

Planning to Compete with Your Current Employer? Plan Carefully!

by David S. Rintoul

Many consulting practices start when someone leaves a current employer to start a firm, maybe in the same city and in the same practice area as the former employer. Sometimes this can result in a cooperative relationship in which the former employer helps you get established and is your ally in developing your firm. Other times, everyone ends up in court. This article will address some of the issues you should consider to increase the chance that you will create an ally, and not an enemy, when you form your new firm.

Will You Tell Your Employer Beforehand? Whether to tell your employer before you leave to compete is perhaps the most fundamental question to answer. Whether to do so depends primarily on two things: the personality of your boss and the competitive threat you pose. The former question is largely beyond the scope of this article, but you should have a pretty good idea of how litigious your boss is based on the time you have been employed and what's happened before when an employee left to compete. The latter question depends on a realistic determination of the effect of your leaving on the employer's practice. Aside from the obvious questions of how many clients you think you will take and the proportion of the firm's revenues they represent, ask yourself the following:

- Could the employer give you contract work after you leave, or even office space, if you talk beforehand?
- Is it worth agreeing not to go after certain clients or not to accept work from them to secure your employer's cooperation in setting up your new practice?
- Can you define an initial area of practice that you can do economically on your own that the employer intends to drop or deemphasize because it cannot?

This is an important issue to get right, as the consequences of getting it wrong are serious. For instance:

- If you tell your boss ahead of time in hopes of gaining his or her cooperation, he or she may fire you right away. It may take you months to get up to speed so you can compete without the pay you were counting on from your now-former employer. In the meantime, your former employer will be giving great service to the clients that you thought you could pick up because they were unhappy. Even if you are not fired, you are giving your employer a chance to lock in its relationship with its clients, while you cannot solicit them for your new business due to the duty of loyalty, discussed below.
- If you don't tell your boss ahead of time, you may lose the chance to do contract work or receive referrals from your former firm. A potential ally can turn into an enemy. If you quit and set up a new firm the next day, your former employer may be suspicious that you are using its proprietary customer list or other intellectual property, or that you violated your duty of loyalty by contacting its clients while still employed. This could result in the employer suing to obtain an injunction to stop you from doing business.

The above parade of horrors happens rarely. The consequences of things going badly are serious, however, so you should spend significant time considering this question at an early stage in your planning.

Do You Have a Non-Compete? If you are subject to a non-compete, you should consult with a lawyer about what effect it may have on your business plan. A non-compete or covenant not to compete is an agreement not to compete with your employer in a certain practice and geographical area. Other articles I've written for this publication deal with them in more detail. You have to individually agree to a non-compete, which is almost always in writing, so review anything you signed when you joined the employer. If you are not sure you signed a non-compete, ask to review your personnel file.

If you are subject to a non-compete, consult with a lawyer familiar with your state's laws of non-competition. State laws on this issue vary widely, so you need to know what the law is in your state. The situation is even more complex if you live in one state and your employer is in another.

As you may learn from your lawyer, the existence of a non-compete is only the beginning of the issue. The agreement may not be enforceable, in whole or in part. There may be a viable market niche not covered by the non-compete in which you can confine your practice for the duration of the non-compete. You may be able to negotiate a relaxation of the non-compete with your former employer. You may decide that it is so unlikely that the employer will enforce it that you will open your practice anyway. This is an issue to address early, however, with qualified legal help.

What Can I Do For My Business While Employed? This is another area where you need to check on your own state's laws. The following discussion reflects principles of Connecticut and general law, but this is another area where you should consult with a lawyer in your state.

As an employee, you generally owe a duty of loyalty to your employer not to compete with it while employed. You can prepare to compete, however. You can sign a lease, form an entity, reserve a name, buy advertisements to run after you leave, have announcements printed, and do anything else other than actually starting to deal with the public. Do not take any customer lists, as these can be trade secrets. Also, avoid taking any documents from your employer, even your own work product, to avoid an intellectual property fight. You can talk with co-workers with whom you may want to go into business. You can probably talk to other employees about coming to work for you as an employee, though this is an area that touches on your duty of loyalty to your employer.

You generally cannot tell existing clients that you are going into business for yourself and ask if they will come with you. You can try to scoot around the edges of what is allowed by making general enquiries about whether they are happy with your employer, but you have to be careful when asking these questions.

As soon as you are no longer an employee, and so long as you are not subject to a non-compete, you are free to compete. You can call your employer the morning you intend to start business to quit, and then go into your office and start calling clients.

Conclusion: You Can Do This. The purpose of this article is not to scare you out of forming a firm to compete with your employer. Most transitions to a new firm happen seamlessly and develop into mutually beneficial relationships. In the series of articles I've written for this newsletter, I have discussed many issues that you can handle on your own without a lawyer. Setting out to compete with your former employer, however, is generally not one of these. A visit to a lawyer early in the planning process can save a lot of money and anxiety compared to seeing one after you get served with a lawsuit. With early planning with experienced counsel, you can have a much better chance that you will be one of the fortunate ones whose former employer is an ally and not an enemy.

David S. Rintoul practices with the firm of Brown, Paindiris & Scott in Glastonbury, Connecticut and represents many independent consultants in addressing the legal and business issues arising from a professional consulting practice. Feel free to send any comments or legal or business questions that you confront in your practice to drintoul@bpslawyers.com and they may be the subject of a future column. © David S. Rintoul 2006.