

Time to move on? TRO can spell trouble

By Linda Shirkey

When it's time to leave your current firm, prepare for war. Tug-of-war.

Whether you're hanging your own shingle or going to a competitor, expect your current employer to fight you for your clients.

As the first step in your battle plan, consider the types of agreements you may have signed:

- a confidentiality and non-disclosure agreement
- an agreement not to solicit customers
- an agreement not to solicit co-workers to change jobs
- an agreement not to work in competitive fields.

When you leave to become a competitor, your former employer can sue, claiming it is being damaged by your actions. The former employer can also ask a judge to issue a temporary restraining order, or TRO, which forbids you from violating the agreement.

Even if you have refused to sign any of these types of agreements, your former employer can still sue you, says Rachel Powitzky Steely, a partner and board certified labor and employment law attorney with Gardere Wynne Sewell LLP in Houston.

"They can still say you used confidential information," she says. "They can still go after you."

But if you're determined to move on and bring your best clients along, don't let fear of a lawsuit stop you.

Keep an attorney handy

Review your agreements with your legal counsel ahead of time. Be prepared for a lawsuit and TRO.

"This is one of those cases where an ounce of prevention is worth a pound of cure," Steely says. "TROs happen all the time. For some companies, it's a standard business practice." It's nothing personal; it's their method of fending off competition.

Your attorney may be able to reach a settlement with the other side before the TRO goes before a judge. In Houston, for example, you'd be notified by your former employer's attorney that they've requested a TRO. At that point, your attorney may be able to negotiate a compromise.

But let's say the judge grants the TRO. It will be in effect between ten and 28 days, Steely says. Then you'll go to a court again. Your former employer will try to get the TRO extended into a temporary injunction, which can last up until the time of a trial – anywhere from six months to a year. During that time, there will be depositions and discovery.

All the while, the meter is running on legal fees. Dealing with a TRO can cost \$5,000 to \$10,000, Steely says. A temporary injunction can rack up anywhere from \$25,000 to \$75,000. The trial itself can soar up to \$500,000. Most cases don't make it that far.

"About 90 percent settle before they go to trial, at the temporary injunction stage," Steely says. "It's in the best interest of all parties to settle quickly because of the legal fees involved."

Are there ways to avoid a TRO? It depends on your former employer. There are ways to make it harder for them to prove a case. Here are a few pointers:

1. Leave empty-handed

On the day you resign, “go out as clean as snow,” Steely says. “Don’t download anything, don’t take a single piece of paper with you. Make sure there’s nothing on your home computer or your cell phone. Be completely clean.”

A caveat to her “clean as snow” tip: Don’t use a “white out” program to erase everything on your company-owned laptop. “It may look as if you’ve been up to something,” she says. If you have personal data on it, such as banking information, tell the employer that you’ll need help getting it erased.

Another suggestion from Steely: When you tell your employer you’re leaving, give them an opportunity to look through your home computer and cell phone to prove you have nothing to hide. This is a one-time chance and done at their expense.

2. Mum’s the word

Keep your departure plans secret until the day you resign. By all means, do not contact clients ahead of time.

Many departing advisors give notice at late as possible on Friday evening, spend the weekend contacting clients and filling out account applications and transfer papers, and start their new business on Monday morning. They’re betting that it will take the former employer at least until Monday afternoon to file the TRO. By then, they’ve contacted most of the clients.

Steely strongly advises against this practice. She suggests waiting at least a week, maybe longer, to contact clients, depending on the contentiousness of your departure.

And how do you get the client list? Remember their names and go to public sources like the Internet to get their phone numbers and addresses.

Your former employer could inadvertently help you reconnect with clients. The firm probably will send a letter to clients saying you’ve left and introducing them to the person who’s now handling their accounts. Clients will call you to ask what’s happening.

Another tip about being tight-lipped: Don’t tell co-workers that you’re leaving until you actually resign, and don’t offer any staffers a job while you’re still there. “If your staff says ‘What do we do?’ you say, ‘There’s nothing I can talk to you about right now, but call me after I’m gone,’” Steely says.

She adds that while non-compete agreements are upheld in court about 50 percent of the time, agreements not to solicit personnel are “almost always upheld.”

3. Let’s make a deal

Let’s say you’re fairly certain your former employer is going to sue you because you’ve seen the firm go after other departing co-workers. You may want to propose a deal, Steely says.

“You may want to say, ‘Okay, I won’t do anything for three months.’ Take a vacation, then get started.”

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