

Ask The Lawyer

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CONFIDENTIALITY AGREEMENTS

In my "Ask the Lawyer" article in January, I discussed covenants not to compete (also referred to as a non-competition agreement) in general terms. A related subject that many business owners have inquired about relates to confidentiality agreements.

Most confidentiality agreements prevent an employee from using information and knowledge obtained during their employment once that employment has been terminated in order to protect the employer's investment in its business enterprise. Depending on the nature of the business, an employer will have spent a significant amount of time, money and effort in developing methods, techniques, relationships and customer lists. Accordingly, an employer will take every possible measure to protect its investment.

As was seen with respect to covenants not to compete, whether the courts will enforce such agreements must be examined on a case-by-case basis. There is no definitive answer. The case law simply provides a litmus test that can be used to measure whether such a confidentiality agreement will be enforced according to its terms.

What IS clear are the terms of a previous ruling that said "Where the customers are readily ascertainable outside the employer's business as prospective users or customers of the employer's services or products, trade secret protection will not attach and courts will not enjoin the employee from soliciting his employer's customers." *Leo Silfen, Inc. v. Cream*, 29 N.Y.2d 387 (1972).

Another factor that courts examine to determine whether to enforce a confidentiality agreement will be the degree to which the employer has limited access to use of the information, methods and techniques sought to be assigned "trade secret" protection.

It's a well-settled principle of law that an employee may not physically appropriate that which belongs to an employer. As such, the analysis a court will undertake changes dramatically if an employer can establish that an employee

has absconded with a customer list, computer program or a manual that illustrates the method or technique the employer sought to protect under the terms of the

confidentiality agreement. In this situation, the employer can have an injunction issued preventing the employee from using that which was taken.

What does this mean for the day-to-day operation of your business? First and foremost, limit employee access to the information you deem to be confidential. The ability to do so will obviously depend on the nature and size of your business.

As discussed in my previous article, consult your attorney as soon as you suspect that a confidentiality agreement has been breached or an employee has taken that which does not belong to him. Keep in mind that **you do not need a covenant not to compete or a confidentiality agreement to seek judicial relief in the event that your employee has taken your property.** □

Nothing contained in this article is to be construed as a legal opinion or the creation of an attorney-client relationship.



Small-Biz Snapshot

Small-business owners in Central and Western New York were asked what they needed the most to help them grow:

- 24% More demand for product/service
- 20% Better access to capital
- 13% Lower taxes/fees
- 10% Lower non-wage labor costs
- 8% More qualified workers
- 8% Less government regulation



Source: Buffalo branch – Federal Reserve Bank of New York and Center for Governmental Research, Inc.