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Avoiding legal risks as you expand your head count

In many industries across New England, companies are expanding their work forces. With increased competition for talent comes a surge in litigation over perceived violations of restrictive covenants and other hiring related issues. We have observed a fundamental transformation in this area, largely stemming from the continued evolution of technology in the workplace and, in particular, companies' ability to track the computer activities of departing employees.

INSIDER VIEW

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Many companies now scrutinize employees' computer activities when employees give notice of their departure, and some employers use sophisticated forensic tools to uncover evidence of computer-related activities that employees may not have understood could ever be detected. The discovery of such evidence has the potential to fundamentally alter the hiring landscape, particularly where an employee is moving between competitors. In fact, in recent years, courts have seen a marked increase in the number of lawsuits focused on a departed employees use of information belonging to the former employer, and courts are grappling with litigation focused on the downloading,

transmission, use and attempted destruction of electronic data.

These trends underscore the need for hiring employers to take a careful, strategic approach to recruiting and hiring in an environment where vast amounts of information can be transmitted with the click of a mouse.

Employers should appreciate that legal risk may exist even when a new hire never signed a restrictive agreement with his former employer. Absent a restrictive covenant, departing employees and their new employers still can subject themselves to litigation involving claims of misappropriation of trade secrets, breach of fiduciary duty, violation of federal and state computer fraud statutes, intentional interference with contractual or advantageous business, and claims under state unfair business practices laws.

To minimize the risks and complications of litigation, companies should effectively manage the hiring process from the outset. As a starting point, hiring employers should carefully analyze all documents that conceivably could restrict an employee's activities, such as nondisclosure agreements, stock option or restriction agreements, bonus and commission plans, and employee handbooks.

In addition, early on candidates should be given clear guidelines about their conduct in the recruitment process.

Although new hires often intend to act properly, many lack a sufficient understanding of what is permitted conduct and what is forbidden. Therefore, the hiring employer should be emphasizing the following:

- No communications about the hiring should occur either on the existing employer's time or equipment, even if using a personal e-mail account.

- Every key stroke on every computer — including personal computers and personal e-mail accounts — is potentially reviewable by the former employer.

- Even in the absence of restrictive agreements, candidates may need to wait until the termination of employment is effective before communicating with others, including co-workers, customers and other business contacts, about their plans.

- Individuals should be advised — preferably in writing — not to take, delete or destroy any documents, computer files, electronic information, or other materials, and to return all company materials stored at home or in other remote locations.

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