Podcast

Protecting Against Poaching

By Clifford R. Atlas & Erik J. Winton

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Details

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Employees are the most valuable assets of any company. Particularly in the life sciences industry, where employees are often highly skilled and entrusted with trade secrets, it is mission critical to protect against unfair poaching by competitors.

Takeaways

Protecting Against Poaching

Employees are among the most valuable assets of any company. Particularly in the life sciences industry, where employees are often highly skilled and entrusted with trade secrets, it is critical to protect against unfair poaching by competitors.

What Employers Need to Know

- Employees create and protect trade secrets and cultivate customer/client relationships. Without talented employees, employers likely would have neither.
- On July 9, 2021, President Biden issued an executive order to prevent anti-competitive conduct, calling on the FTC to engage in rulemaking to prevent the unfair use of noncompete agreements.
- Tiered restrictive covenants can prevent poaching and incorporate different clauses including:
  - Non-compete;
  - Nondisclosure of confidential information;
  - Non-solicitation of employees; and
  - Customer non-solicitation and non-servicing obligations.
- Most jurisdictions recognize that companies have a legitimate business or protectable interest in keeping valued employees.
  - Draft employee non-solicitation covenants to cover a wide array of situations.
  - Use liquidated damages clauses to address potential arguments that the employees in question would have left even if they were not solicited.
- Protect confidential personnel information.

    - Define confidential information in employee handbooks, policies, restrictive covenants, and non-disclosure agreements.
    - Define confidential information in a way that captures sensitive workforce data including compensation structure, strengths and weaknesses of your employees, employee experience and the level of training of your workforce.
    - Properly tailor these provisions specific to the organization.
    - Treat the information confidentially by storing behind secure passwords, in locked files digitally and physically, and train and educate employees on why information is deemed to be confidential and what that means.
- The National Labor Relations Act and other state laws may prohibit provisions aimed at preventing employees from discussing compensation, terms and conditions of employment or engaging in other protected conduct.
- Consider agreements with business partners and vendors similarly.
- Practical steps employers can take include:
    - Be cognizant of the dynamics of your workforce.
    - Ensure that human resources has a pulse on how the entire workforce, as well as specific divisions, groups or individuals, may be feeling about their jobs in order to best address potential problems before they arise.
- Use exit interviews to provide an employee with a signed copy of the restrictive covenant agreement. Remind the employee of what those restrictions are and follow up with the employee in writing about these points after they leave.
- Consider informing the new employer of the employee's restrictive covenants, letting them know that the company is monitoring the situation carefully, the company believes it has enforceable legal rights at stake and they will enforce those rights through litigation if necessary.

Transcript

Alitia (00:06):

Welcome to Jackson Lewis' podcast, We get work™. Focused solely on workplace issues everywhere and under any circumstances, it is our job to help employers develop proactive strategies, strong policies, and business oriented solutions to cultivate a workforce that is engaged, stable, and diverse. Our podcast identifies the issues, dominating the workplace and its continuing evolution and helps answer the question on every employer's mind. How will my business be impacted?

Employees are the most valuable assets of any company, especially in the life sciences industry, where employees are often highly skilled and entrusted with trade secrets. Mission critical is to protect against unfair poaching of employees by competitors. On this episode of We get work™, we share both practical and legal techniques to prevent poaching, including using tiered restrictive covenants, protecting sensitive personnel information, creating an effective exit protocol and engaging with competitors who hire someone away.

Our hosts today are Cliff Atlas and Eric Winton, co-leaders of the Restrictive Covenants, Trade Secrets and Unfair Competition practice group, and principles respectively in the New York City and Boston offices of Jackson Lewis. Cliff and Eric think it's unfair to compare, but often engage in friendly competition over who provides the best client service. However, both agree in not being restrictive in finding

the most effective ways to protect client's confidential business information.

Cliff and Eric, the question on everyone's mind today is how can I prevent poaching in the post pandemic era and beyond, and how will that impact my business?

Cliff Atlas (01:53):

Hi, I'm Cliff Atlas.

Eric Winton (01:55):

And I'm Eric Winton.

Cliff Atlas (01:56):

And welcome to this episode of We get work™. Why is the topic of how to protect against poaching employees relevant, especially in cutting edge industries like life sciences? Often one of the company's most valuable assets is its talent. Now one might think that trade secrets, or intellectual property rights, or relationships or contacts with clients or customers are the most valuable assets of a company. But without talented employees, you likely would not have, either. Employees create and protect trade secrets and they're the ones who procure and cultivate customer and client relationships.

Eric Winton (02:33):

Cliff, competition for high quality talent is fierce across many industries, but I know you and I have found that in life sciences, that's really one of the most competitive industries with respect to talent. And this intense type of competition sometimes will unfortunately incentivize certain companies to behave poorly and to engage in unfair competition for top talent. When we talk about unfair competition in this regard for talent, it's known as poaching or raiding. Just stepping back for a second, the default rule is that employees can go wherever they want, right? Absent they can be free to leave or work anywhere, even if for a competitor, unless there's some covenant that they've signed that says they can't do that.

And for the same reason, competing companies can be free to target or solicit specific, one-off employees from their competitors to hire them away. Subject again, to certain limitations, which is what makes the difference between simply hiring someone from a competitor and raiding or poaching them because not every solicitation or hiring of an employee of yours by someone else is a raid or a poach. That's really an important point that we need to make here. So companies seeking to protect their most valuable asset, their employees, against unfair poaching needed to be proactive. We're going to discuss on this podcast, some legal and practical steps to take to defend against the threat of poaching.

Cliff Atlas (04:03):

Thanks, Eric. Before we talk about what you can do, let's spend a minute talking about what you cannot do.

Eric Winton (04:10):

Cliff, don't be a negative Ned here. It's not all about what we cannot do.

Cliff Atlas (04:13):

Well, but this is really important because employers may not agree with their competitors or even with the other non-competitive company that might be located down the road, that they will not hire each other's employees. That would be viewed as a naked restraint and a violation of federal antitrust laws. This is according to the October 2016 joint publication for the Department of Justice Antitrust Division and the Federal Trade Commission, that's titled Antitrust Guidance for Human Resource Professionals.

Now to be clear, the kinds of activities that likely are problematic include even informal agreements between companies not to hire or not to cold call each other's employees. Informal inquiries about how much your competitor or other companies in your community are paying employees also could be problematic. The Department of Justice's focus on these issues spans the Trump and Biden administrations and the Department of Justice is very aggressive. We have seen a number of criminal indictments, including of the individual employees responsible for these activities over the last couple of years.

Eric Winton (05:30):

Cliff, I want to make sure I heard you right there because the people listening to this podcast may be the kind of people who might have to be concerned about being one of those individuals if they enter into one of these naked restraint agreements. That they may be on the hook criminally as an individual.

Cliff Atlas (05:48):

Yes, that's absolutely right. And if that doesn't get your attention nothing will.

Eric Winton (05:52):

Right. On July 9, 2021, President Biden came out with an executive order calling for all kinds of action to be taken to prevent anti-competitive conduct and including calling on the FTC to engage in rulemaking to prevent the unfair use of non-compete agreements. That's all part of this topic and earlier in his presidency Biden had spoken about getting rid of no poaching agreements. Although he did not get into detail as to what he meant exactly by that, from the context, it would appear that he was speaking more about the type of naked restraints mentioned earlier. So what can you do? Now we're going to be a positive Pete, not a negative Ned. What can you do to prevent poaching, Cliff? What we can do is, we can use tiered restrictive covenants. Why don't you talk about that?

Cliff Atlas (06:41):

Yes, we can use restrictive covenants in what we refer to as tiered restrictive covenants, really as a variety of slightly different covenants that can be present in an agreement all at the same time. Probably the most well-known contractual mechanism for protecting against poaching is a non-compete agreement. Now non-compete agreements are agreements that prohibit an employee from working for a competitor within some reasonable geographic territory performing some scope of activities and for a limited period of time. I typically refer to these as true non-

competes. I know Eric, you use the same sort of terminology. Non-compete agreements while still valid and enforceable at least to some extent in 47 states, have been subjected to increased regulatory scrutiny at both the state and federal levels. But there are other agreements that can be effective and they're typically scrutinized by the courts less heavily than non-competes.

Eric Winton (07:47):

Cliff, let me jump in there for a second. When you say other agreements, we're talking about different provisions within the same document ordinarily, right?

Cliff Atlas (07:54):

Yes, other clauses. Thank you for correcting me. We generally recommend that companies consider using different tiers of restrictive covenants with different groups of employees. Even the lowest level of employee should be subject to non-disclosure of confidential information obligations and potential employee or contractor non-solicitation provisions and possibly no higher provisions, depending upon the jurisdiction. Now, most jurisdictions recognize that companies have a legitimate business interest, or as we call it, a protectable interest in keeping valued employees. For larger companies, non-solicitation of employee restrictions generally should be limited to those employees or contractors with whom the signing employee had some contact or some connection during employment and not extend to the entirety of the employee population of a very large corporation.

Eric Winton (09:00):

Agreed and the restrictions, they should prohibit not only personal solicitation, but helping others to solicit or recruit as well. This is something that we run into a lot in our practice, Cliff. Is that we hear, "Oh, well, I didn't reach out to that employee. They reached out to me first," as if that is going to make the world of difference here. What we try to do with these provisions is that we try to expand the language, make it broader so that that type of argument really doesn't rule the day. Just giving you an example of some contractual language that we've used, that I'm actually litigating in another case. Something like that the employee will for a period of one year after termination, will not directly or indirectly, either alone or in association with others, hire, or approach, or solicit, recruit, induce, entice, or attempt to do any of those things. So that you are really being able to cover all those different scenarios where an employee leaves and someone reaches out to that employee and say, "Hey, can I join you?" Or, "What's it like working at that new company?"

These restrictions should be, as I say, drafted broadly so that those type of factual scenarios can fall into that. There's also the possibility of using a liquidated damages provision with those provisions. The reason for that is because one of the arguments we often hear from the other side is that, "Hey, that employee was going to leave anyway." In order to combat that and combat the argument there's no causation or damages, we have a liquidated damage provision at times. That's something to consider.

Going back to our different levels of tiered agreements, employees who are in the middle level of hierarchy or who have interaction face-to-face with customers, just like

sales employees, should also potentially have customer non-solicitation or non-servicing obligations. Again, most jurisdictions recognize that protection of goodwill for such employees that the employees generate on behalf of the company is a protectable interest. And if a sales employee is subject to a reasonable enforceable customer non-solicitation or non-servicing agreement, they become less attractive as targets for a competitor to take away and therefore less likely to be poached unfairly by a competitor.

Cliff Atlas (11:14):

When you say reasonable, Eric, what do you mean?

Eric Winton (11:16):

Well, I mean this should apply to the customers that they actually had dealings with as opposed to every single customer of the company. Sometimes salespeople come to a company with their own book of business from a prior company, from years in the industry before. You may need to carve out those customers that they came to you with from that non-solicitation provision. That's what I mean by reasonable, Cliff.

Cliff Atlas (11:41):

Right and what you just said about the customers with whom they've had contact and a possible exception for book of business that they bring over, is something that's consistent with New York law and New York precedent, for example.

Eric Winton (11:55):

Yeah, in New York, as well as Massachusetts and plenty of other states that follow what's called the rule of reason. So even if the employee leaves for a competitor, that company is protected against unfair competition on the business side. Meaning if that employee leaves, it's not as damaging to you because they can't go after their book of business with that restriction there. So they are just competing fairly, just like anybody else would be who never had experience working for you as a company.

Finally, for senior leaders or research and development employees, companies should consider maintaining or adding the true non-compete provisions in jurisdictions where they are enforceable. The takeaway here is that true non-competes specifically should not be the default way to protect against poaching for all employees. There are several other options from a contractual standpoint that can be effective to limit raiding, and they make sense for an employee relations and legal enforceability perspective.

The next thing you can do to try to combat the potential for raiding or poaching of your employees, is to protect your confidential personnel information. Now, when companies talk about what are their trade secrets or their confidential business information, they don't often first think of information about their workforce or their personnel as being a trade secret or confidential information. Now it may not rise to the level of a trade secret, like the recipe for Doritos or something like that. But it may, and very well does, rise to the level of confidential, proprietary business information that does have a right to be protected and something that can be protected.

So how do you protect it? Well, you need to define wherever you define your confidential information, and that should be in your employee handbooks, it should be in policies and certainly be in your restrictive covenants and your non-disclosure agreements. You need to define confidential information in a way that captures sensitive workforce data. This would include information about potentially compensation structure, strengths and weaknesses of your employees, their experience, the level of training of your workforce. This information could be used by a competitor to unfairly poach your key employees. And recently there have been decisions or at least one in the past few years in Massachusetts at the highest court, an [inaudible 00:14:05] decision, which talked about how that kind of knowledge, that inside knowledge to be able to raid key employees is protectable. It's the kind of information about internal management dynamics, things about specific strengths, training. Frankly, it would give an unfair advantage to someone who has that inside information to be able to raid people from you.

There are things that maybe we're not even thinking about, and maybe it's not necessarily something you put in the drafting, but have some broad reference to it. Things like which employees are happy or unhappy, who likes or dislikes their managers, who's frustrated about the company's work from home policies? Who got a small raise the last time around, who didn't get the choice sales [inaudible 00:14:45] assignment? These are all things that you're only going to know if you've worked with those people and not from their LinkedIn profile. That's the kind of stuff that you don't want other employees using to be able to poach away or cherry pick your people.

Cliff Atlas (15:01):

Yeah, and Eric, I think that you're right. The other thing that I want to add on to that is that each company needs to think about its own workforce, its own business, and try to define these provisions in the agreement in a way that's going to be appropriate for them. So the agreement winds up being properly tailored for that specific employer. Of course, just defining or designating information as confidential isn't going to be enough. The company has to treat the information confidentially. Now it can do that by storing certain information behind secure passwords, in locked files digitally, in locked files physically. The company also can train and educate employees on why information is deemed to be confidential and what that means. The other-

Eric Winton (15:56):

Cliff, I had a client a few years ago that anytime something would be printed out, there was a chief security officer who would walk around the office. If there was a document sitting on the printer for more than 30 seconds, it would be shredded. I'm not sure they need that type of protection, but it is something that you need to think about is, what's out there? Things aren't being printed as much anymore. How are you protecting it? It's something that you need to train your employees about and your staff continually.

Cliff Atlas (16:24):

I think that's right. I mean, most companies now are working exclusively on computer networks. A lot of them don't permit printing except in limited instances, certainly don't permit the uploading of files to Dropbox or copying of files onto a thumb drive.

Those are things that are important because they do go to the point that you're working hard to keep the information confidential.

The other thing that employers need to keep in mind is the National Labor Relations Act and other state laws that may prohibit certain provisions aimed at preventing employees from discussing compensation, terms and conditions of employment, or engaging in other protected conduct. Companies of course, should discuss these issues with counsel before implementing non-disclosure agreements or confidentiality policies that designate all of that information as being confidential. One state, Eric, is Massachusetts, that has a law on this that would really limit in some way the scope of this type of provision.

Eric Winton (17:35):

Exactly, we do have our own Equal Pay Act that does not allow the restriction for certain employees of disclosing compensation information. So you have to be careful what you put in your agreements.

Cliff Atlas (17:45):

Right. Along with having agreements with employees protecting against employees poaching other employees or contractors, companies also should consider carefully having these types of agreements with their business partners and vendors. While such provisions are likely enforceable in most jurisdictions, we've seen, as I mentioned earlier, increased scrutiny by the Department of Justice and the Federal Trade Commission on the naked no poaching agreements between companies under federal antitrust law.

Now I've used that term a couple of times now, naked no poach agreements. These are generally agreements between two companies in which each agrees not to hire the other's employees with no other substantive terms to the agreement. The Department of Justice's focus has been concentrated on competitor companies, at least for now, as opposed to business partners. But as we said earlier, one should tread very carefully in this area.

Eric Winton (18:52):

Cliff, I think one more mention of naked restraints and we're going to have to change the rating of this podcast from PG to R. Look, there are other contexts in which no poaching agreements may be valid when they're not naked restraints, but instead are built into a business relationship or other valid contract. That can include, for example, a longterm contract between a company and a vendor, due diligence agreements pertaining to a potential merger, or agreements pertaining to some joint venture. And-

Cliff Atlas (19:20):

I think also, Eric, it could be settlement agreements of a litigation.

Eric Winton (19:24):

Absolutely, absolutely. In fact, towards that end, Cliff, I have at least two cases where there were raiding between two competitors that we settled the case on terms that the

raiding employer would no longer be raiding for some specific period of time. Both of those agreements, we made court orders which were endorsed by federal judges. Hopefully they were reading them before they endorsed them. We had an argument there that how could you just call something that's endorsed by a federal judge unlawful? Yeah, so I think these types of agreements, the ones between vendors and due diligence agreements, part of that, it goes to is there a protectable interest there?

Are these two companies introducing their employees to each other, or are they getting to know the employees and their strengths and weaknesses that they would be able to take advantage and poach those employees? You want the companies to be able to engage in these relationships and not be concerned about having employees be poached away. These are tools that companies can use to protect against poaching. But again, you should work with counsel to ensure that it is done lawfully.

We've talked about the legal ways, contractual and otherwise, to prevent poaching. There are also practical steps companies can and should take as well. One of the first ones, be cognizant of the dynamics of your workforce. This might seem obvious and is more of an employee relations than a legal issue, but the best way to keep your employees from being raided or poached is to make sure they're happy, engaged, appropriately challenged, but not overworked and fairly compensated. That's the best way to keep people, not by using the threat of enforcing restrictive covenants against them or going after the companies that are hiring them away.

Human resources should have a pulse on how the entire workforce, as well as specific divisions, groups, or individuals may be feeling about their jobs at any given time in order to best address potential problems that cause mass exoduses before they arrive. Certainly there will always be some turnover. It's natural for employees to leave for a variety of valid, fair reasons, and that can't be avoided. But if an entire workforce or some percentage thereof is not happy for a number of reasons, that's the first sign of an issue that may eventually lead to a raiding situation. If it can be addressed early, the likelihood of a larger scale poaching can be minimized.

Cliff Atlas (21:44):

Eric, it's interesting because this same advice is the advice that one gives to an employer who might be looking at a union organizing campaign. You need to talk to your employees and understand what they're thinking about. It's labor relations 101.

Eric Winton (22:01):

Talk to the guy, Cliff. Have you heard that before?

Cliff Atlas (22:03):

Yes, I have heard that. Talk to the guy.

Eric Winton (22:06):

Cliff, what do you have to say about exit protocols?

Cliff Atlas (22:09):

Creating an effective exit protocol is also really an important part of this because

when the employee leaves, don't just say goodbye and good luck. You want to have a protocol in place to ensure that your confidential information does not walk out the door with the employee and that the employee understands what information the company considers to be confidential. Including this type of personnel information, Eric, that you were talking about earlier. You want to make sure the employee who's leaving now is not just the first domino in what will become a raiding scheme. The company needs to understand the potential risk of unfair competition.

There also should be when an employee leaves and you are having a concern that they're going to a competitor, or they might be part of a bigger plan to leave, that you do secure and review the employee's emails, say for the last month of employment or so, gather the employee's laptop computer, iPhone, or other mobile device. And at a minimum, preserve them for a forensic review. But you may want to conduct that forensic review now and see if you can find evidence of any sort of misappropriation of trade secrets. It's remarkable what people will still try to do these days, even though activity is very easily traced through good forensic review.

An exit interview is going to be important to understand from the employee why they're leaving. That's from an employee relations standpoint, but it also gives you an opportunity as an employer to remind the departing employee of his or her legal obligations to the company post departure. Now, to be clear, it is appropriate to ask the employee if they're leaving to join a competitor and if so, what role they'll have with that competitor. It's also appropriate to ask them where they're joining, even if they're not joining a competitor, because again, poaching can occur not just between competitors, but among companies in the same community or companies that might have nothing to do with one another. So you do want to know that information.

During the exit interview, the company can provide the employee with a signed copy of the restrictive covenant agreement, whatever tiers of restrictive covenants might be in that agreement. And remind the employee of what those restrictions are and what they are not supposed to be doing. Of course, it's also helpful to follow up with the employee in writing about these points after they leave. A reminder letter that has a copy of their agreement attached, for example. Then of course, if they do join a competitor, there might be some ways to deal with that. Eric, do you want to talk about that for a second?

Eric Winton (25:02):

Yeah, and that's important. Hiring one person away is usually not an issue, but if it becomes two or three or more people, you need to engage proactively with those competitors or whatever company is hiring. Cliff referenced this earlier that it doesn't have to be a competitor. It can be an unfair poaching or raiding from a non-competitor, if they are doing it in a way that's not lawful. For example, if they are pumping your former employees for information about who are the best salespeople, it doesn't necessarily have to be for a competitive sales position. It could be for any sales position, because they're still damaging you by using your information to take away your asset, your workforce. Sometimes actions by a competitor or another company hiring away employees requires a proactive response. And if there are red flags of potential raiding, then it's best to get ahead of it as soon as possible.

You should consider informing the new employer of the employee's restrictive

covenants. And before doing this, companies should discuss this with counsel, of course, because there are risks in involving or contacting the new employer. But it is appropriate and necessary sometimes. And the risk is lessened if the concentration is on the disclosure of information or restrictions on hiring, rather than about true non-competition or customer restrictions. Communications to the new employer should usually be matter of fact, and circumspect. However, it can be important to put a competitor on notice of the company's position on these issues before one departing employee becomes more. It's possible to stop a raiding scheme in its tracks, simply by letting the competitor know that the company is monitoring the situation carefully, the company believes it has enforceable legal rights at stake, and the company will enforce those rights through litigation if necessary.

Indeed, many times taking such an action, writing that letter to the other company will result in the new hiring company speaking to their own counsel and deciding to stop, or at least slow down any possible hiring of additional employees in order to avoid potential litigation. Of course, if the companies are direct and fierce competitors, that letter could also lead to an aggressive response.

Cliff Atlas (27:07):

Right, the goal is Eric, I think as you suggested, to change the conduct of the hiring employer. You want them to back off a little bit. If you do need to litigate, you certainly can do so, but it's important to pick your battles. There are situations that do demand litigation if a large group of employees is hired away by a key competitor and those employees have enforceable restrictive covenant agreements. Your hand may be forced and failing to enforce rights through litigation in these types of extreme situations could risk the argument that the company has waived those rights for all employees in the future, and not just as to this particular competitor. Again, this is a complex decision that should be discussed with counsel and litigation in this area can be costly and can be complicated. But it is sometimes absolutely essential to do and to pursue.

These are just a few of the legal and practical methods of protecting employees against poaching. Hope that the information we've conveyed today has been informative to you. Attorneys in our restrictive covenants, trade secrets and unfair competition practice group have extensive experience in handling these types of issues and devising preventive strategies for you and we're happy to assist.

Eric Winton (28:35):

Thanks for listening.

Cliff Atlas (28:36):

Thank you.

Alitia (28:39):

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