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An Intellectual Property Law Update

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Who Owns Knowledge?

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You may have recently heard that the heads of two mega-tech companies, Meta and the company formerly known as Twitter, have exchanged accusations. No, we are not referring to the potential "cage match" but to the allegation that Threads (a social media app from Meta) was developed using confidential information and trade secrets known by former Twitter employees and retained in their memory. Meta has quickly denied this. The public food fight illustrates a very real challenge faced by innovative companies -- what to consider when hiring key employees from a competitor.

Absent certain contracts or unique circumstances, it is generally perfectly legal to hire employees from competitors. However, hiring high value employees can increase the risk of retaliation from former employers. Here is a short list of considerations:

1. Did the employee sign a noncompetition agreement? While noncompetition clauses can be unenforceable, the new employer should know whether one exists. If so, it should be evaluated by legal counsel to analyze its scope and understand the risk of any violation.

2. Did the employee leave the former employer with anything tangible or electronic? For example, documents, data, ideas, diagrams, specifications, customers information, etc. Property, whether physical or digital, is not something that the new employer wants the employee to bring with them.

3. Does the employee understand that obligations of nondisclosure exist whether or not they have signed nondisclosure agreements? We recall an interview with a prospective employee who said "Oh, I have no trade secret obligations because I never signed that NDA." Of course, that was a sign of a potential threat to the new employer.

4. Does the employee -- and do you, the new employer -- understand that trade secrets can be misappropriated without access to copies of documents or information? Meaning, the definition of "trade secrets" and "confidential information" can include specialized knowledge that resides in a person's memory?

5. Did the employee sign a contract with a patent "tail" -- where ownership of inventions that are reduced to practice after employment, for a period of time, are owned by the former employer? Similarly, did the employee conceive of any part of an invention during the prior employment -- and fail to disclose it to the former employer?

6. Did the employee seek to bring with them, to the new employer, additional employees from the old former employer? Again, there are ways to implement this that are lawful and ways that bring with them all sorts of legal complications.

7. Did the employee say or do anything, on their way out, evidencing an intent to harm their former employer?

8. Does the new employer understand that the law will allow an employee to use generalized knowledge and skills and expertise? It is sometimes difficult to draw the line between expertise of an employee and trade secrets of a former employer.

Our legal teams are comprised of attorneys with expertise in employment law, intellectual property, and litigation. We can guide you through this process and help you minimize, and sometimes eliminate, legal threats to your development of innovative products and services.

Patent owners that want to discuss how this change impacts their patent strategy can contact any member of **Bodman's Patent Practice Group**. Bodman cannot respond to your questions or receive information from you without first clearing potential conflicts with other clients. Thank you for your patience and understanding.

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