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DUTIES OWED BY DEPARTING EMPLOYEES

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In today's business climate, employers are downsizing their workforces and losing good people who they simply can't afford to retain. Just a few short years ago, when the economic conditions were much more positive, employers were focused on trying to keep good employees who were being tempted away by competitors with better job offers.

Whether an employer has to dismiss an employee because of tough economic times, or the employee is resigning to pursue a better job opportunity in good economic times, the duties owed by a departing employee to their former employer, remain the same. All employees are subject to duties of loyalty, fidelity and confidence owed to their former employer. More senior employees, those in top management and key employment positions, are subject to additional fiduciary duties that continue even after their employment has been terminated.

Junior Employees Every employee, regardless of how junior the position held, is subject to certain duties that arise when their employment comes to an end. While the precise nature of the duty owed by the departing employee has to be considered on a case by case basis, there are a few simple rules of thumb to keep in mind. This list of "do's and don'ts" can always be varied by specific written agreements, but it provides a useful summary of the basic rules that apply to all departing junior level employees:

CAN DO

- Can resign with reasonable notice* equivalent to time it would reasonably take the employer to replace the employee or to adapt to the resignation
 - Can compete with former employer after employment ends, even during the notice period*
 - Can compete "fairly" with former employer (i.e. without using confidential information, customer lists or trade secrets belonging to former employer)
 - Can solicit former employer's customers*
- (*subject to express contractual provisions)

CANNOT DO

- Can't resign without providing reasonable notice
- Can't work for a competitor while still employed by first employer because duty of loyalty and fidelity continues until employment contract with first employer ends
- Can't misuse any confidential information, customer lists or trade secrets belonging to former employer
- Can't copy or memorize customer lists or records and use them to solicit former employer's customers



Senior Employees Employers are more vulnerable when they lose top management or key employees. Typically these senior employees have built strong relationships with their employer's key customers. The employer's customer base and its employees are typically the most important assets an employer can have. For that reason, the employer will often try to protect these key assets through written employment agreements containing specific restrictions preventing senior employees from competing, soliciting customers or employees, and accepting business from customers or hiring employees of their former employer, after they leave that employment. Even if there is no written employment agreement providing these additional protections to an employer, there are certain basic rules and fiduciary duties, which will bind and restrict the activities of senior employees on their departure. Some of the key fiduciary duties and the "do's and don'ts" of departing senior employees, can be summarized as follows:

CAN DO

- Can set up business in direct competition with former employer after term of employment contract ends*
 - Can send out general business announcements, advertisements and solicitations to the general public, after employment ends
 - Can accept business from former clients who approach you*
 - Can use skills and experience acquired from former employer to pursue new opportunities
- (* subject to express contractual restrictions)

CANNOT DO

- Can't do anything which conflicts with duty of good faith, fidelity and loyalty so long as employment contract has not ended (e.g. by organizing a mass exodus of employees under his or her supervision)
- Can't compete "unfairly" with former employer (e.g. by directly soliciting former employer's customers OR misusing its confidential information)
- Can't directly solicit former employer's customers because employer has proprietary interest in its trade connection with its customers
- Can't take any property or business opportunity belonging to employer or which employer is actively pursuing

Summary

Whether you are an employee considering a resignation from employment to pursue a better job opportunity, or an employer deciding to dismiss one of your employees, it is important to understand the consequences of a termination and the duties owed by the departing employee, even after the employment relationship has come to an end. If you are an employer and want additional protections before you dismiss an employee, then consider whether you can negotiate additional protection as part of a severance package. If you are an employee who wants to make a move, then make sure you have a full understanding of what you can do and cannot do before simply deciding to go work for a competitor and soliciting business from customers of your former employer.