

LEAVING YOUR EMPLOYER? TIPS FOR STAYING OUT OF THE COURTROOM

If you are planning to leave your current employer, an awareness of some common claims brought against departing employees may keep you out of court.

First, have you signed any employment agreements? If so, it is advisable that you seek review of the agreements by an attorney. Many employment agreements contain non-competition and/or non-solicitation provisions. These provisions seek to prohibit you from competing with your former employer and/or soliciting your former employer's clients. While these sort of provisions are disfavored by courts, they will be enforced if they have been narrowly tailored so as to reasonably protect legitimate business interests of your former employer. Each case is very fact specific. Hence, the reason why a review by an attorney is a good idea. If possible, it is advisable to attempt to obtain a ruling from a court declaring a non-competition and/or non-solicitation provision unenforceable prior to accepting your new employment. I have found that courts are more inclined to strike down an overly broad non-compete or non-solicitation provision where you are not yet actually competing with your former employer.

Second, a claim of breach of fiduciary duty is a common claim brought against departing employees. In Virginia, like most states, an employee owes his or her employer a duty of good faith and loyalty. Each case turns on its specific facts to determine whether this duty has been breached. Merely taking preparatory actions necessary to leave your employer (e.g., interviewing with a prospective employer, etc.) are not likely to be sufficient enough to establish a cause of action for breach of fiduciary duty. If your actions extend further than mere preparatory actions necessary to leave your employer, you run the risk of triggering a claim for breach of fiduciary duty.

Third, another common claim brought against departing employees is misappropriation of trade secrets. Virginia's trade secrets statute is based upon the Uniform Trade Secrets Act. Virginia's trade secrets statute very broadly defines what may constitute a trade secret. Client lists are perhaps the most commonly cited trade secret claimed by employers. Trade secrets, however, may include virtually any property of the employer that derives economic value in not being generally known in the market and of which the employer has adopted reasonable measures to ensure that its secrecy is maintained by employees. The best way for departing employees to avoid this claim is to ensure that all property of the employer is returned upon termination. Departing employees should be reminded that generally all property, such as documents, processes, etc., that are created when one is acting as an employee are property of their employer and not the personal property of the departing employee. In today's electronic age much potential trade secret property of the former employer probably resides on computers. Departing employees are advised to review personal computers, PDAs, and discs containing downloaded information to ensure that no trade secret property is unknowingly kept after the departing employee has terminated employment. Employees should be aware that one may think they have deleted a document from one's hard drive to only find out later that it actually still resides on the hard drive. The safest course is

for departing employees to promptly advise the former employer in a writing that they intend to delete all documents residing on any computer, PDA or disc within a certain time frame absent objection being raised by the former employer. The departing employee then is advised to have a computer professional ensure that such information is permanently deleted (which may require actual destruction of hard drives). If the departing employee believes that litigation is likely with the former employer, the absolute safest approach is to return to the employer any discs or hard drive that may contain property of the employer.

Finally, a few general tips that may keep you out of court with your former employer. Think before you hit “send” when preparing e-mail. E-mails are generally produced through discovery after litigation. Consider how a judge or jury may view your e-mail (and any writing) in the context of the fiduciary duty owed to your employer. If you signed employment agreements (any writing signed by you with your employer), have them reviewed promptly. Be careful with communications with clients that you intend to maintain as you move to your new employer so as to avoid claims referenced above and/or other claims (such as defamation and tortious interference with a contract or business expectancy) with your former employer. If presented with a severance agreement upon termination, take time to carefully review all of the terms. These agreements often contain release and waiver language favoring the employer. Discuss this issue with an attorney as well.

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Scott is a Director in the firm and chairs the Litigation Practice Group and Workers' Compensation Practice Group.

Scott is an experienced trial lawyer that has tried numerous cases to judges and juries in Virginia's state and federal courts. He has also argued matters before all of Virginia's state and federal appellate courts.

Scott has considerable experience as a commercial litigator representing businesses and individuals with contract disputes, business torts, product liability, intellectual property and employment disputes.

Scott was lead trial counsel for the third largest reported defense verdict for 2003, *Smith v. Sherwin-Williams, et al.*, a \$2.5 million aerosol can product liability case (District Court's entry of summary judgment affirmed by Fourth Circuit Court of Appeals.)

As part of his workers' compensation defense practice, Scott represents numerous employers and carriers before the Virginia Workers' Compensation Commission and its appellate courts, the Court of Appeals of Virginia and the Supreme Court of Virginia.

Scott is active in his community. He is a current participant in Leadership Metro Richmond, a community leadership program of selected local leaders addressing issues important to the future of Richmond. He is also currently serving on the Board of Directors for Greater Richmond SCAN and Richmond's Young People's Community Choir.

Scott is active with State Bar leadership and currently serves on the Board of Governors for the Litigation Section of the Virginia State Bar.

Scott was honored by *Inside Business* in 2001 as one of Richmond's "Top 40 Under 40," an award presented to top young business leaders.