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HR's Role in Protecting Your Brand's Reputation

37th Annual Workforce Management Briefing

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Your Workforce. Our Business.™

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HR's Role in Protecting Your Brand's Reputation

Hiring from a Competitor: Practical Tips to Minimize Litigation Risk

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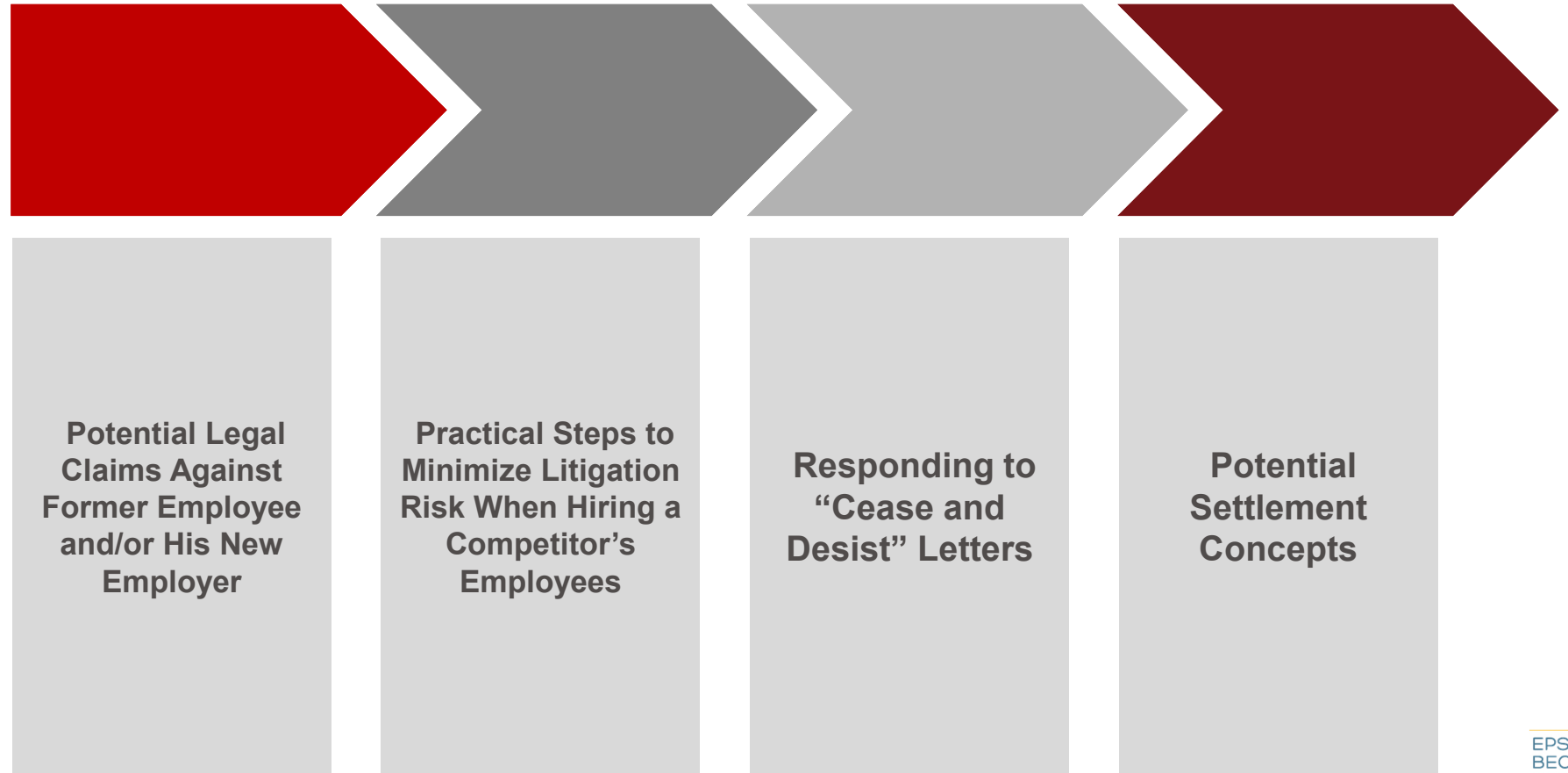
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Agenda



Potential Legal Claims Against Former Employee and/or New Employer

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Breach of contract/
employment agreement

- Violation of non-solicit
(customers or co-workers)
- Violation of non-compete
- Violation of confidentiality
agreement



Alternatively, common law torts,
e.g., conversion and unjust
enrichment

More Potential Legal Claims by Former Employer



Breach of fiduciary duty / duty of loyalty (inappropriate conduct or solicitations pre-resignation)

Tortious interference with contractual and business relations

- For interfering with employee's contract
- For interfering with employer's customers or other employees

More Potential Legal Claims

Misappropriation of trade secrets

Actual misappropriation by former employee or his/her new employer

“Inevitable disclosure” of trade secrets is actionable

- Former employee is in possession of his/her former employer’s trade secrets
- Joins direct competitor
- Cannot help but rely on trade secrets
- Circumstances suggest lack of trustworthiness



Computer Fraud and Abuse Act



Federal Statute

May be available where employee accesses a computer:

- “Without authorization” or
- “Exceeds authorized access”



Typical Violations

Employee downloads and copies confidential files from employer’s computer system

Employee tries to “cover his tracks” by deleting copied files before returning company’s computer



Computer Fraud and Abuse Act

Courts Split On:



Whether CFAA applies to employees who are authorized to access an employer's computers but do so for their own purposes (e.g., to copy documents before leaving to join a competitor)

OR

Whether CFAA applies only when an individual was not authorized to access an employer's computer (e.g., a hacker)

Practical Steps to Minimize Litigation Risk When Hiring a Competitor's Employees

Gather Necessary Information



Does the applicant have a restrictive covenant with current employer?

Ask!



Also ask about:

- Restrictions from prior employers
- Restrictions buried in employment agreements, confidentiality agreements, option agreements, other benefit programs, or purchase and sale agreements
- Any other nooks and crannies where a restriction could be buried

Review Any Restrictive Covenants

01

Have an expert review any restrictive covenant

- Governing law?
- Likelihood of enforceability?
 - › Narrowly tailored to meet employer's legitimate business interest?
 - › Undue burden on individual?
 - › Duration of restrictions?
 - › Does new employer meet definition of "competitor"?

02

Can candidate adhere to restrictions and perform the new position?

- Compare non-compete with any available job description
- Discuss requirements with candidate's prospective manager

03

Employer's past history of enforcement?

Possible Protective Steps



Is it appropriate for the candidate to seek a waiver of restrictions?

His/her choice

Can the proposed position be restructured to avoid issues?

Park candidate “on the bench” for duration of restriction?

Provide Legal Advice to Candidate?

01

Encourage candidate to seek his/her own counsel

02

Alternatively, the candidate and prospective employer can jointly seek advice, provided that they have a common interest and there are no conflicts

03

Any agreement to indemnify candidate (or not) should be clear

Be a “Good Leaver”

Instruct new hires to be “good leavers”:

- Take nothing with them when leaving and return all property at termination (laptops, iPhones, thumb drives)
- Do not retain e-mails or electronically stored documents or information
 - Consider whether appropriate to seek direction from former employer regarding disposal or return
- Do not solicit any customers or colleagues

Think like the new hire – particularly salespeople:

- Talk his/her language
- New hire’s view of who “owns” a client list might differ from the employer’s view

“Loose Lips Sink Ships”

New hire should be advised:

Don't “rub salt in the wound”

Litigation decisions can be driven by emotion

Don't “trash talk” former employer

It just invites claims for defamation and tortious interference

Do “kill them with kindness” and professionalism on the way out the door

Other Possible Protective Steps

If the candidate has a non-compete, possible protective steps include:

Have candidate represent in countersigned offer letter that he/she has reviewed duties and no contractual restriction would prevent performance

Courtesy phone call to old employer to provide assurances?

Seek a declaratory judgment?

Assess Likelihood of Litigation

When assessing likelihood of litigation, put yourself in the other side's shoes:

Circumstances of departure?

How competitive are the businesses?

Value of information?

Similarity of new/old positions?

Likelihood of customer or co-worker flight?

Do circumstances justify litigation cost?

Avoiding Claims of Unlawful Co-Worker Solicitation

Possible steps to avoid these claims:

Of the various types of post-employment restrictions, courts are most likely to enforce an “anti-raiding” provision (i.e., a clause barring solicitation of former colleagues)

Wall off new hire from recruitment of former colleagues?

Establish protocol for handling employment inquiries by former colleagues?

Avoiding Trade Secret Litigation

**Only a minority of “cease and desist”
letters result in actual litigation**

When they do, it’s usually because of trade
secrets



**Is there anything you can do to avoid
such litigation?**

Yes, quite a few things



Create Your Own Defense to a Trade Secret Misappropriation Claim



**Think of offer letter as
“Defense Exhibit No. 1”
in any resulting lawsuit:**

The letter should instruct new hires not to bring, distribute, or use any confidential information, trade secrets, or property of a prior employer

The letter should require new hire to confirm that he/she has reviewed duties and responsibilities of new position and can perform them without using or disclosing confidential information of another

Helpful Handbook Provision



Address property of others in an employee handbook or confidentiality agreement

Prohibit use or distribution of confidential information or trade secrets of former employers

Avoid “Inducement” Claims



Verbally instruct new hires not to solicit co-workers or customers until after effective date of resignation

Responding to “Cease and Desist” Letters

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Who should respond?

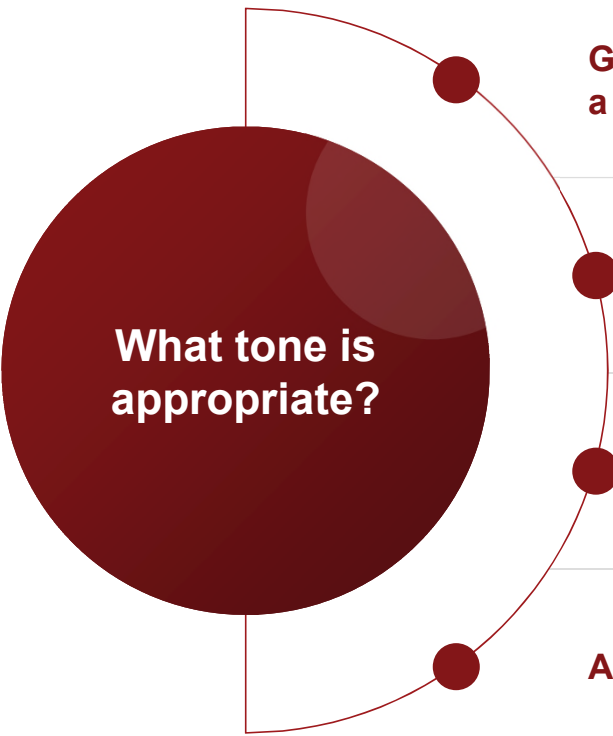
- An equivalent person (HR vs. HR; lawyer vs. lawyer)
- If using a lawyer, have someone who knows the law



Should you do so?

- Yes, almost always
- Depending on the response, it can be “Defense Exhibit 2”

The Appropriate Tone



What tone is appropriate?

**Generally,
a reassuring one:**

- New employer takes the concerns of the old employer seriously, but they have no basis
- New employer has investigated (if trade secret misappropriation is alleged) and found none (if that's not true, take appropriate action)
- New employer has created an information or client wall (if true)
- If haven't addressed all concerns, please advise

Leave the door open to dialogue

Aggression will beget aggression

Ask questions

- E.g., “What is your basis for believing that Fred solicited your client Acme?”

Evidence Preservation

01

Duty to preserve is triggered by “cease and desist” letter (possibly even before that)

02

Issue document preservation notice

03

Preserve e-mails

04

Take forensic image of key hard drives

Potential Settlement Concepts

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Return of information and documents



Possible reps and warranties

- No longer have access
- If discovered, will return
- New employer not aware of violations

Other Potential Settlement Concepts



Inclusion of “No Hire” Provision in Settlement Agreement?

What is a “no hire” agreement?

An agreement by new employer not to hire others from former employer for a limited time period

Why include in settlement of non-compete or raiding case?

Workforce protection for former employer
Avoidance of disputes about former employee’s involvement in recruiting – a “bright line”

Risk

Possible antitrust scrutiny
Consider recent Department of Justice emphasis and activity
Must be narrowly tailored, of limited duration, and tied to a legitimate business interest

Be In The Know ...



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Any Questions?