

WATER COOLER MONTHLY

E-NEWSLETTER

**July 2007 Tying Your Employees' Hands To Protect Profitability****The "Work Around" To Unlawful Covenants Not To Compete****Employee Covenants Not To Compete**

California law (Business & Professions Code section 16600) makes all contracts that restrain anyone from engaging in a lawful profession, trade or business void. Void – meaning such contracts/agreements are simply not legally enforceable. California courts have viewed this section very broadly when asked by employers to enforce them.

A 21st Century Mobile Workforce Creates Problems

These days though employees jump ship to a competitor or start their own competing business and steal your clients, raid your employees, and use your business secrets against you. For California employers trying to protect their businesses, this has been challenging. With an increasingly mobile information based workforce, the problem is accelerating.

Courts Struggle Setting Boundaries

To top it off, this seems to be a very difficult problem for courts. Recently one court refused to enforce a contract clause between an information technology consulting firm and one of its clients that prohibited the client from hiring any of the IT consulting firm's software engineers within 12 months of completion of any engagement without paying a fee. The contract heading stated: "BUYER [client] WILL NOT ATTEMPT TO HIRE SELLER'S PERSONNEL." VL Systems, Inc. v. Unisen, Inc. (June 25, 2007).

You guessed it, the client placed a job advertisement, one of the IT consulting firm's employees responded and the client hired that person. When the IT consulting firm sent its client a bill for the fee, client balked and got sued by the IT consulting firm.

The court sided with the client, but primarily because of the effect on the employee and other employees in California.

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Because the fee provision created a potential barrier to mobility of the employee, the court "voided" it and refused to enforce it under B&P 16600. That meant the client got the employee without having to pay the IT consulting firm anything in spite of the contract provision.

How To Protect Your Business?

Certain very narrow restrictions may be enforceable, for example:

- Against soliciting customers/clients
- Against soliciting employees
- Against using "trade secrets" and other proprietary intellectual property
- Against taking electronic or hard copy information

Restrictions against soliciting customers and employees should be limited to a reasonable time.

Broad based restrictions against former employees to keep them from competing against you at all won't work. Those are flatly unenforceable under California law (B&P 16600). So take what you can and don't go for the whole enchilada. Going for the whole enchilada might result in zero protection to your business.

The Fix

Evaluate the risk to your business of departing employees taking what you have taught or exposed them to and using it to compete against you. While broad "can't compete against us" provisions will not work, narrowly tailored policies or agreements may protect your profits from employees or competitors wanting a piece of them. If the risk warrants a non-solicitation of customers/employees and proprietary rights agreement, then implement one.