

PROTECTING CONFIDENTIAL INFORMATION

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How to prevent an ex-employee misusing your confidential information

Is the information confidential?

If you answer yes to the following questions, it is likely that the information will be considered confidential by the court and you will have a good chance of obtaining a court order to prevent your ex-employee misusing it:

- Can you describe the confidential information in a specific way? e.g. 'the database of client profiles in H drive' is specific, 'client information' is not.
- Did it take considerable skill and effort to acquire the information?
- Would it take someone outside your company considerable skill and effort to acquire the information?
- Would your competitors regard the information to be confidential?
- Did you take steps to keep the information secure in your company?
- Did you tell your employees and contractors that this type of information was confidential?
- Can you provide that the ex-employee still has access to the confidential information, and intends to misuse it?

Legal steps to prevent misuse of your confidential information

The primary legal remedy to prevent misuse of confidential information is an interlocutory injunction requiring the ex-employee to:

- Surrender all the confidential information either to you or to the court; and
- Not use the information until the final hearing.

How to obtain an interlocutory injunction

You must convince the court that:

- Your case is arguable (in other words you answered yes to most, if not at all, of the questions in the checklist above);
- Your business would suffer, more of the injunction was not given than your ex-employee would if it were given. This is known as a 'balance of convenience test'. Ordinarily, you will not satisfy this 'balance of convenience' test if the court believes that any harm you suffer be adequately compensated by an award of damages at the final hearing; and
- You are willing to compensate the ex-employee for any losses they suffer as a result of injunction if you lose the case at final hearing.

In some circumstances, the court will grant what is known as an 'Anton Pillar' order. An Anton Pillar order is a form of civil search warrant issued by the court without notice to the ex-employee.

The court will only grant an Anton Pillar order in serious cases. For example, when it has determined there is a high risk that the ex-employee would destroy the information if they knew you were trying to prevent them from misusing it. Z

Tip: The best way to protect your confidential information is to ensure the employee's contract of employment contains an express restraint clause.



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