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**Non-Compete Agreements  
and Trade Secrets: Update**

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**Selected Trade Secret & Non Competition Issues: Employee Solicitation of Other  
Employees To Leave The Employer, the Computer Fraud and Abuse Act and the  
Economic Espionage Act of 1996**

By

Peter Altieri  
Frank C. Morris, Jr.  
Epstein Becker & Green, P.C.  
New York, New York

These materials are largely taken from a paper by Peter Altieri, a partner in the New York office of Epstein Becker & Green, P.C. who is co-head of the Firm's Non Competes, Unfair Competition and Trade Secrets Practice Groups, 250 Park Avenue, New York, NY 10177-1211, (212) 351-4592, paltieri@ebglaw.com. Mr. Morris represents and counsels employers in all matters concerning the workplace and is Director of the Employment Law Department in Washington, D.C. for Epstein Becker & Green, P.C., 1227 25th Street, N.W., Suite 700, Washington, D.C. 20037, (202) 861-1880,

## Selected Trade Secret & Non Competition Issues:

### Employee Solicitation of Other Employees To Leave The Employer, the Computer Fraud and Abuse Act and the Economic Espionage Act of 1996

Peter Altieri  
Frank C. Morris, Jr.<sup>1</sup>

#### I. Employee's Prohibition Against Solicitation of the Employer's Customers, Accounts or Employees

An employee breaches the duty of loyalty to his or her employer by soliciting the employer's customers or accounts, by appropriating the employer's equipment, or by soliciting coworkers to join a rival firm. See Hill v. Names & Addresses, Inc., 212 Ill. App. 3d 1065, 1079-80, 571 N.E.2d 1085, 1094 (1991) (solicitation of accounts); ABC Trans Nat'l Transport, Inc. v. Aeronautics Forwarders, Inc., 62 Ill. App. 3d 671, 685, 379 N.E.2d 1228, 1238-39 (1978) (appropriation of equipment); Bancroft-Whitney Co. v. Glen, 64 Cal. 2d 327, 345, 411 P.2d 921, 934-35 (1966) (solicitation of employees). The most significant factor in this type of case is whether the employee's statements to the employer's customers and employees were simply indicative of the employee's future plans, or consisted of a pre-termination solicitation to the employer's customer and employees to join a rival firm.

Thus, an employee should not solicit business from the clients of the current employer while still employed at the current firm. Solicitation is often given a broad definition to include any communications intended to suggest to the client that it move its business to the prospective firm. The employee should resist the temptation to speak with clients until the employment relationship has ended because it is likely that any communications with clients will be viewed with suspicion.

Similarly, the employee should avoid consulting with other employees about leaving the current employer and moving to the prospective employer because such communications may be viewed as solicitations. This is particularly true where the employee is the head of a team or group. Gibbs v. Breed, Abbott & Morgan, 271 A.D.2d 180, 186-87, 710 N.Y.S.2d 578, 583 (1st Dep't 2000) (partners of law firm who began recruiting associates and staff while still members of firm and prior to serving notice of their intent to withdraw violated fiduciary duty to firm). Moreover, furnishing a prospective employer with confidential information about one's co-workers' compensation, bonuses, billable hours, and billing rates for purposes of recruiting those co-workers gives an unfair competitive advantage to the prospective employer and is also a breach of an employee's fiduciary duty. Id. at 188, 710 N.Y.S.2d at 584.

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Prohibitions against soliciting other employees to leave the employer or raiding the employer are also generally permissible even in jurisdictions where non competition agreements as to customers or clients are not permissible.

Additionally, an employee breaches his duty of loyalty by physically taking or actively memorizing proprietary information, often lists of client names. Leo Silfin, Inc., 29 N.Y.2d at 392-93. All documents or other physical property should remain with the current employer.

However, an employee has a right to advance professionally and to consider embarking upon other employment while in someone else's employ. Thus, it is not necessarily a breach of the duty of loyalty if an employee sets up a competing business, but it is a breach of the duty if the employee remains with the old employer while the competing business operates in competition with the employer. Reis, Inc. v. Rubin, 12/6/04 N.Y.L.J. 19 (col. 1) (Sup Ct. N.Y. County); Metal & Salvage Ass'n v. Siegel, 121 A.D.2d 200, 503 N.Y.S.2d 26, 27 (1<sup>st</sup> Dep't 1986) (finding no illegality in incorporating competing business prior to departure, so long as defendants did not use plaintiff's time, facilities or proprietary secrets); Headquarters Buick-Nissan, 149 A.D.2d at 303, 539 N.Y.S.2d at 356; Republic Sys. and Programming, Inc. v. Computer Assistance, Inc., 440 F.2d 996, 1000-01 (2d Cir. 1971). Therefore, it is prudent for the employee to end the employment relationship with the employer before participating actively in the competing business. Augat, Inc. v. Aegis, Inc., 409 Mass. 165, 565 N.E.2d 415 (1991); Chernow v. Reyes, 239 N.J. Super. 201, 204, 570 A.2d 1282, 1284 (App. Div.), cert. denied, 122 N.J. 184, 584 A.2d 245 (1990).

## II. The Computer Fraud and Abuse Act

### A. Purpose and Applicability of the Statute

When passed in 1984, the Computer Fraud and Abuse Act ("CFAA") was written to protect classified, financial and credit information on government and financial institution computers ("federal interest computers"). It initially provided only criminal penalties (fines and imprisonment) and only prohibited unauthorized access or hacking into such federal interest computers. It did not protect against improper use by authorized users of such computers.

The CFAA was amended in 1994 to include civil remedies (compensatory damages and injunctive and other equitable relief) and to expand protection to include damage or loss caused both by outsiders and by insiders or other authorized users. It also criminalized certain types of reckless conduct and other intentional acts. The CFAA appears in full at Appendix C.

With the proliferation of computers in businesses and homes, and ever increasing use of the internet, remote access and portable devices, computer use and become increasingly interstate in nature and therefore subject to the CFAA. As more and more tools are now available to a dishonest and/or disgruntled employee, employers are beginning to use the heretofore infrequently used CFAA to fight back.

### B. Elements of Proof

Today, the most common civil causes of action under the CFAA are brought under either: