

Managing Group Lift-Outs and Responding to Corporate Raids

12:00 p.m.—1:00 p.m. CST | CLE and Roundtable

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Before We Get Started...

Welcome and Some Housekeeping Items

- Be sure to sign-in for MCLE Credit at the registration desk.
- Ask questions! Our panelists are happy to engage with you.
- If your attendance time meets the rules set by the Illinois MCLE Board, ACC Chicago will send your certificate by email next week.
- Watch for the survey/feedback link sent to your email after the program.

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What is a group “lift out”?

- People are generally free to resign and work for a competitor, assuming they don’t violate obligations to their former employer.
- An employer can generally hire whomever the employer thinks would be best for a role.
- The tricky area is where multiple employees are moving at or about the same time – a group “lift out.”

Why are group “lift outs” a hot issue right now?

- Companies in the financial services, insurance, and technology spaces are seeing massive changes, and massive employee movement.
- Issue can arise in any situation where employees have access to trade secrets, or where they may have an outsized impact on client movement if they were to leave.

Why are group lift outs so often fraught with litigation?

- Emotion
- Real economic and/or competitive harm
- Litigation as a chilling effect

What are the potential causes of action associated with a group lift out?

- Breach of contract (notice period, noncompete, coworker nonsolicit, customer nonsolicit, confidentiality)
- Tortious interference with contract
- Breach of duty of loyalty
- Aiding and abetting a breach
- Misappropriation of trade secrets
- Conspiracy
- CFAA

Outside of the FINRA context, is there a specific cause of action for “raiding”?

- Not exactly, but you can address a raid through the causes of action just mentioned.

In the FINRA context, is there a cause of action for raiding?

- Yes, FINRA panels may recognize a claim for raiding.

When a company client believes it has been unlawfully raided, what steps should it take?

- Review email activity
- Review contractual obligations
- Review computer/smart phone activity
- Review printer activity
- Look online (e.g., FINRA license transfer timing)
- Talk to those who remain/find out what they know
- Review social media activity of those involved/those who left
- Write to the people and demand they sign an affidavit of compliance /or otherwise give an assurance
- Notify new employer of any restrictive covenants (just the facts)
- TRO? What is the immediate harm?

How do you measure damages associated with a group lift out?

- Enterprise value
- Lost profits
- Value of trade secrets (computer code, strategic concepts, client lists, etc.)
- Need experts to explain the value to a panel or a court

What things can the hiring employer do to minimize the risk of litigation when conducting a group lift out?

- Analyze all contractual obligations
- Clean briefcases
- Adhere to duty of loyalty owed by existing employees in virtually all states
- No employees should coordinate, nor should any employers give information regarding other employees – every hire is an independent event
- Do not use current employer's systems or time when communicating
- Assume all communications are potentially discoverable and use appropriate discretion
- Be professional throughout; don't rub salt in the wounds
- Timing considerations as to solicitation of big clients
- The ever-present affidavit (conduct yourself in a way that you could sign it)

How do you settle disputes like these?

- Emotion can make it difficult
- Provide limited assurances – although you have to be careful if the plaintiff firm is seeking a strict no-hire.
- Buy employee out of restrictive covenants
- Mediation
- Consider acquiring the former company – may be an option