

EMPLOYEES OBLIGATIONS TO THEIR EMPLOYERS

By: Lauren M. Bernardi

Shelley works with a management consulting company and has decided that within a year, she wants to open her own consulting company. In the meantime, she takes steps to set up her business, including getting letterhead and business cards in the name of her new company. She also begins to offer her services outside working hours. A few months before her planned departure from the company, she starts leaving business cards on her desk when meeting with her employer's clients and, indirectly suggests that she can offer better service at a lower price. Is Shelley allowed to do this?

It is an implied term of all employment relationships that the employee will act in good faith towards his or her employer. This obligation, called the duty of fidelity, applies during the employment relationship and, in some cases, survives termination. The overriding consideration is that there be an alliance of interest between the employer and the employee.

The components of the duty of fidelity include:

- the employee's duty to avoid conflicts of interest and the duty not to compete with the employer or work for others during working hours
- the employee's obligation to maintain the confidentiality of the employer's proprietary information, such as trade secrets and customer lists; and
- the employer's presumptive right to ownership of any inventions or copyrights the employee has made during the course of employment.

In addition to the duty of fidelity, fiduciary obligations may also apply to certain employees.

Conflicts of Interest

Employees must not be in a conflict of interest with their employer. Employees may be considered to be in a conflict of interest position if:

1. the employee is competing with the employer
2. the employee is not in direct competition with the employer but has a side business and the commitment to this business interferes with the duty to the employer; or
3. the employee uses the employer's resources to advance his or her own interests.

Obviously it would be unreasonable to allow an employee to compete against the employer, since that would leave the employer vulnerable to unfair competition.

This rule prohibiting conflicts, applies even if the employer has not suffered any economic harm as a result of the competition.

EMPLOYEES OBLIGATIONS TO THEIR EMPLOYERS

In addition, even if the employee is not competing with the employer, having outside employment or business interests may breach the implied duty of fidelity. The courts will find a breach if such outside interests interfere with the employee's duties e.g., the employee spends time that should have been spent working for the employer, working on the side venture. It makes sense that this is a breach of the duty of fidelity, since the employee is effectively stealing time away from the employer. Similarly, the employee is stealing from the employer if the employer's resources are used to advance the outside enterprise, e.g., if the employee uses the employer's computer, fax machine, email or photocopier for his or her own business.

In our example, it is clear that Shelley is in a conflict of interest position with her employer. She is attempting to set up her own business during time she should be spending working for the management consulting company.

It is not just business interests or outside employment that breach the duty of fidelity. Volunteer activities can also result in a conflict of interest. This is because employers are entitled to the undivided trust and loyalty of the employee. For example, the courts would be inclined to find a conflict of interest if an employee worked at the Canadian Cancer Society and, in her spare time, was a volunteer with a smokers' rights group.

To protect themselves, prudent employers often implement conflict of interest policies. These kinds of policies cover things like outside employment and business or volunteer activities. In some instances, they place specific restrictions on these activities. At other times, the employer will simply say that the employee must obtain approval in advance to engage in these activities. Conflict policies may also cover things like whether the employee can accept gifts from suppliers or enter into business dealings with friends or family of the employee, on behalf of the organization.

Using the Employer's Confidential or Proprietary Information

Employees may not misappropriate the employer's confidential business information. This rule applies both during the employment relationship and after it ends.

Confidential business information includes things like manufacturing or business processes, customer lists, supplier lists and business plans.

General know-how that the employee gains by virtue of working for the employer is not typically considered confidential information. Unfortunately, the distinction between know-how and confidential information can be quite fine. For example, if an employee deliberately records or memorizes a customer list, the employee is in breach of the duty to maintain confidentiality. However, if the employee simply remembers the names of customers or uses a public phone directory to obtain addresses and phone numbers, there is no breach.

EMPLOYEES OBLIGATIONS TO THEIR EMPLOYERS

This duty also prohibits employees from canvassing the employer's customers for the employee's own business purposes during the employment relationship. Therefore, Shelley's efforts in soliciting away clients of the management company would be considered a breach of her obligations to her employer. However, if she had simply informed the clients shortly before leaving that she was forming her own company, without actively trying to solicit business, then she would be less likely to be viewed as violating her obligations toward her employer.

In gray areas, the courts will favour the employee, in part because the employer can protect itself through a written agreement with its employees. For this reason, it is becoming increasingly more common for employers to require employees to sign confidentiality and non-solicitation agreements.

Ownership Rights

There are two types of ownership issues to be considered: one is the right to ownership of inventions and the other is the right to ownership over copyrights.

Generally speaking, employees are entitled to ownership over any inventions they make during the course of their employment, unless it is something they were specifically hired to invent or design, or they have a written agreement with the employer that states otherwise. This rule tends to operate in favour of employees, unless the employee was hired specifically because of his or her skills at inventing and then invents something in the ordinary course of his or her duties.

Fiduciary employees have superadded obligations toward their employers. Such employees are sometimes disentitled to ownership rights over inventions, even if the invention is made on their own time. The theory is that fiduciary employees should apply all of their talents for the benefit of the company.

Copyright is somewhat different. Copyright applies to things like written documents, software programs and speeches. Copyright holders own the right to reproduce, perform or publish a work. They also have control over the use of the creation and have the ability to benefit financially from it.

The general rule in employment situations is that if an employee creates something in the course of his or her employment, the employer owns the work. If the employee creates a work on his or her own time, the employee owns the work. Unfortunately the meaning of "his or her own time" sometimes creates confusion and leads to disputes.

To avoid disputes over ownership rights, many employers require employees to enter into agreements that assign ownership rights to the employer.

EMPLOYEES OBLIGATIONS TO THEIR EMPLOYERS

Fiduciary Duties

By virtue of their positions, some employees have a higher duty to their employers. These employees are called fiduciary employees and generally include officers of a company, senior management and, in some situations, sales representatives.

Fiduciary duties are considerably more extensive than the duty of fidelity owed by regular employees. That is because fiduciary employees work closely with their employer's confidential and proprietary information, and measures must be put in place to protect the employer.

Some of the duties imposed on fiduciaries are that:

- (a) a fiduciary cannot quit work in order to take advantage of a business opportunity he or she discovers while employed unless the fiduciary discloses the opportunity to the employer and gives the employer the opportunity to exploit it;
- (b) fiduciaries must disclose any information that might reasonably impact on the employer's business, including plans the fiduciary has to quit and start a competing business; and
- (c) fiduciaries cannot compete with their employers for a reasonable period after employment ends - this includes being prohibited from soliciting away customers of the former employer.

This list is not exhaustive and the courts will view with suspicion any violations of the trust the employer places in the fiduciary employee.

The Employer's Remedies for Breach of Duty

As with all employment law matters, the remedies available to the employer will depend on the particular circumstances. In less serious circumstances, a disciplinary warning will suffice. In others, the employer may have just cause to terminate the employment relationship. Where the issue is competition or violating confidentiality, the employer may also sue the present or former employee and may seek an injunction to stop the continued violation.

Conclusion

Shelley breached the duty of fidelity: she has placed herself in a clear conflict of interest position with her employer and is also misappropriating confidential information. Her employer's remedies would include terminating her employment for just cause and possibly suing her for any damages the employer has suffered from her efforts at soliciting away customers. The bottom line - employees must act in good faith and with loyalty to their employers. If they do otherwise, they do so at their peril.

EMPLOYEES OBLIGATIONS TO THEIR EMPLOYERS

About Bernardi Human Resource Law

At Bernardi Human Resource Law we know that today's response to your workplace challenges can become tomorrow's precedent. We think ahead and help you make the best decisions to meet your needs both now and in the future.

Balancing your legal obligations and business objectives can be hard. We act as your trusted advisors; not simply as lawyers but as an integral part of your management team. Through our practical advice, workshops and articles, we arm you with the knowledge and tools to address rapidly changing human resource issues.

Above all, we're on your side. We work with you to prevent costly problems and when litigation is necessary, we act as strong advocates to protect your interests.

Bernardi Human Resource Law: forward thinking at work™.

About Lauren Bernardi

Lauren is a lawyer and human resource advisor with the Mississauga firm of Bernardi Human Resource Law. Lauren's advisory, training and educational services help managers direct their human resources in a strategically sound and legally appropriate manner. She is an accomplished and entertaining speaker on management and human resource issues.

For more information, you may reach Ms. Bernardi at 905-486-1991, by e-mail at lbernardi@hrlawyers.ca or on the web at www.hrlawyers.ca.

© Bernardi Human Resource Law. This article is intended as general information only and does not constitute legal advice of any kind. Duplication and distribution of this material is permitted, provided the name of Bernardi Human Resource Law and the authors' names are included.