

CORPORATE COUNSEL: A Monthly Feature for In-House Lawyers

Cooperation Agreements

When employees leave, companies should get a commitment to cooperate in any future lawsuit or investigation. This simple tool can avoid big problems later on.

BY GORDON SCHNELL

A former employee may engage in a variety of conduct that can wreak havoc on a company. Some of the more obvious harms are: using or disclosing the company's confidential or proprietary information and trade secrets, encouraging the company's remaining employees to leave the company, soliciting the company's clients, starting a competing business, or simply joining an existing competitor.

Virtually all of this potentially damaging conduct can easily be avoided (or at least significantly discouraged) through the simple use of contractual tools such as confidentiality, nondisclosure, nonsolicitation, and noncompete agreements.

What is often overlooked by companies—and can be far more damaging—is the potential for a former employee to refuse to cooperate with the company in connection with a lawsuit or government investigation in which the company is a party or a target. This can take several forms:

- Refusing to appear voluntarily as a witness on behalf of the company to support the company's claims or defenses in the lawsuit or investigation.
- Acting directly against the interests of the company by providing voluntary assistance to the company's adversary.
- Refusing to cooperate with the company in connection with an involuntary appearance as a witness (by subpoena or

other compulsory process) for the company's adversary or the government.

Any of this conduct can have serious ramifications, particularly if the former employee had a key position in the company and is uniquely situated to either substantiate or undermine the company's position regarding the subject on which the lawsuit or investigation is focused.

A refusal to appear voluntarily on behalf of the company may send an irreversible signal to a judge, jury, or governmental body that the former employee would not have supported the company's position. More important, the former employee may be the only witness, or at least the best-suited one, to provide critical information in support of the company. Without the cooperation and voluntary testimony of such key witnesses, the company will have a much more difficult time supporting or explaining its conduct.

Voluntary assistance to the opposing side or refusal to cooperate with the company in connection with involuntary appearances can have even more dire consequences. Without the former employee's cooperation, the company loses its ability to prepare the former employee for an appearance or interview, to cloak this preparation under the attorney-client privilege, and to direct the course of the deposition, examination, or interview through objection and witness instruction. The results can be devastating, par-

ticularly if the person left the company under less than ideal circumstances.

The good news is that companies are not helpless in all of this. Like more commonly used agreements with ex-employees, a cooperation agreement is a simple contractual tool that companies can use to prevent (or at least discourage) their former employees from refusing to cooperate in connection with any future lawsuits or investigations involving the company.

Here is a basic road map (with some sample language) for a standard cooperation agreement.

- **Consideration.** As with any contract, a cooperation agreement must provide for consideration to the former employee in exchange for agreeing to cooperate. Not only is this consideration necessary for the legal validity of the contract, it is also a necessary inducement. The form of the consideration is not important, but it should be something with value that increases over time. In this way, the company can maintain for as long as possible some measure of leverage over the former employee to ensure compliance with the agreement—without resorting to the courts for enforcement.

- **Confidentiality.** The agreement should prohibit disclosure of nonpublic information obtained through employment by the company. If such disclosure is mandated by law (through subpoena or

otherwise), the former employee should be required to provide the company with written notice to allow the company time to object to the mandated disclosure.

You agree that you will not use or disclose to any third party, directly or indirectly, any confidential or proprietary information pertaining to the Company, unless such disclosure is permitted by the Company or required by law. Confidential or proprietary information shall include any information concerning the Company which is not otherwise publicly available and which was obtained by you as a result of your employment with the Company. If such disclosure is required by law, you will provide the Company within 72 hours written notice that such disclosure is required.

• **Nondisparagement.** The agreement should prohibit the departing employee from publicly criticizing the company.

You agree that you will not disparage or make adverse public statements against the Company, or any of its directors, officers, or employees.

• **Future Cooperation.** The agreement should require full cooperation with the company in any lawsuits or investigations in which the former employee would be a relevant witness.

You agree to cooperate fully with the Company and its counsel in connection with any legal matters relating to the Company in which the Company determines that you are a relevant witness. Your cooperation will include meeting with the Company's attorneys, providing the attorneys with requested information, consenting to depositions and interviews, and appearing as a witness on behalf of the Company in any private or government lawsuit in which the Company is a party, or any government investigation, formal or informal, in which the Company is a target, subject, or called upon to be interviewed or examined under oath as a third party. Except as otherwise provided in this agreement, with respect to any such depositions, interviews, and appearances, you agree to be represented by the Company's counsel and to

work with such counsel in preparation therefor.

• **Voluntary Participation.** The agreement should prohibit the departing employee from participating in, encouraging, or providing voluntary assistance with respect to any lawsuit brought against the company by a private party. Extending this provision to any government proceedings would not be advisable.

You agree that you will not, without the Company's consent, voluntarily assist or cooperate in any way with any party or attorney in any private lawsuit in which the Company is a party. You further agree that you will not voluntarily participate in any such action, and that you will not solicit, encourage, or do anything to induce any party to bring such an action. You further agree to provide the Company within 72 hours written notice if any party or attorney not affiliated with the Company attempts to contact you in connection with any such action.

• **Involuntary Participation.** The agreement should require cooperation with the company, and proper notice, if the departing employee is required to involuntarily participate (by subpoena or other compulsory process) in an action or investigation involving the company. This provision is important to give the company time to object to the compulsory process, and to prepare the former employee for the appearance.

You agree to cooperate fully with the Company and its counsel in connection with any legal matters relating to the Company in which you are called as an involuntary witness (by subpoena or other compulsory process). Your cooperation will include providing the Company within 72 hours written notice of the subpoena or other compulsory process, meeting with the Company's attorneys, providing the attorneys with requested information, and working with the attorneys in preparation for your involuntary appearance. Except as otherwise provided in this agreement, with respect to any such involuntary appearance, you agree to be represented by the Company's counsel.

• **Right to Individual Representation.** The agreement should try to secure the departing employee's agreement to be represented by the company's counsel in connection with any future proceedings involving the company. However, such an agreement would likely be unenforceable because of the absolute right of a client to choose his or her own counsel and the potential for a conflict of interest from the dual representation. Therefore, it is advisable to include in a cooperation agreement the right of the former employee to use his or her own counsel instead of, or in addition to, the company's counsel. Even with this right, former employees will likely agree, if not expect, to be represented by the company, particularly in light of their broad obligations to cooperate, outlined above, and the fact that such representation would be free.

Notwithstanding any other provision in this agreement, you are entitled to appoint, at your own expense, your own counsel to represent you, in lieu of or in addition to the Company's counsel, in connection with any legal matters covered by this agreement. The selection by you of your own counsel shall in no way detract from or interfere with any of the obligations to cooperate with the Company that you have agreed to herein.

In the current environment of revolving-door corporate loyalties, multibillion-dollar lawsuits, and aggressive government enforcement, cooperation agreements should be a standard tool that companies ask key employees to sign at the time of their departure. Drafted wisely, these agreements can be a lifeline for a company that finds itself at the center of an unanticipated dispute or investigation.

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