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Client Advisory

When You Hire Someone with a Noncompete, You Roll the Dice and the House (Often) Wins

Trade secrets come in all different shapes and sizes. Some trade secrets are obvious: the recipe for how to put the nooks and crannies in English muffins, or the algorithm for what we see in our Facebook feeds. Other trade secrets are not so obvious. Sometimes, instead of things, such as recipes and algorithms, trade secrets are information.

Information can be very valuable to a business. For example, New Jersey casinos collect information about the preferences and gaming habits of the high rollers who play at their tables. They use this information to try to keep these patrons coming back. These high rollers are important, as they are collectively responsible for tens of millions of dollars in annual revenue for the casinos. Any information that the casinos can utilize to keep these gamblers coming back is extremely valuable, and casinos treat it as a closely-held trade secret.

A recent case in federal court in New Jersey illustrates this point. Like other casinos, the Borgata collects information about, and caters to, a group of customers it calls "high-level patrons." The casino hires employees for the specific purpose of working with these customers, seeing to their needs, and ensuring that they continue to patronize the Borgata. In this way, these employees develop personal relationships with the patrons and are privy to the information gathered by the casino and protected as trade secrets.

One of the ways the Borgata attempts to protect these trade secrets is by having the employees assigned to its "high-level patrons" sign a restrictive covenant preventing them from disclosing the trade secrets. Unfortunately, the presence of such an agreement does not always prevent competitors from attempting to learn these trade secrets by hiring the employees with access to them.

This is what is alleged to have happened in *Marina District Development Company v. AC Ocean Walk LLC,* 2021 WL 1526552 (D.N.J. Apr. 19, 2021). Over the course of several months, one of the Borgata's competitors hired several Borgata employees assigned to its "high-level patrons." According to the Borgata, the competitor met with some of these employees before hiring them to discuss how they might be able to circumvent the restrictive covenants protecting the Borgata's trade secrets. One of the employees went so far as to purchase a separate iPhone, which he allegedly used to copy the Borgata's customer information and other trade secrets.

After the employees went to work for the competitor, the Borgata brought suit for a number things, including theft of trade secrets under both state and federal law. The competitor sought to have the trade-secrets counts dismissed because the Borgata had not alleged that the defendant had actually used any of the trade secrets. According to the defendant, the plaintiff had to establish both that the trade secret was acquired, and that it was used or disclosed.

The court rejected this argument and allowed the Borgata's trade-secrets claims to go forward. This is because under both state and federal law, the plaintiff must demonstrate only that the defendant acquired, used, or disclosed the trade secret. In this case, there was no dispute that the defendant acquired the Borgata's trade secrets. The fact that the defendant had not used any of the trade secrets to attempt to lure away the Borgata's "high-level patrons" was beside the point. If the defendant never used any of the information, it could still be liable for theft of the Borgata's trade secrets because it had already acquired them.

It is noteworthy that the Borgata has not won this case yet—it just succeeded in convincing the court to allow its claims to go forward. The competitor will now have to litigate this case and incur all of the costs associated with litigation.

The term "trade secret" can cover a variety of different categories of things that provide value to a business. Businesses must take adequate steps to protect these trade secrets, including by having employees sign restrictive covenants. If you seek to hire your competitor's employees, it is important to know what, if any, restrictive covenants are in place. This is especially true if the employee has any information that could be considered a trade secret. Remember, you could be held liable for theft of a trade secret, even if you acquire it and never put the information to use.

In addition, this case serves as a cautionary tale for employers taking on new employees. Be mindful of how any actions you take would look if they were ever discussed in a court of law. The allegations in this case—that the new employer met with the employees

while still employed by the Borgata to discuss how to circumvent the restrictive covenants, the hiring of multiple employees over an extended period of time, and the purchase of a new phone for the purpose of recording trade secrets—may be allegations you would not want leveled at you in court.

If you have questions about restrictive covenants or the many legal issues that they create, or about any issue that could arise between former employers, employees, and new employers, feel free to contact Tom Muccifori, Chair of Archer's Trade Secret Protection and Non-Compete Group at 856-354-3056 or tmuccifori@archerlaw.com, or any member of the Group in: Haddonfield, NJ at 856-795-2121, Princeton, NJ at 609-580-3700, Hackensack, NJ at 201-342-6000, Philadelphia, PA at 215-963-3300, or Wilmington, DE at 302-777-4350.