire an Employee From a Competitor

In today’s economy when attracting new business particularly is tough, many roofing contractors are focusing on retaining their existing customers and business relationships and ensuring protection of their proprietary and confidential business information. Roofing contractors often require their key employees involved in sales, estimating or other sensitive customer information to execute employment agreements with confidentiality clauses or restrictive covenants, such as noncompete clauses or nonsolicitation clauses.

Employees bound to restrictive covenants in an employment agreement may be prohibited from soliciting business from the company’s customers should the employee obtain employment elsewhere. These restrictive covenants commonly are referred to as nonsolicitation provisions. Similarly, employees may be bound to a noncompete provision, which prohibits the employee from working in the roofing industry within a specific geographic area for a period of time after the employment relationship is terminated.

When a restrictive covenant, such as a nonsolicitation or noncompete provision, is breached by a former employee, it is not just the former employee who will be subject to liability for the breach. The new employer may have liability, as well. Companies that hire an employee from a competitor need to be concerned about this potential liability and whether they are subjecting themselves to a claim by the competitor alleging tortious interference with contractual relations. A claim for tortious interference with business relations requires the competitor to prove the new employer was aware of the duty the employee owed to his or her former employer and that the company placed the employee in a position to induce or cause a breach of the duty owed the former
AVOID LIABILITY WHEN HIRING A COMPETITOR’S EMPLOYEE

In order to avoid liability for tortious interference with contractual relations, the roofing contractor hiring the employee from the competitor should be sure to ask the applicant or newly hired employee whether he or she is bound to an employment agreement with the former employer. If the applicant or newly hired employee represents that he or she is bound to an employment agreement with the former employer, the new employer should ask to see a copy of the agreement to review its terms. Legal counsel should be asked to review the enforceability and legal restrictions of any restrictive covenants contained within the employment agreement. If the terms include any enforceable restrictive covenants or confidentiality provisions, the new employer needs to be sure not to place the newly hired employee in a position that would inevitably have the employee breaching the terms of his or her employment agreement with the former employer.

Further, it always is a good idea to have the newly hired employee execute a document whereby the employee promises that accepting employment will not put him or her in breach of any existing agreement with a former employer. For example, the following clause can be included in an agreement with a newly hired employee:

Employee represents that his or her performance of job duties and responsibilities does not and will not breach any enforceable agreement to solicit business, compete in business or keep in confidence proprietary information acquired in confidence or in trust prior to employment with the company.

Employees hired from a competitor also should be required to notify the company in writing if they are asked to perform a task, or otherwise placed in a position, requiring them to breach the terms of an employment agreement with a former employer. In those instances, once notice is provided, the new employer should rearrange job duties and tasks to avoid a breach of the agreement the employee has with a former employer.
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It may be that the first notice received by a roofing contracting company informing them an employee hired from a competitor is bound to an employment agreement with confidentiality provisions and restrictive covenants comes from the competitor or the competitor’s attorney.

Roofing contractors who receive a letter from a competitor or an attorney informing them an employee may be in breach of an employment agreement should not ignore the letter. Instead, a reasonable inquiry should be made into the allegations. A proper inquiry must include reviewing the subject agreement. If the notice from a competitor or its attorney does not include the agreement, it is reasonable to request a copy.

If the notice suggests the employee is soliciting customers of the competitor and is in violation of an employment agreement, you also can ask for a list of those customers being improperly solicited. Only with this specific information can an employer avoid placing employees hired from a competitor in a position where they may be breaching the terms of their employment agreement with their former employer. If the information is provided and the employee remains in a position where he or she is in breach of duties owed the former employer, you may be liable for a claim alleging tortious interference with contractual relations.

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