SILVERMAN | ADVISORS
ATTORNEYS AT LAW

January 2014

LEGAL TRENDS YOU SHOULD KNOW

This Edition's Topics:

I. Recent Court decisions may give your employees an exit strategy - WHAT YOU NEED TO KNOW!

II. The FTC is actively investigating Dealers – ARE YOU BEING WATCHED?

I. EMPLOYMENT ISSUES

The Bad News – non-solicitation/confidentiality agreements can go "stale" if not routinely updated, allowing tenured employees to violate their written promises.

The Good News – "wedding announcements" no longer work! These wedding announcements are the cards you typically get from people announcing their new contact information. They use these in the hopes of keeping your business while abiding by their obligations to their former employer.

Can you have employees sign *non-compete agreements* to stop them from going to work at competitors? *Maybe*, but there are a lot of conditions and Courts often find the ex-employees right to earn a living and support their family outweighs an employers concern for how the employee will unfairly compete.

Can you stop key employees from poaching your employees with *non-solicit agreements*? *Probably*, and you only need to follow some simple steps to ensure your agreements and practices stay current with the decisions of Judges that may be asked to enforce your agreements and protect your business.

You may not want to have employees sign *non-compete agreements* – preventing them from being employed at a local competitor – but every employer should have employees sign *non-solicit agreements* confirming their obligations not to solicit other employees or customers, and to maintain the confidentiality of your private information and the private information of your customers.

It may be tough to get a yes or no answer from an attorney, but in this case it is because there are conflicting decisions from some Judges interpreting one set of facts that leave other Judges unsure how to rule.

Recent Court decisions impact the obligations owed by former employees.

Five years ago you paid an attorney to draft a document for every employee to sign. It was very fair – your employees promised not to steal your confidential information, client lists, or pricing models and they couldn't bring all their friends with them when they leave to go to a competitor. You had every employee sign, stuck it in their file and called it a day. Now, your general manager of ten years leaves, and is sending post-card announcements, Linkedin invitations to all of your employees and your commercial customers, and Facebook requests inviting them to like his page that is linked up to the Facebook page and web-site of his new employer.

Once you get over the emotional betrayal, you remember this employee freely signed a document promising not to do this. Two conflicting decisions in Massachusetts last year left it up in the air whether the agreement with this former manager are enforceable years later. It's possible that if a non-solicit agreement isn't renewed often enough, it may not be enforceable any more, especially if there's been some material change to an employee's position, salary, or duties.

Another decision helps clear up a lot of confusion regarding how legit "wedding announcement" solicitations are, and the answer is simple: your former employee who leaves can't avoid his/her obligations and poach clients or employees through a transparent effort to titillate their curiosity with an announcement of his new activities.

By way of its August, 2013 decision in *Corporate Technologies Inc. v. Harnett*, the United States First Circuit Court of Appeals finally put to rest the longstanding uncertainty as to whether solicitation required first-contact under Massachusetts law. A salesman who had gone to work for a chief competitor sent a blast email to his former clients announcing his new job, and then waited for them to contact him. He argued that his activities in relation to clients of his former employer did not violate the non-solicitation provision because it was the clients who initiated first contact with him.

The trial court judge rejected this distinction, finding that the nature of the communication, rather than who first contacts whom, controlled whether or not solicitation had occurred. The fact that he "met with his former [employer's] clients and has *encouraged* them to bring their work to [his new employer]" the "kind of persuasion [which] constitutes solicitation", even if he hadn't contacted them first.

The Appeals Court agreed, stating that if an employee agrees not to solicit former co-workers or clients, "that right cannot be thwarted by easy evasions, such as piquing [employees] curiosity and inciting them to make the initial contact . . ."

Below are some situational examples that may help make the point:

Situation #1: You have every employee sign a non-solicit document that says they won't poach your staff or steal your customer lists if they leave.

Problem: Have you had your most important employees sign new agreements each time they were promoted? If not, Courts might not enforce the document that was freely signed by both you and your employee.

Most employers hire candidates with a positive outlook – and an expectation that the employee will grow, evolve, be promoted, and rotate to different positions or locations. So memorialize those expectations: when an employee signs an agreement, make sure the agreement addresses the possibility of changes, and states your intention to keep the agreement in effect despite those changes.

Situation #2: "I don't have employees sign those documents – I'm not getting involved with that stuff, this isn't Wall Street." Your general manager is offered an ownership opportunity at your closest competitor, leaves, and offers jobs to your five top managers and your best sales and service staff!

Problem: Without a non-solicitation agreement very little prevents groups of your employees from following a ring-leader to a competitor.

Situation #3: You have all your managers sign non-solicit agreements stating they won't solicit your staff if they leave. You update the agreements on a yearly basis. Your top two managers leave for a competitor under cordial conditions. Two weeks later they send every one of your employees an announcement with their new contact information. On top of that, you hear through the grape-vine that several of your managers have reached out to talk to them and are now considering leaving.

Problem: There may not be a problem if you have kept your agreements updated. Recent decisions have made passive aggressive efforts to solicit just as prohibited as a frontal attack.

Action Points/Summary:

You may choose not to have any employees sign agreements with post-employment restrictions or obligations. However every employer should ensure that he/she makes clear to employees that they can't take your stuff with them when they leave.

II. FTC/ADVERTISING ISSUES

The Bad News – the FTC may be watching you online, and you don't know it . . . and may not for awhile.

The Good News – the playing field is getting leveled and businesses don't need to worry as much about pushing the envelope to match their competition (ok, maybe this isn't much of a silver lining).

The FTC just announced 9 tentative settlements with auto dealers for violating advertising regulations (and one lawsuit against a Massachusetts dealer who refused to settle). Beyond the obvious reminder to pay attention to your practices – what else does this mean?

First, if the FTC is watching you, they won't let you know right away. The settlement with one of the dealers says their "bad ads" were being run "Since at least March, 2011" and many began no later than January, 2013. This means the FTC investigators were looking at dealer's ads at least a year ago without any notice to the dealer, and the resolution only got announced last week. You won't get any notice either. Meanwhile, the FTC's "register" will ring away as its claim for damages rises with every instance that you publish a problematic ad.

Second, they're not just reading the daily paper anymore. As you might expect, the complaints are generally for ads in which an advertised price or term is contradicted by fine print that is difficult to read. However, these ads are not just traditional print ads appearing newspapers, magazines, or mailings. The FTC has started to police the wide world of online advertising. Seven of the ten complaints were for misrepresentations in a wide range of internet-based marketing. They are going after ads in online circulars like myautoplus.com and autoviso.com, banner and video ads on dealer websites, as well as video ads posted on youtube.com. In these advertisements, there is fine print that is blurred, extremely small, scrolls by at high speed, or is otherwise called "illegible" by the FTC; such high-tech workarounds to advertising regulations may seem attractive to stay competitive, but be warned, the FTC is online and watching.

Action Points/Summary:

Big picture – DO NOT over-promise and underperform. Ask yourself whether your promotions pass the "smell test":

(1) Would most average customers understand what is being offered?
(2) Would most average customers be able to take advantage of the offer?

If you think the rules seem confusing and enforcement seems random or erratic, you are not alone. If you have specific questions or would like guidance on any of the information discussed above, please do not hesitate to contact me at scott@silvermanadvisors.com or at 781.591.2886. Thank you to clerks Nick Dorf and Robert Langevin for their assistance with this bulletin.