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EMPLOYEE DUTY OF GOOD FAITH AND LOYALTY TO EMPLOYER

Non-officer Employees:

In general, the duty of loyalty prohibits non-officer employees from:

- 1) competing with the employer while still in the employ of that employer;
- 2) taking employer's customer list or soliciting customers away from employer while still in the employ of that employer; and
- 3) appropriating the employer's personal property.

Examples of Breaches of Duty of Loyalty:

- Establishing a business to compete with employer
- Giving away company property
- Using company funds for your own purpose
- Taking kickbacks
- Embezzlement
- Erasing computer information and taking computer and personal files
- Interfering with current and potential business relationships
- Selling company goods and pocketing the money

Corporate Officers or Corporate Fiduciaries:

Conduct which is likely to trigger liability for corporate officers under the duty of loyalty includes:

- 1) using corporate assets without compensating the corporation to develop a new entity;
- 2) appropriating the office space of the corporation to help another corporation or business in which the officer has an interest;
- 3) taking advantage of a corporate opportunity without first disclosing it and tendering the opportunity to the corporate employer;

- 4) taking advantage of a corporate opportunity where officer's private interest would conflict with that of the corporation;
- 5) using corporate assets to usurp corporate opportunity for employee's own venture;
- 6) pre-termination solicitation of one or more customer of the employer;
- 7) soliciting or contracting with fellow employees of employer prior to terminating employment relationship;
- 8) voting for and accepting bonuses without disclosure that officer is leaving the company or firm; and
- 9) using firm's confidential information such as credit, billing or other financial information of the company or company's records for the benefit of employee's new venture.

TRADE SECRETS

A trade secret is information that is not known to the public, that its owner takes steps to keep from public knowledge and that has value because it is not known to the public. By definition, an employee who has access to an employer's trade secret information acquires it under circumstances giving rise to a duty to maintain its secrecy.

Ohio has adopted the Uniform Trade Secrets Act. This Act defines a trade secret as:

Information, including the whole or any portion or phase of any scientific or technical information, design, process, procedure, formula, pattern, compilation, program, device, method, technique, or improvement, or any business information or plans, financial information, or listing of names, addresses, or telephone numbers, that satisfies both of the following:

1. It derives independent economic value, actual or potential, from not being generally known to, and not being readily ascertainable by proper means by, other persons who can obtain economic value from its disclosure or use.
2. It is subject of efforts that are reasonable under the circumstances to maintain its secrecy.

The most common forms of trade secrets misappropriation in employment litigation are customer lists and pricing information. Marketing plans, software, engineering drawings, and other non-public information stored in electronic form under password protection will also likely qualify as trade secrets.

Making a copy of the employer's password protected customer list and sending a direct mail advertisement to each customer on the list for his/her new employer is misappropriation of trade secrets. The new employer has also misappropriated the trade secrets because the new employer reasonably should have known that the employee had a duty to maintain its secrecy.

FEDERAL ECONOMIC ESPIONAGE ACT

The federal Economic Espionage Act makes the theft and misappropriation of trade secrets a crime. Covered misappropriation includes theft of trade secrets for the benefit of foreign powers and the theft of trade secrets for commercial or economic purposes regardless of who benefits.

The Economic Espionage Act of 1996 applies outside of the United States where the offender is a US citizen or permanent resident alien of the US or any act that occurred in the US involving the misappropriation of the trade secret.

Elements under 18 USC Section 1831

1. Defendant stole or, without authorization of the owner, obtained, destroyed or conveyed information;
2. Defendant knew this information was proprietary
3. The information was in fact a trade secret, and
4. Defendant knew the offense would benefit or was intended to benefit a foreign government, foreign instrumentality, or foreign agent.

Prohibited acts include copying, duplicating, sketching, drawing, photographing, replicating, transmitting, delivering, sending, mailing, communicating, or conveying.

Elements under 18 USC Section 1832

1. Defendant stole, or without authorization of the owner, obtained, destroyed, or conveyed information;
2. Defendant knew this information was proprietary;
3. The information was in fact a trade secret;
4. Defendant intended to convert the trade secret to the economic benefit of another other than the owner'
5. Defendant knew or intended that the owner of the trade secret would be injured; and
6. The trade secret was related to or was included in a product that was produced or placed in interstate or foreign commerce.

HOW TO PROTECT YOURSELF

Avoid Printing Proprietary Information

Do not print, download, or copy sensitive company information unless it is absolutely necessary.

If you must print a document, place the information in a secure envelope or locked drawer or cabinet. Keep the cabinet locked when you are not using the information.

If you are ever in doubt about whether you have authorized access to information or a document, make sure to get written clearance from your chain of command prior to accessing the document.

Do not use cameras or recording devices in the office, unless needed for the work you are performing.

Avoid putting company information on your personal devices.

Avoid using your personal devices to receive or respond to company business.