

# MASS HIGH TECH

# MHT

THE JOURNAL OF NEW ENGLAND TECHNOLOGY

## INSIDE LEGAL SERVICES

# Ten tips for hiring without getting sued

**A**s was recently reported in these pages, many New England technology companies are hiring, creating an increasingly tight labor market. When competition for workers heats up, litigation often ensues, as employers seek to send a strong message to both their competitors and employees that they are serious about protecting their interests.

Each hiring event is unique, but the following guidelines can help tech companies avoid common pitfalls as they recruit and hire new employees.

1. Review all documents. It seems basic, but the source of many disputes is a misunderstanding about whether a candidate is actually subject to any post-employment restrictions. It is not sufficient to simply ask, "Are you subject to a noncompete?" and then accept "No" as an answer. Ask for all documents that might contain post-employment restrictions, such as nondisclosure, confidentiality and invention assignment

agreements, nonsolicitation agreements, general employment agreements, stock option or restriction agreements, bonus and commission plans and employee handbooks.

2. Thoroughly analyze enforceability. Do not assume that a noncompete clause is enforceable and therefore that you cannot hire the person. Similarly, do not assume that courts are always unwilling to enforce noncompetes.

In many states, the reality is somewhere between these extremes. Enforcement depends on many factors, including the specific activity that is prohibited, whether the individual will actually be engaging in that activity in her new position, and whether a company can even prohibit that activity. In many instances, basic notions of fairness will undermine a former employer's ability to enforce a noncompete.

3. Document existing restrictions. If you decide to hire a person subject to post-employment restrictions, document your understanding and expectations. For example, state in the offer letter or employment agreement that the individual is subject to a specific agreement and is required to abide by the agreement. Similarly, if the individual has represented that she has no noncompete, make that clear in the relevant hiring documents, which may help insulate the company if the employee's representation turns out to be false.

4. Beware of the "no-noncompete" situation. Even if you are satisfied that the candidate has no noncompete, do not assume that the hiring poses no risks. A number of legal principles restrict employees' conduct while moving between companies, even in the absence of written restrictions. These "no-noncompete" cases represent a significant litigation growth area.

5. Be careful about customers. Even candidates who are not subject to a nonsolicit should limit their communications with customers until after their departure date. If they are subject to a nonsolicit, develop clear guidelines about what, if any, communications with customers are permissible.

6. Be careful about hiring employees from the same company. The stakes are inevitably higher when you hire a group of people from a company or engage in successive hiring from a single company, especially a competitor. Therefore, be strategic about whom you need

to hire, and when. And provide clear instructions to all new hires about communicating with former co-workers.

7. Don't unwittingly obtain another company's information. Be clear throughout the recruiting process that you want the individual, and nothing else, and require candidates to confirm in writing that they are not bringing with them any materials — including electronic information — belonging to the former employer.

8. Provide clear do's and don'ts to candidates. Advise them, early in the recruiting process, not to use the current employer's time or resources to plan their departure. For example, candidates should not use a current employer's computers to communicate with you, even if they are using a personal e-mail account.

9. Consider whether the candidate needs counsel. In some situations, particularly involving the hiring of a senior-level person from a company in the same industry, it may be prudent for the candidate to be separately represented by counsel, so that the attorneys for the candidate and the company can most effectively manage the hiring process.

10. Respond appropriately to cease and desist letters. Inevitably, you will receive a letter from the former employer's lawyer, accusing you of inappropriately employing someone. While each situation is unique, approach such communications as an opportunity to educate the former employer about your good intentions, potentially averting litigation.

**Michael Rosen** is a partner and **Sheila O'Leary** is an associate in the Boston office of Foley Hoag LLP, where they litigate and advise clients on noncompetition and trade secret issues. Rosen can be reached at [mrosen@foleyhoag.com](mailto:mrosen@foleyhoag.com) or 617-832-1231; O'Leary at [soleary@foleyhoag.com](mailto:soleary@foleyhoag.com) or 617-832-3044.

### GUEST COLUMN



**Michael Rosen**



**Sheila O'Leary**