

Employee Mobility and Confidential Information: Key Issues to Consider When Onboarding and Offboarding Employees

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The content in this presentation should not be construed as legal advice. It is solely for an educational/informative purpose.

WHAT INFORMATION ARE WE PROTECTING?



Confidential Information



Trade Secrets



Compared to Other IP
(Trademarks, Copyright,
Patent)

CONFIDENTIAL INFORMATION DEFINED

- Any non-public information as you define it
- Be specific about information that is “confidential” in your business and align it as close as possible to financial information, inventions, and trade secrets
- Keep it limited to your company rather than the industry
- Not facially illegal - "information and material concerning the Company and its employees ... that is not generally known to the public and that is used in the business of the Company and that the Company treats as proprietary, private or confidential." *Bimbo LLC v. Patterson*, 2024 Cal. Super. LEXIS 69358, *5



CONFIDENTIAL INFORMATION GOES TOO FAR



Too broad may be a “de facto” non-compete that is illegal under Bus. & Prof. Code § 16600. *Brown v. TGS Management Co.*(2020).



Avoid omnibus definitions that prevent employee from continuing to work in same space



Avoid provision that protects “all information” that an employee learned or obtained working for the company, especially general practices, common methods, or publicly or readily available information



Avoid provision that includes information known before joining company



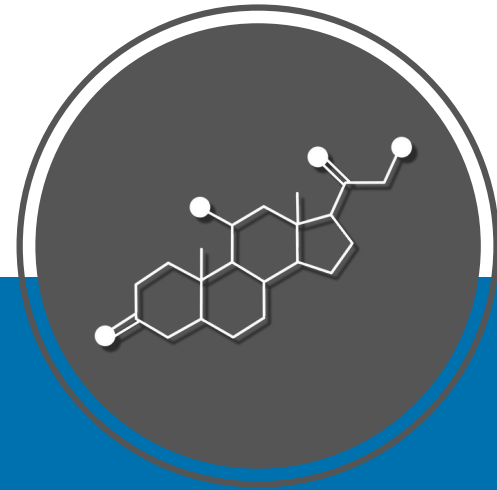
TRADE SECRET DEFINED

“Trade secret” means information, including a formula, pattern, compilation, program, device, method, technique, or process, that: (1) derives independent economic value, actual or potential, from not being generally known to the public or to other persons who can obtain economic value from its disclosure or use; and (2) is the subject of efforts that are reasonable under the circumstances to maintain its secrecy. Cal Civ Code § 3426.1; *see* Federal Defend Trade Secrets Act of 2016 (similar)

COMMON TRADE SECRETS



Business Plans



Technique/Formula



Software/Source Code



Pricing/Costs

WHY SHOULD WE CARE?

Valuable Assets
to Competitor

Valuable Assets to
Your Company

Potential
Liability

Potential Loss of
Trade Secret
Protection

TRADE SECRET CLAIMS CAN BE HUGE

- Ex-Uber Executive Levandowski Was Sentenced to 1.5 Years in Federal Prison for Trade Secret Theft (Law 360 August 4, 2020); later pardoned
- *Propel Fuels, Inc. v Phillips 66 Co.* (2024) (\$833 million for stealing alternative fuel info, including \$600 million jury award, \$195 million exemplary damages, interest)
- *Insulet Corp. v. EOFlowCo. Ltd., et al.* (2024) (\$452 million for stealing tubeless insulin patches trade secrets after defendant hired away several senior executives and employees)
- AMS Sensors USA, Inc. f/k/a Texas Advanced Optoelectronic Solutions, Inc. v. Renesas Electronics America, Inc. f/k/a Intersil Corporation (\$51 million verdict for stealing trade secrets in semiconductor industry) (2025)



COMMON CLAIMS



Breach of Contract



Intentional Interference with
Prospective Economic
Advantage or Contract



Unfair Competition



Trade Secret
Misappropriation



Penal Code §
502



Breach of Duty of Loyalty
or Fiduciary Duties

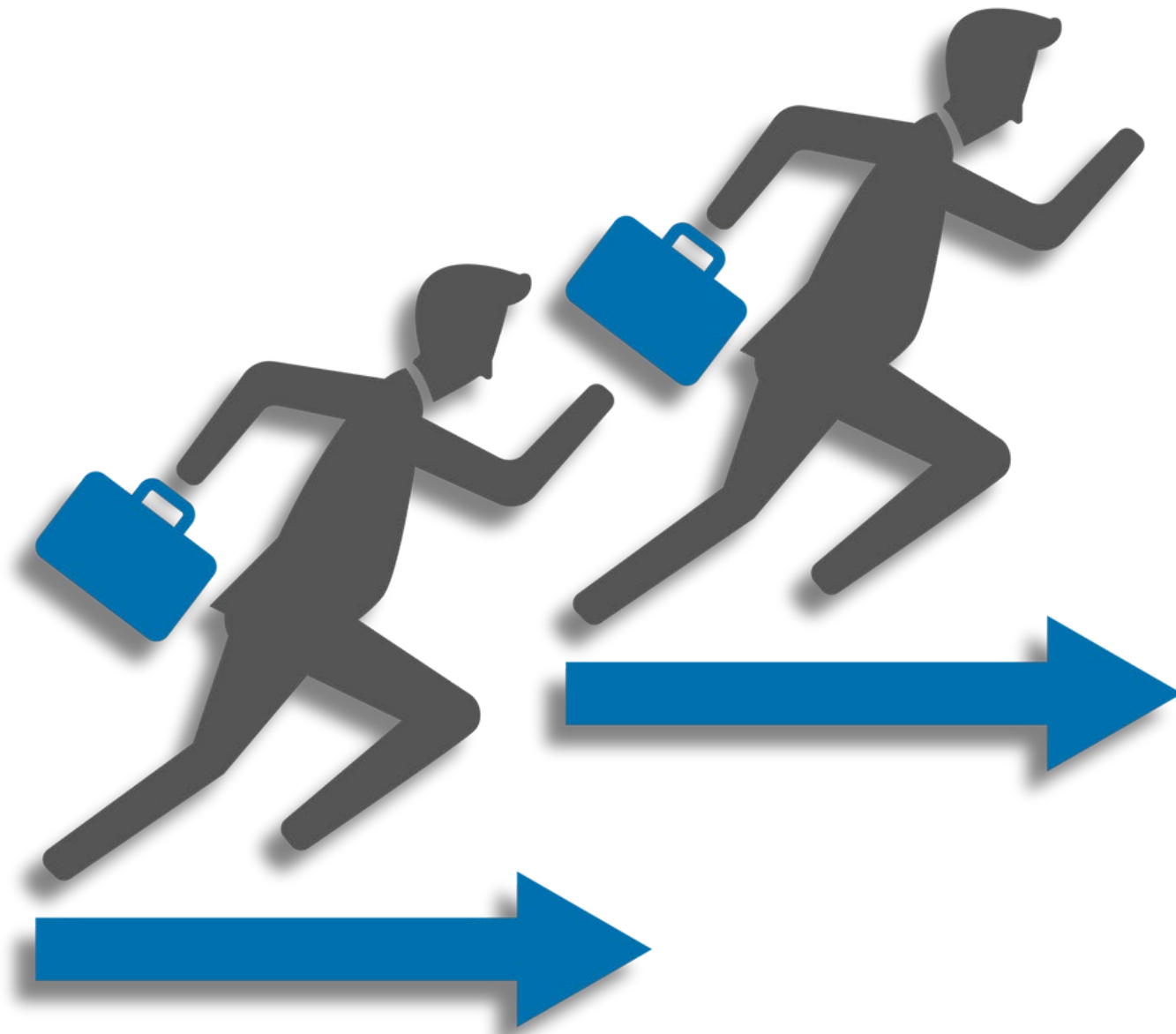
ONBOARDING EMPLOYEES COMING FROM A COMPETITOR

▶ Discussion With Employee

- Do not take or use any confidential documents or information
- Employee written acknowledgment
- No disparaging comments
- Do not coordinate employee's resignation from employer



ONBOARDING EMPLOYEE COMING FROM COMPETITOR



▶ Employee's Obligations to Prior Employer

- Ask to see/review employee's agreement?
 - Ignorance is bliss?
 - Assess risk?
- Do not provide advice to employee about agreements.
- Encourage employee to obtain counsel or offer to provide independent counsel for employee.
 - Company can pay for it.

ONBOARDING EMPLOYEE COMING FROM COMPETITOR

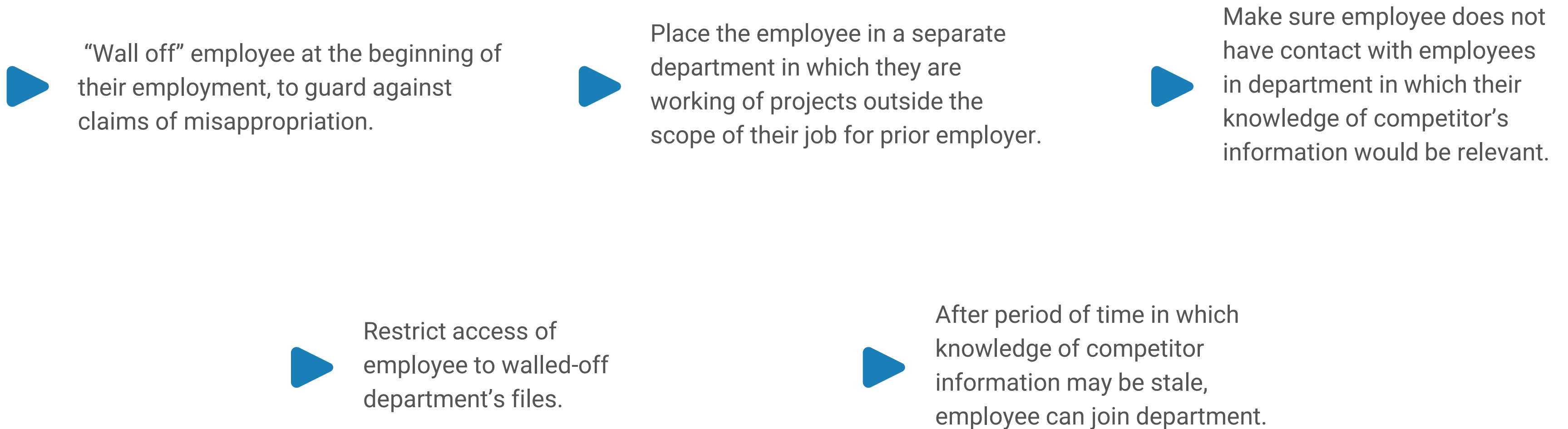
Employee's Contacts with Clients or Accounts

- For certain roles, these are key relationships and solicitation of clients often gives rise to litigation
- Are client lists or contact information trade secrets?
- Tombstone Announcement
 - It is a communication with basic information about the new role
 - Announcement should just include name, new job title, name of new employer, statement that employee has joined now company
 - Employee should use publicly available sources for names and addresses of customers.
 - Keep records of the announcement and all responses received from customers.

ONBOARDING EMPLOYEE COMING FROM COMPETITOR



Wall Off Employee?



ONBOARDING EMPLOYEE COMING FROM COMPETITOR

Protecting Employer Confidential Information

- Confidentiality Agreement
- Limit Access to Confidential Information
- Monitor employee downloading and access of sensitive files.
- Marking documents (or folders) with designations of confidentiality
- Prohibit use of personal emails or other devices to conduct company business.

ONBOARDING EMPLOYEE COMING FROM COMPETITOR

► Bring Your Own Device Policies

- Under a BYOD policy, employees are carrying around trade secret customer information on personal devices.
- The secrecy of customer information in phones is jeopardized when employers maintain a BYOD policy and fail to take measures to ensure that the information is maintained confidentially and deleted prior to employee departures.
- Employers should implement procedures that give them the ability to inspect employees' devices prior to departure and delete company information.
- Doing away with BYOD policies altogether?

ONBOARDING EMPLOYEE COMING FROM COMPETITOR

▶ Social Media Contacts

- Does this give away sensitive information?
- Use of personal accounts can create a dispute over ownership of customer information?
- Prohibit employees from using personal social media accounts to connect with customers?
- Set up new, company-owned and controlled social media accounts that employees are required to use?



OFF BOARDING AN EMPLOYEE TO COMPETITO

1

Immediate Steps to Take
Upon Termination/Resignation

2

Investigation of
Suspicious Activity

3

Pre-Litigation
Investigation

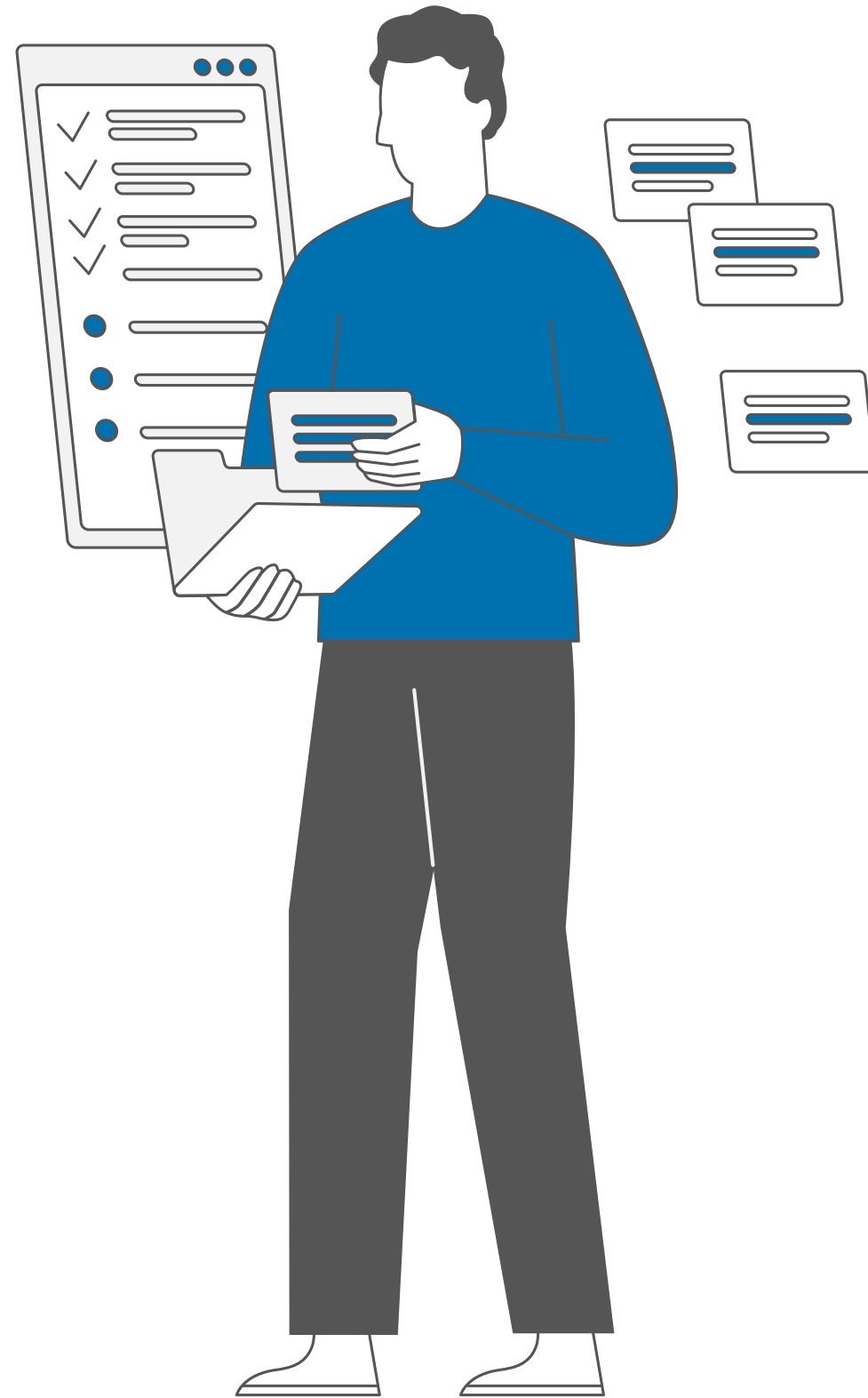
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Litigation Strategies
and Considerations

IMMEDIATE STEPS TO TAKE UPON EMPLOYEE TERMINATION/RESIGNATION

- Consider having employee leave premises immediately
- Retrieving employer property
- Make an inventory of returned items
- Exit interview
- Certificate of Compliance
- Reminder letter
- Notice to new employer





INVESTIGATION OF SUSPICIOUS EMPLOYEE ACTIVITY

- Review emails
- Conduct a forensic inspection of devices and company systems
- Interview other employees
- Contact customers (potentially).

PRELITIGATION INVESTIGATION



Investigation and
fact accumulation



Preserve
evidence



Cease and
desist letter



Be careful in
wording letter



Cease and Desist --
informal resolution

LITIGATION STRATEGIES AND CONSIDERATIONS



- If no informal resolution, consider litigation
- Early resolution v. protracted litigation
- Temporary restraining order or preliminary injunction; expedited discovery
- Risk/benefit analysis
 - Expense
 - Two-way discovery obligation
 - Unintended consequences of an adverse ruling (e.g. denial TRO/preliminary relief)

THANK YOU

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IRVINE



LAS VEGAS



LOS ANGELES



PHOENIX



SALT LAKE CITY



SAN FRANCISCO

