FOCUS: LABOR & EMPLOYMENT LAW

The Rights & Obligations of Departing Executives

By Ted Anderson and Robert Behrendt

Before executives leave a company for any reason, they should consider the common law and contractual duties that they may owe to the former company after departing, as well as their potential legal rights to assert whistleblower and other claims.

Under state common law, an executive owes the company duties of loyalty and confidentiality, as well as fiduciary duties. Fiduciary duties and the duties of confidentiality may survive the employment relationship. In addition, many companies require their executives to execute non-compete agreements, non-solicitation agreements, assignments of intellectual property rights, and confidentiality agreements at the time (or after) the executive joins the company. These agreements impose requirements — beyond those under the common law — on the departing executive which may limit the executive's ability to find a new position. To avoid potential claims, such as misappropriation of trade secrets, unfair competition, breach of contract, breach of a covenant not to compete, breach of common law duties, and tortious interference with business relations, departing executives (with the assistance of counsel) should understand the nature of their continuing obligations owed to the former employer before accepting a new position.

Employers increasingly pursue their former employees for breach of a covenant not to compete. Notwithstanding myths to the contrary, courts do enforce non-compete covenants. Under TEX. BUS. & COM. CODE § 15.50(a), two criteria must be satisfied in order to enforce a non-compete covenant:

(1) the covenant must be "ancillary to or part of an otherwise enforceable agreement at the time the agreement is made"; and

(2) the covenant must contain "limitations as to time, geographical area, and scope of activity to be restrained that are reasonable and do not impose a greater restraint than is necessary to protect the goodwill or other business interest of the promisee."

Typically, in the "otherwise enforceable agreement," the company provides the executive with confidential information, trade secrets, or specialized training as consideration in return for the executive's promise not to disclose any of the employer's confidential information or trade secrets. To have the best chance of enforcing the covenant not to compete, the company should provide the executive with the consideration at the time the executive executes the agreement containing the covenant, rather than at a later date. The Texas Supreme Court's eagerly anticipated opinion in *Alex Sheshunoff Management Services, L.P. v. Kenneth Johnson and Strunk & Associates, L.P.*, No. 03-1050, may further delineate what is or is not required in order to make a covenant not to compete enforceable.

Under certain circumstances involving potential corporate wrongdoing, executives who are departing public companies may want to consider whether or not they have a potential whistleblower claim against the company under the Sarbanes-Oxley Act of 2002 (18 U.S.C. § 1514A).

Additionally, if an executive believes that he or she was retaliated against by the employer for providing information, causing information to be provided, or for assisting in an investigation relating to alleged violations of 18 U.S.C. §§ 1341, 1343, 1344, or 1348, any rule or regulation of the Securities and Exchange Commission, or any provision of federal law relating to fraud against shareholders, then they should consider filing an administrative complaint with the U.S. Secretary of Labor. The executive's claim, however, must be filed quickly — within 90 days of the act of retaliation or discrimination against him. The claim will be investigated by the Department of Labor, which can order "make whole" remedies, including reinstatement and the payment of back pay and special damages, to the prevailing executive.

If circumstances exist in which the company may have defrauded the federal government, the departing executive may also consider bringing a *qui tam* claim, under the False Claims Act, to "blow the whistle" on the former employer. In order to initiate a *qui tam* action, the executive-relator must provide the government with enough non-publicly disclosed information to get the federal government to pursue the company for the false claim. In the event of a successful recovery by the government, executive-relators can recover 15 percent of the government's award if they merely bring suit, and up to 25 percent of the award if they actively assist in the government's action.

Finally, executives often execute written employment agreements, which often give rise to disputes under the "termination for cause" provision and may provide the executive with rights to vested benefits including severance, retirement benefits and special "golden parachute" payments when there is a change in control of the company. HN

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