

# Potential implications for businesses when new employees use confidential information belonging to a former employer

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*Hiring new talent often brings new perspectives and injects new skill sets into businesses. But when does using information or knowledge gained by a new employee during a previous employment amount to a breach of confidence, or infringement of another party's intellectual property rights? Can the new employer be implicated in such a breach? How should employers insulate themselves against these risks?*

As businesses become more competitive, employers are becoming more cautious about protecting their company's confidential information and intellectual property. Of course, not all information or skills acquired from a previous employer are confidential. People naturally acquire knowledge and experience as they progress through their careers, and are generally entitled to use the skills they have gained during employment with one employer when they move on to another.

However, employees must be careful that they do not use or disclose confidential information in their new role that is proprietary to their previous employer. The scope of what constitutes "confidential information" will differ depending on the type of company and the particular industry, but this typically includes trade secrets, client and customer lists, product and pricing information, and the former employer's intellectual property. Prohibitions against using a previous employer's confidential information are often included in the employee's employment agreement with that employer, and employees also have implied legal obligations of confidentiality, good faith and fidelity to their previous employer.

Whilst a new employer may not have any direct obligations to an employee's previous employer, this does not mean that the new employer can deliberately or recklessly use information given to it by a new employee which the employer knows is confidential. If information is clearly confidential in nature, an obligation of confidence is likely to apply to anyone into whose hands it falls, including the new employer. Utilising or capitalising on information that an employer knows, or ought to know, its new employee is not authorised to disclose may make the employer liable for that breach as a secondary party.

Under the Employment Relations Act 2000, any person who "incites, instigates, aids or abets" any breach of an employment agreement could also (along with the person committing the breach) be liable to a penalty under the Act of up to \$10,000 for an individual, and up to \$20,000 for a company. An employee's previous employer can also take further legal action against the new employer to recover damages and costs incurred due to a new employee's breach of their obligations of confidentiality and good faith, if the new employer is found to have contributed to, encouraged, or assisted with the breach.

Turning a blind eye to the breach is unlikely to be a justifiable defence. An employer may be held to be liable as long as it is aware of an employee's prior employment obligations (e.g. that they are subject to a restraint of trade or confidentiality obligations) or the common practice of a particular industry regarding confidential information.

The following are various basic steps employers can take to protect themselves against liability arising from a new employee's breach of their obligations to their previous employer:

- Seek written confirmation, from new employees, that they will not disclose or use any information relating to prior employers (this is particularly relevant where a new employee has joined from a direct competitor).
- Do not use, or allow your employees to use, information that is obviously confidential to another party. If you notice a document or report being circulated around your business that is marked "Confidential", it should be immediately deleted and removed from your business' records.

- If you are unsure whether the information is confidential or not, but there is some indication that it might be, confirm the status of that information before using or disseminating it. Deliberately ignoring the potential confidentiality of that information will cause problems.
- Do not encourage your employees to use confidential business information gained from a previous employer, even if that information will give your business a competitive edge.
- If you know of a restraint in place against your employee, do not take steps to intentionally breach that restraint before taking legal advice.

Given the potential liability for employers, the confidential status of another business' proprietary information should not be viewed lightly. It is important to know where the line is drawn between utilising a new employee's skills and talent, and when using knowledge brought into a business by a new employee might be breaching another party's proprietary or confidential information. If in doubt, we always recommend that you seek legal advice before proceeding.

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