

Employee Exits

The Morning After

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Meet Your Presenters



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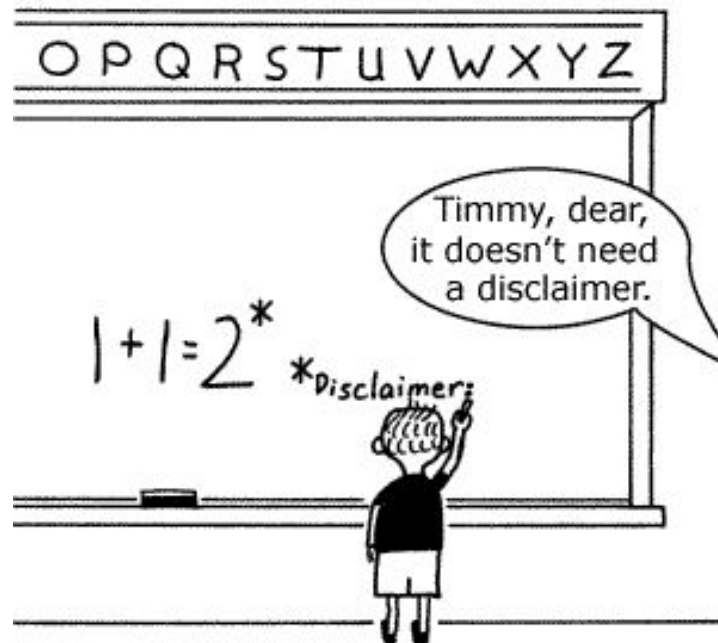
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Timmy
doesn't need
a disclaimer
but we do...



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Presentation Roadmap

- 1) Protecting the Employer's Assets
- 2) Employee Obligation post-employment
- 3) Non-Competes & Non-Solicitation
- 4) References & Mitigation
- 5) Key Takeaways

Protecting the Employer's Assets



Protecting the Employer's Assets

What are the best practices for protecting business information and data security?

- Enforceable confidentiality provision
 - Employment contract
 - Policy
 - Past practices

Protecting the Employer's Assets

What are the best practices for protecting business information and data security?

- Return of property
 - Complexities in remote worker environment
 - Working with your IT provider before the exit
 - Focus on digital and most valuable assets, such as IP

Protecting the Employer's Assets

What are the best practices for protecting business information and data security?

- Standardized post-employment tech procedures
 - Build workflows for employee access to protect systems
 - Build workflows to remove emotion from charged moment

Employee Obligations Post-Employment



Employee Obligations

- What are an employee's legal obligation post-employment?
- Fiduciary duties (sometimes)
- Confidentiality (always)
- Mitigation
- Whatever is in the Release...

Non-Compete & Non-Solicitation Clauses



Non-Competes vs Non-Solicitation Clauses

- Difference between these two restrictions
- Purpose and court rationale

Non-Compete & Non-Solicitation Clauses

What is a non-compete agreement?

A non-compete agreement is defined as an agreement, or any part of an agreement, between an employer and employee that prohibits the employee from engaging in any business, work, occupation, profession, project or other activity that is in competition with the employer's business, after the employment relationship between the employee and the employer ends.

Non-Compete & Non-Solicitation Clauses

Can an employer ever enforce a non-compete clause?

- **Non-compete clauses**

- Effective October 25, 2021 non-compete clauses are banned in Ontario
- Enforceable clauses entered into prior to October 25, 2021 can be upheld
- Non-compete clauses for c-suite executives and as part of sale of business transactions are not subject to the ban

Non-Compete & Non-Solicitation Clauses

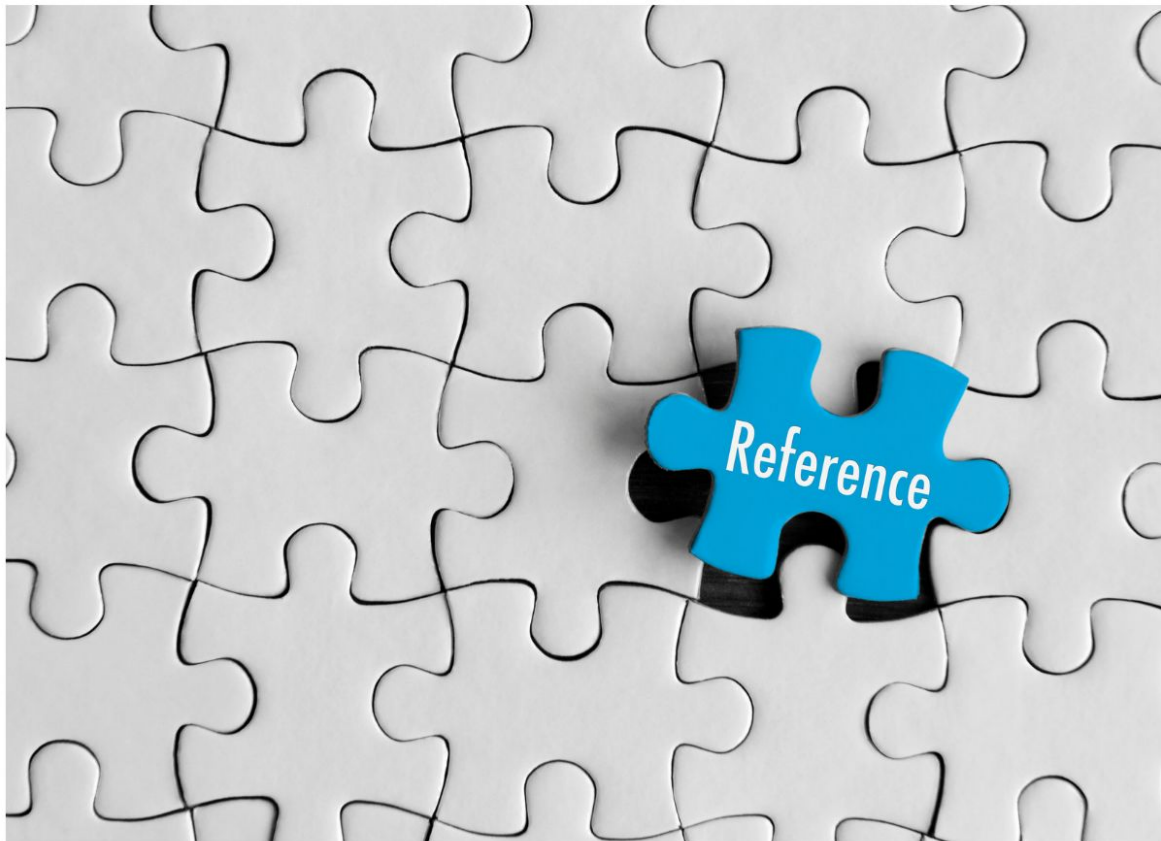
Can an employer ever enforce a non-compete clause?

- **Non-compete clauses**
 - Always difficult to enforce
 - Only upheld in exceptional cases
 - Be as minimally restrictive as possible - time, geography, activity
 - Injunctions

Non-Compete & Non-Solicitation Clauses

- **Non-solicitation clauses**
 - Easier to enforce than non-competes
 - Restrict an employee from taking clients or staff post-employment
 - Should clearly set out which customers, clients or staff are off limits
 - What is and isn't solicitation depends on the employee's role and their industry

References & Mitigation



References & Mitigation

Should you give your exiting employee a reference?

- Employers are under no legal obligation to provide a reference - but should you?
- Not providing a reference can prolong an employee's job search, and therefore increase their damages
- Employment confirmation letters
- Protection against allegations of bad faith
- Can have the employee draft it themselves

References & Mitigation

Should you give your exiting employee a reference?

- **Do's and don'ts**
 - Do: find something true and positive to say if you can
 - Do: say if the termination was because of downsizing, business reasons etc.
 - Do: provide it in a timely manner
 - Don't: be negative

References & Mitigation

Can an employer reduce a termination package if the employee finds a new job quickly?

- **What is the duty to mitigate?**
 - Law requires terminated employees to mitigate their damages by seeking alternate comparable employment
 - Must actively attempt to reduce their economic losses

Reference & Mitigation

Can an employer reduce a termination package if the employee finds a new job quickly?

- The “clawback clause”
 - More valuable for higher income and longer service employees
 - Remember: statutory entitlements cannot be reduced by mitigation income
 - Explain clearly in termination letters and/or termination meetings
 - Better with enforceable termination clauses

References & Mitigation

Can an employer reduce a termination package if the employee finds a new job quickly?

- How can an employer soften an employee's landing?
 - Reference letters
 - Outplacement services
 - Understand the job market
 - Make introductions and rely on recruiters
 - Include an "if-you-get-another-job-clause"



Key Takeaways

- Focus on digital not physical assets in most workplaces
- Sabotage is rarely a live issue - assume the parties want to end with grace and treat exiting employees with respect (it's also better for business)
- Include post-employment obligations in the Termination Letter & Release
- Focus on restricting taking clients/employees rather than preventing exiting employee from working
- Be nice with references & help employee mitigate (it's a win-win)

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THANK YOU!

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GRAZIE!

GRACIAS!

DANK JE WEL!



Questions?

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THANK YOU!