

Can You Prevent An Ex-Employee From Using Your Customer Data?

August 15, 2007

How well is your business prepared to prevent an ex-employee from using your customer data to compete with you? A recent decision by the U.S. District Court in Pennsylvania reinforces the need for employers to be steadfast in requiring employees to properly maintain confidential and proprietary information both during and after employment.

Stephen Fitzgerald, a sixteen-year employee of the law firm of Brett Senior & Associates (the "Brett firm"), had access to the firm's customer database, including specific services performed for clients and the amount of fees paid by clients. Fitzgerald had no written employment agreement; however, at the firm's request, ten years into his employment, he signed a "policy document" that included a section on disclosure of confidential information.

In November 2005, Fitzgerald advised the firm that he was leaving to work for a competing firm. Over the next two weeks, Fitzgerald contacted firm clients and asked them to come with him to his new firm. Fifteen clients did so. After leaving, Fitzgerald succeeded in soliciting an additional fourteen clients away from his former firm.

The Brett firm sued Fitzgerald, alleging that his use of the customer data violated the federal Computer Fraud and Abuse Act (the "Computer Fraud Act"). Other allegations included that Fitzgerald misappropriated the firm's trade secrets, breached his fiduciary duty, wrongfully interfered with the firm's relationship with its clients and engaged in unfair competition. The court dismissed all claims against Fitzgerald, except the breach of fiduciary duty claim, given the fact that Fitzgerald had solicited clients while still employed by the firm.

The court held that the 'policy document' was not a binding agreement. Similarly, the court found no violation of the Computer Fraud Act because Fitzgerald did not obtain the customer information through unauthorized or inappropriate means. His later alleged misuse of that information is not the type of conduct that the Act is intended to prevent.

So what if this happens to your business? One of the best practices towards preventing this type of conduct is to require all applicable employees to sign an appropriate non-disclosure agreement. The agreement should clearly state the parties' intention to be bound by a contract, contain terms that are sufficiently definite to be enforced, a signature line for the employee and an authorized company official and be conditioned upon employment (for new employees) or continued employment (for current employees).

Employers should also establish and maintain policies and procedures to protect confidential and proprietary information (including a swift exodus for an employee going to a competitor) and re-affirm an employee's contractual obligations with him or her upon termination.

If you have questions about employment issues or practices, feel free to contact Adam Forman at +1.313.496.7654.