



NO GUARANTEES ON LEVEL OF LOYALTY OWED BY WISCONSIN EMPLOYEES

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How much do you trust your employees? Wisconsin courts have long debated what level of "trust" is justified, and when an employer can obtain legal recourse against an employee who puts their own personal interests and financial gain ahead of their employer's interests. Unfortunately, many employers are surprised to learn how little protection the law provides against disloyal employees whose secret activities may result in significant losses to a business.

In December of 2009, the Wisconsin court of appeals issued a new decision, InfoCorp LLC v. Hunt and Tierney Brothers Inc., 2007 AP 2887, outlining the remedies available to Wisconsin employers who suffer harm at the hands of a disloyal employee. As that case illustrates, the threats posed by disloyal employees can be significant, and the legal protections are not clear-cut. Employers are well advised to educate themselves on the lessons presented in the InfoCorp case and take appropriate precautions to avoid harm from a disloyal employee.

In InfoCorp, Hunt was employed as an outside salesman selling "Smartboards" and other high tech audio visual aids. Hunt secretly wanted to work for one of InfoCorp's competitors, Tierney Bros. In an attempt to induce Tierney Bros. to hire him, Hunt secretly introduced Tierney Bros. to one of InfoCorp's key customers, and then helped arrange for Tierney Bros. to become an authorized vendor for that customer. He also claimed, in an email to Tierney Bros, that he would bring \$30,000 of additional orders with him if he were hired by Tierney Bros. After Tierney Bros hired Hunt, InfoCorp's key customer switched its business to Tierney Bros.

InfoCorp had not required Hunt to sign any confidentiality, non-compete, customer non-solicitation, or other agreement as part of his employment. He was not a manager or an officer or policy maker at InfoCorp.

After losing its key customer and other business following Hunt's departure, InfoCorp sued Hunt, claiming Hunt violated his fiduciary duty of loyalty to InfoCorp by secretly placing his own interests above those of his employer. InfoCorp also sued Tierney Bros., claiming that they had conspired with Hunt to interfere with InfoCorp's customer relationships.

The trial court, relying on prior Wisconsin court decisions, dismissed InfoCorp's claims against Hunt, on grounds that Hunt did not owe a duty to his employer because he was not an officer or policy maker. Likewise, since InfoCorp had not required Hunt to sign any written contract, there was no breach of contract claim available. Since Hunt's actions were not unlawful, the claims against Tierney Bros. were also dismissed. InfoCorp was left without meaning recourse for suffering significant losses at the hands of its disloyal employee and chief competitor.

InfoCorp appealed and in December of 2009, the court of appeals reversed the trial court decision and reinstated the claims. However, instead of awarding damages to InfoCorp as a result of Hunt's and Tierney Bros' actions, the appellate court merely sent the case back to the trial court for a full factual hearing. Ultimately, InfoCorp may still be unable to recover any of its losses.

The appellate court held that, even if Hunt was not an officer or a policy maker for InfoCorp, it was

possible that he was a “key employee”. If so, as a key employee he may, the court held, depending on the duties he was assigned, have owed InfoCorp a duty of loyalty, including a duty not to provide assistance to InfoCorp’s competitor in obtaining vendor authorization, and a duty to disclose his activities to InfoCorp. If Hunt did owe such duties, and were found to have violated them, then Tierney Bros might also be liable for conspiracy and other claims brought by InfoCorp. All of those questions would need to be decided by a jury upon full review of the evidence.

While most employers would applaud the fact that the appellate court reversed the trial court decision, most would be shocked at how difficult it was for InfoCorp to secure a remedy for the egregious conduct by its salesperson. InfoCorp had assigned its salesperson to work independently, as most sales staff do, and had trusted that its salesperson would never even consider introducing its arch rival to its customers, much less promising to transfer \$30,000 of purchase orders to a competitor.

Like many companies, InfoCorp may have believed that requiring its employees to sign noncompete agreements or other restrictive covenants would create ill will and poor morale among its workforce, might cause some employees to leave, and might indicate a lack of trust between the company and its staff. The decision not to introduce such contractual protections clearly backfired on the company.

There are many lessons that HR professional should take from the sad story of InfoCorp and its disloyal employee and conspiring competitor. The following are a few of the most important:

- **Recognize the reality of secret employee activities.** Although in a perfect world all employees will remain satisfied with their jobs and remain with the same employer through retirement, the fact is that most employees will move between jobs, multiple times during their career. In a number of cases, such as when the employee is resigning for self-employment or when the employee has exaggerated his value to a prospective employer, the employee will be prone to take actions to assure success in the new venture. Most times this will involve either secretly setting up a new business or meeting with competitors to explore employment, which Wisconsin courts have generally viewed as not violating duties of loyalty. Other times, these actions may involve more direct positioning, including pre-arranging for the transfer of customers and orders to a new business, similar to the facts in InfoCorp. Employers need to anticipate that these types of secret activities are likely to occur at some point.
- **As the economy improves, defections will increase.** Employers should also be aware that there are likely employees currently on staff who would prefer to work elsewhere, or for a higher wage, or for themselves, but who may currently be limited from such options due to the economy. Improvement in the economy will bring more opportunities, which will increase the potential for secret disloyal activities.
- **Understand the weakness of Wisconsin legal protections.** Another lesson taught by the InfoCorp case is that Wisconsin law does not provide adequate protection against disloyal actions of employees, absent a contract with the employee. As InfoCorp learned, even where the employee’s actions are egregious and deliberate, there are many defenses available to the employee. The law is not at all clear as to which employees owe duties of loyalty to their employer or what those duties entail. Even the InfoCorp court could not define what a “key employee” is – it merely indicated that “it depends on the nature of the duties, which requires a factual inquiry”. Likewise, the court did not define what duties were owed if the employee were found to be a “key employee”, deciding to leave that issue to the jury. Thus, employers are left to their own devices in trying to fathom which of their employees might be considered “key employees”, and thus subject to legal restraints, and which employees might be allowed to secretly transition sales and customers away from the business without legal recourse against them. For employees who might not be considered “key”, businesses must decide

whether to allow them to work independently and what type of access to customers and confidential information should be allowed.

- **InfoCorp highlights the importance of contractual restrictions.** Both employers and employees generally abhor restrictive covenants in the workplace. Employees claim that such agreements are one-sided, restrict their ability to earn a living in their next job, reflect a lack of trust by their employer, and are not conducive to a friendly work environment. Employers dislike “forcing” employees to sign such agreements, either at the start of employment or, even more distastefully, during the middle of an employment relationship. Employers have also learned that such agreements, if not properly drafted, may not be enforced by the courts and thus all the time, cost and aggravation might be wasted cost. However, in the wake of InfoCorp, employers must recognize that such agreements are their best if not only hope of protecting themselves against what could be catastrophic losses associated with disloyal employees. Such losses, unlike other events, are not insurable and can have a long lasting impact. There are a multitude of helpful restrictive covenants, ranging from confidentiality agreements, to customer non-solicitation (or “non-piracy”) agreements, non-compete agreements, non-disparagement agreements, and others. Employers should evaluate which employees should be covered by a restrictive covenant and what type of covenant is best suited for the threat posed by the employee.
- **InfoCorp also highlights the dangers in recruiting disloyal employees.** Another lesson of InfoCorp involves the hiring process. In InfoCorp, the Court reinstated claims against the company that hired the disloyal employee. That company was accused of having full knowledge of the employee’s activities and possibly even directing or participating in them. The potential liabilities associated with such knowledge or participation sound a need for recruiters to pay close attention to the actions of job applicants and, even more, to caution applicants, preferably in writing, against any activities that might violate the rights of their current or former employer. Companies should immediately distance themselves from any situation where the job applicant or new employee has improperly diverted business, taken electronic or hard copies of business records or customer information, or otherwise engaged in improper conduct.

In summary, the court of appeals has reminded Wisconsin employers that “there are no guarantees” in relation to the trust placed in employees. While the law may, in some cases, step in and provide remedies to an employer who has suffered business losses at the hands of a disloyal employee, that law is extremely vague and difficult to enforce. Better remedies lie in instituting protections such as restrictive covenants to protect customer relationships and other assets of the business. HR professionals should routinely examine the workforce to identify categories of employees who have access to confidential information, trade secrets, or customer relationships and take appropriate measures to protect such assets and avoid the hard lessons learned by InfoCorp.

Copies of the InfoCorp case can be obtained from the Wisconsin State Bar website www.wisbar.org or the author.