



Salespeople: An Employment Law Minefield in Your Own Backyard

By Liz Tascio
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Remember the days of door-to-door sales calls and filing cabinets full of client information? These days, your salespeople most likely work in-house, and all that valuable client information is much easier to copy and move – it’s all digital. Communication technology has made it easier to do business, but it also changed the role and influence of a salesperson; the laws that address them had to change, too.

Today, more and more claims and lawsuits deal with overtime for salespeople – unheard of in the days of door-to-door – and the copying of huge amounts of information when a salesperson leaves, says Joel J. Greenwald, managing partner of Greenwald Doherty LLP, who presented at TemPosition’s HR Roundtable in January.

Protecting your employer from litigation and from the loss of trade secrets now requires HR professionals to convince executives to make a few important changes – like adding specific restrictive covenants and clear commission agreements, ensuring the company’s customer information is well protected, and re-assessing employee classification.

“Increasingly, we’re really concentrating on keeping people out of court,” Greenwald says. “And that’s what HR is all about. I often think you guys are like offensive linemen in football, that your name is only called when there’s a holding penalty or the quarterback’s sacked.”

“(But) you have to be on the ball about this,” he adds. “Nobody else is going to be.”

Restrictive covenants: What you need

Sometimes the first sign of a problem comes after a salesperson has already quit or been fired. Then Greenwald sometimes gets a weekend call from a worried CEO.

“Someone has not only left the company for a competitor, but it’s somebody that has a lot of information that could hurt them, and how do you stop them? How on Earth do you stop that person from doing that?”

It used to be that even if a salesperson had signed a non-compete agreement, the contract might be too broad to stand up in court; judges were loathe to prevent a person from making a living. (By the same token, non-competes and non-solicitation agreements aren’t enforceable if you fire someone without cause – for example, because your company is in financial trouble.)

Today, a well-defined non-solicitation agreement or non-compete can protect your company if a rogue salesperson leaves with valuable information: It can provide grounds to seek an injunction or a temporary restraining order against a rogue salesperson and his or her new company, prohibiting them from going after your clients for a limited time.

“For a salesperson, they’re out there expecting to sign these things,” Greenwald says. “They’re going to think you’re an idiot company if you don’t get them to sign it, half the time. ‘Wow, look at this, I get to loot the place when I leave.’”

Part of the reason for the change is that courts have redefined trade secrets, no longer protecting only scientific information – like the formula for Coke – but also detailed client lists that include information about pricing and buying histories, their personal lives and families. It’s information that would seriously affect a company if it were disseminated, and that’s accessible only to employees who need it.

When you’re considering how to prevent salespeople from taking all that information to a new job on a thumb drive, keep in mind that a non-solicitation pact is easier for a judge to enforce than a broad non-compete, Greenwald says.

“They could work anywhere they like,” he says. “They just cannot take the customers that we’ve given to them, and they just cannot take employees that work at our company.”

Who signs which documents, and why

Non-solicitation agreements should be written specifically for your salesforce, and other employees should get their own tailored agreements, but confidentiality agreements are a must for everyone.

“They are for everybody: your secretary, your janitors,” Greenwald says. “I would not want someone working for me that doesn’t sign a simple confidentiality agreement.”

While it’s great to get these documents signed before employment begins, don’t bundle them up in an offer letter, Greenwald says. A lengthy legal document can intimidate the person you’re trying to hire; plus, you don’t want the offer letter to contain anything resembling a contract. You can instead present a packet that includes each document, clearly separated.

If your current salespeople are working without restrictive covenants, you can still ask them to sign non-solicitation agreements (under New York state law, continued employment counts as consideration for signing), and require broader non-competes only of new hires, Greenwald says. That way, you’re grandfathering in the tighter restriction without upsetting your current workforce.

When new hires come on, it’s a good idea to ask them to list any clients they’re bringing with them – being as specific as possible – so there’s no question when they leave as to which clients must remain with the company.

If, after all this, a salesperson leaves and a client wants to leave with them, the agreements you put in place beforehand can empower you to negotiate for royalties, so the client stays happy, and you can be compensated, Greenwald says.

When you suspect a problem

Of course, sometimes it's not about what the client wants; a salesperson might really have underhanded intentions.

To protect yourself, you can require that they disclose any restrictive covenants they might be under from a previous employer, Greenwald says.

“Can you potentially be sued for hiring somebody that has restrictive covenants? Yes, you clearly can,” he says. He suggests adding language to application materials that states the new hire isn't bringing in any trade secrets or any restricted information, and have them sign it. If the person lied, a signed statement can help beat a lawsuit, especially if you fired them after discovering they lied; even better, it can make an applicant think twice about lying at all, Greenwald says.

Take advantage of the fact that so much of your salespeople's work happens on your computer equipment and online, he says: Keep your e-mail and Internet policies up to date so they know you're keeping an eye on what they're doing. Hire an outside party to image hard drives from time to time so you can have an independent copy of all computer activity. E-mails and file-copying both leave trails that an IT person can follow.

Overtime and employee classification

Overtime cases are the lawsuit du jour, partly because they can so easily include multiple plaintiffs and partly because so few companies are fully compliant, Greenwald says. Plus, they're fee-shifting: If the company loses, it pays both its own attorney fees and those of the plaintiff. It can get so expensive – in the tens of millions of dollars – that even Wal-Mart, notorious for fighting suits, settles overtime cases, he says.

“You're more exposed on overtime issues than you are anywhere else, guaranteed,” Greenwald says. Even other types of cases, such as sexual harassment, have “an overtime claim tagged on more often than not. They realize they can always get the attorney's fees, because there's always an overtime violation.”

The basic rule is that time worked over 40 hours a week is considered overtime, Greenwald says. Therefore it's crucial to keep accurate time records, and to carefully assess the classification of all employees and independent contractors.

All hourly employees, no matter their job title, are entitled to overtime. Many employers operate on the assumption that all of their commissioned or salaried workers are exempt, but that varies broadly depending on their duties and other variables, such as management responsibilities, regular bonuses, and base rate of pay, Greenwald says.

“You don't make exemption decisions without attorney involvement,” Greenwald says. “The stakes are so big here”

For salespeople, overtime exemptions vary. Outside salespeople are always exempt. But today, very few salespeople truly work outside the company – in the classic manner of the door-to-door salesman.

As for inside salespeople, “I find it very hard to argue, if they’re not sales managers, that they’re not entitled to overtime,” Greenwald says. “Nobody’s keeping time records on inside salespeople. It’s just not being done. But they’re big-time targets of lawsuits.”

Commission agreements

As of October 2007, New York mandates that companies who pay their salespeople commissions must have a written agreement to that effect, something Greenwald says companies should have been doing for their own protection anyway.

“These are agreements that are written (regarding) how wages and salaries and commissions are drawn, how payment is earned, calculated pay, how the draw is to be reconciled, and what’s the payout at the end of the relationship,” Greenwald says. “Those are the basics of what needs to be in one of these commission agreements.”

It can include, for example, non-payment of commissions if a salesperson is fired for cause. It can stipulate that a commission is earned when paid, so if a salesperson is fired for cause, he or she can’t collect commissions after they’re no longer with the company. However, Greenwald says, this can be tricky; a salesperson can argue you fired them in order to avoid paying the commission.

Why you should make these changes

Even if everything seems fine at your company, and it would be a huge burden to make changes to salespeople’s exemptions, payment practices, and restrictive covenants, the alternative – a multi-plaintiff lawsuit or loss of crucial company information – can be far more expensive, Greenwald points out.

But if it’s too overwhelming to make the changes all at once, make them slowly, he says.

“I’m always a proponent of the baby step. I think it makes sense to move in the direction of compliance at the pace you can handle,” he says. Otherwise, company leadership may decide it’s not worth it, and leave the company vulnerable.

In the meantime, Greenwald offered to evaluate company policies and handbooks for free, and help HR professionals make the case to their executives for changing the way they handle their salesforce.

Liz Tascio is a freelance writer and editor based in New York. Reach her at liz@liztascio.com.

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