ASAP™ A Littler Mendelson **Time Sensitive** Newsletter

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A recent Ninth Circuit case illustrates the potential benefits of certain types of employment agreements to deter competitors from raiding employees. Consider our tips for maximizing your retention of employees.

California Edition

A Littler Mendelson California-specific Newsletter

California and Ninth Circuit Competitors Beware—Hiring Away Competitor's Employees Can Create Exposure for Interference With Contract Claims

By Dylan W. Wiseman and Alison S. Hightower

Competitors are generally free to pursue the at-will employees of other companies, provided they avoid the misappropriation of trade secrets or other unlawful conduct. Applying California law, the Ninth Circuit in *CRST Van Expedited, Inc. v. Werner Enterprises, Inc.*, 479 F.3d 1099 (2007), recently invoked a cautionary note to employers who recruit a competitor's employees that are under employment contracts. If the employees have agreed to a specified term of employment, and those contracts are determined not to be for at-will employment, then liability for inducing a breach of contract is easier to establish.

Background of the Decision

CRST is a trucking company that trained persons to become certified truck drivers. To complete the training, the student driver had to agree to be employed for one year subject to termination for due cause up to that one year anniversary. If the employee left CRST or was terminated for "due cause" before that one year expired, the employee was required to reimburse CRST for the cost of this training, stated to be $3,600.

Two truck drivers completed the training course and signed CRST's employment agreement. After only one month, a competitor, Werner, requested information about both and learned of the existing employment contracts. CRST warned against interfering with them. Nevertheless, the next month both truck drivers left CRST to work for Werner.

CRST sued Werner for intentional interference with contract, misappropriation of trade secrets and related claims. The United States District Court, Central District of California, dismissed CRST's claims and granted Werner's request for attorneys' fees under the Uniform Trade Secrets Act.

The Ninth Circuit's Significant Holdings

The Ninth Circuit reversed the district court. In its defense, Werner argued that it had the legal right to solicit these employees to leave CRST for Werner's employment, but the Ninth Circuit disagreed because these employees were not "at will." Under California law, interference with an at-will employment contract is viewed as an interference with a prospective economic advantage, because the at-will relationship renders future employment only an *expectancy*. Thus, to maintain a claim for unlawfully soliciting "at will" employees, in addition to the solicitation, the employer must show an "independently wrongful act," such as trade secret misappropriation, fraud, or an antitrust violation.

However, the Ninth Circuit concluded CRST was *not* required to prove an "independently wrongful act" because its employees were not "at will." The freedom of both employer and employee to "walk away" from employment at CRST was limited within the terms of the one year contract because neither side could break the relationship without a financial penalty. As a result, Werner engaged in wrongdoing merely by soliciting CRST's employees after Werner was notified of these contracts.

The Ninth Circuit nevertheless affirmed the award of attorneys' fees to the defendant, Werner, on the basis that CRST's misappropriation claim was specious and maintained in bad faith. A smoking gun in favor of Werner

was CRST's decision to abandon its trade secret claim. Subjective bad faith was shown by the failure of CRST to dismiss the claim unless Werner agreed to sign a release. The only saving grace for CRST was that Werner recovered only $8,750 out of $55,655.

Implications of the Decisions for Employers

Are the days of at-will employment relationships numbered in highly competitive industries? Only time will tell, but *CRST* provides valuable guidance to California employers who seek to deter their competitors from raiding key personnel. Under *CRST*, employers who face substantial risks of losing key employees to competitors should consider entering into term employment contracts in order to be able to bring suit against the raiding competitor without having to prove any "independently wrongful act."

The *CRST* decision also demonstrates a simple strategy for maximizing the recovery of attorneys' fees in trade secret misappropriation cases. Defendant Werner had merely sent a letter demanding dismissal of the claim, explaining why there were no trade secrets at issue, and then brought a motion to dismiss. The failure of an opponent to respond to a clear demand that explains why the opponent's position is wrong may provide powerful evidence of both the speciousness and the bad faith that must be shown to obtain attorneys' fees under the Uniform Trade Secret Act.

Suggestions For Employers Regarding Term Employment Contracts

1. Consider whether some employees should be offered employment for a specified contract term, rather than having their employment terminable "at will" at any time -- particularly if your industry is extremely competitive and your practice is not to terminate without cause. The risk of losing key employees to competitors can be significantly crippling to your business.

2. The goal of term employment contracts is to bring stability to the workplace. Employers in highly competitive fields can better protect intellectual property and customer relationships if key employees agree to be bound for a particular term. Doing so can also help improve employee loyalty.

3. Whether departing employees that are subject to term employment contracts can be compelled to return to work may depend upon the industry. However, implementing a term employment contract program provides a company with an important tool to protect against employee raiding by competitors.

4. If your company deploys term employment contracts, when employees leave to work for a competitor, immediately inform the competitor of the existence of a binding employment contract.

5. Be prepared to commence against competitors litigation that seeks damages and injunctive relief for interfering with contractual relationships.

The *CRST* decision both provides a valuable roadmap for successful contract drafting and helps to identify claims that can be successful in deterring employee raiding. Given that covenants-not-to-compete contained in employment agreements are generally unlawful in California, employment contracts for a specified term may be the employer's most effective legal line of defense against losing key employees to a competitor.

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