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Tiptoeing through the noncompete legal minefield

Local employment lawyers are awash in noncompete and nonsolicitation lawsuits, but at least one local boutique has built a practice helping companies recruit smarter to avoid such costly litigation.



LEGAL NOTEBOOK

Sheri Qualters

Recruitment law is the specialty of Newton-based Manchel & Brennan PC, and their game starts with helping draft resignation letters for departing workers with noncompete or non-solicitation agreements. Firm shareholder Steven L. Manchel said a whole body of state law deals with pre-departure conduct, particularly when a group of employees switches companies.

The law allows workers who were peers in a group to talk to each other and plan to compete against the company they're leaving, he said, but other laws kick in if the group brings in employees at other levels or if the group's departure would threaten the company's survival.

"The law in Massachusetts is clear that if you assist someone who is breaching fiduciary duties you become liable," Manchel said. "The real test at the end of the day is who is in the group."

Courts also take a dim view of departing employees who forward résumés of others to the hiring company or who bad-mouth the company they're leaving, Manchel said.

"If an employee acts improperly, it is by far the biggest tiebreaker in this arena," Manchel said. "I can't stress how important it is to make sure an employee leaves properly."

The eight-attorney Manchel & Brennan has clients around the nation, but one of

its homegrown customers is Reebok International Ltd. (NYSE: RBK) of Canton.

Reebok Senior Counsel Keith Wexelblatt said Manchel's firm helps him short-circuit legal problems when recruiting executives, sales professionals and shoe designers in the highly competitive athletic shoe field. Although Reebok faces only a handful of U.S. noncompete cases a year, the company deals with about 10 hiring-related legal hassles that stop short of a lawsuit.

Conventional wisdom holds that judges shy away from enforcing non-competes because they don't want to prevent people from earning a living. But employment lawyers point to several reasons companies can't afford to be complacent: Courts are more likely to enforce noncompetes in a recovering economy; costs are front-loaded because employers must fight requests for temporary restraining orders and preliminary injunctions at the start of the case; and noncompete cases are particularly fact-specific.

In a case involving the former Lycos Inc. of Waltham — which has since been bought and sold a couple of times by foreign companies — in Middlesex Superior Court last year, a judge enforced a noncompete against one employee but refused to enforce a noncompete against a lower-level worker. "They're enforced every day and courts refuse to enforce them every day," said Julie Brennan of Manchel & Brennan.

And Boston-based litigation support and court reporting company WordWave Inc. collected favorable settlement terms last year, including the return of stock, in a Suffolk Superior Court lawsuit against a former employee it accused of diverting court-reporting jobs to her new company.

Everything depends on the company, industry and employee, and the employees' access to trade secrets and clients, Brennan said.

Judges will enforce noncompetition and nonsolicitation agreements if they believe the company is protecting legitimate business interests, said David Casey, the managing shareholder of the Boston employment law firm Littler Mendelson PC.

"They will enforce if they think the departing employee ... is in a position to materially threaten or injure the company with which he had a restrictive covenant," Casey said.

Ground floor operation

Former financial services executive Beth Stubenrauch is bringing affordable legal documentation preparation to Beantown with the first Bay State franchise for We the People USA Inc. of Berwyn, Pa., which Stubenrauch describes as the legal document counterpart to H&R Block Inc.

With a new store at 100 City Hall Plaza that opened last month, Stubenrauch's services include \$99 for wills, \$399 for business incorporation and \$499 for divorces.

While a senior vice president in the Boston office of New York-based Brown Brothers Harriman & Co., Stubenrauch managed a department specializing in foreign investments, but an entrepreneurial itch pushed her to strike out on her own.

"We're excited about the concept and happy to see it's been embraced by other states," said Stubenrauch.

We the People, which has 175 stores in 32 states, charges an \$89,500 franchise fee and estimates startup costs of \$123,000 to \$170,000.

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