

## Thinking about joining – or leading a team move?

Here are a few things you should check out:

- Remember that so long as you are employed by your current employer - and that includes periods of garden leave - you owe a duty of loyalty to them. What this means depends to an extent on your seniority in the organisation, but it will always involve obligations:
  - Not to disclose or misuse confidential information.
  - Not to compete with your employer – even in your spare time – while you remain employed
  - To disclose misconduct by other employees
  - In certain cases, to disclose approaches from competitors. However, it is okay to tell your colleagues you are leaving without telling your managers.

However, there are steps an employee can legitimately take to prepare to set up in business, for example locating premises and contacting suppliers, so long as these are done in their spare time.

If you are a company director, or in a position of trust, those duties will extend even further, to obligations:

- To avoid conflicts of interest.
- To disclose your own misconduct .
- Not to make a personal profit .

Other, less senior, employees may have express terms in their contract setting out similar obligations.

- Have a careful look at your employment contract – you may need advice from a specialist. In particular, look out for:
  - How long is your notice period? Is there a power to require you to stay away from work once you have given your notice, and to force you to delay joining your new employer – in other words a “garden leave” clause? During garden leave you will be bound by all the terms of your contract, and approaching fellow employees will be a breach of the implied and/or express terms of your contract. To reduce the risk of committing a breach of this duty, you could consider passing the details about likely candidates to a third party – either the new employer or a recruitment consultant - so that they can deal with the recruitment phase directly.
  - Restrictive covenants, especially “non poaching” clauses which continue in force after you have left. You will definitely need to get these checked out, and you should disclose them to your new employer. If you fail to do so, you run a number of risks. If you join the new employer and action is taken against you for breach of a restrictive covenant, the new employer could be exposed to liability for inducing breach of contract. Equally, if you have joined the new employer without disclosing a non compete or non poaching clause in your contract, you will be at risk of dismissal.
  - An express obligation to report to your employers if you know that anyone is thinking of organising a team move, or approaches you to jump ship. Clauses like this are increasingly being used in industries where team moves are a big risk. Even if there is no express clause, an obligation to report can be implied some contracts, particularly for senior employees.

- An obligation not to disclose your remuneration to others. There are now restrictions on the enforceability of such clauses, but generally speaking they remain enforceable unless the disclosure is in connection with establishing whether there is an equal pay or sex discrimination claim, and so gathering information to feed to a competitor could be misconduct.
- Does your employer have a power to monitor phone calls or use of its IT systems? If so, it should have been made clear to you, probably in your employment contract or the staff handbook. If not, they may have trouble using any evidence they gather through monitoring.
- Think about the practicalities:
  - Carefully consider what amounts to confidential information belonging to your employer and take care not to use it for the benefit of your new employer.
  - You should be safe using anything which your new employer has themselves made publicly available – for example in an annual company report, or on its website/
  - Something which has legitimately become part of your own know how is something you can take with you – but take care - memorising your employer’s confidential information doesn’t make it part of your own stock of knowledge and experience
  - Remember that you run the risk if you take a new job without disclosing a binding non-compete or non-poaching clause that you will not be staying in that new job long. If your old employer alerts your new company to the restrictions when they find out where you’ve gone, you may be of no further interest to them as an employee, or even a liability to them
  - Your employer probably monitors email communication, and all use of company IT – email traffic, downloading or copying information – and phone traffic (including texts) is going to be scrutinised carefully by an employer who is concerned about a team move. They will also be alert to any changes in behaviour – a sudden unexpected rash of lunches with junior members of a team, or a change in working habits (early starts or late finishes, or working from home more often) - could lead to an investigation. Bear in mind that forwarding information to your personal email account is likely to be regarded as misconduct.
  - Take care what you do about social networking sites; you could be in breach of your duties of confidentiality if you download your LinkedIn contacts to take with you
  - Remember that everything you do on a computer remains traceable - including Facebook chat, Skype traffic and all types of IM – if what you are doing is enough of a threat to your employer, they may well think it worthwhile spending money on a forensic IT expert. All documents – even things you might think of as informal and transitory – are potentially disclosable if legal proceedings are started.

For further information on this issues or other employment related matters please contact:

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