



AT THE BAR WITH BOWDITCH

A Legal Blog for the Craft Brewing Community

The Secret Sauce: Protecting Brewing Recipes and Processes – The Role of Employee Agreements

BY ROBERT G. YOUNG • DECEMBER 8, 2016

Recently, my colleague Roger Zimmerman provided a helpful primer on [how to protect the intellectual property of a brewer's operation through copyright and trademarks](#). There is, however, another area that brewers must consider when protecting their business: their workforce. As a brewer's business expands, and more and more employees are hired, the brewer-as-employer must grapple with how best to protect the business in the event an employee leaves. There are several types of agreements that employees can be required to sign that can add layers of protection for a brewer's business.

Perhaps the most basic level of protection is a non-disclosure agreement. This type of agreement typically prohibits an employee from using or disclosing an employer's confidential and proprietary information at any time (whether during or after the employment relationship) for purposes other than work for the employer. In the absence of a non-disclosure agreement, an employer still could rely on statutory and common law trade secret protections, but a written agreement with an employee can provide a powerful deterrent against nefarious conduct and also allow an additional arrow in the employer's quiver in the event a former employee must be sued. To enforce a non-disclosure agreement, however, an employer still will need to show that the information at issue actually is confidential and that the employer has taken appropriate measures to safeguard the information beyond having the employee sign a piece of paper. In particular, the confidential information should not be shared beyond those with a legitimate need to know, and an employer should ensure that a departing employee returns (or, in the case of electronic information on a personal laptop or other device, deletes) all company property upon leaving.

Non-competition and non-solicitation agreements are other vehicles that employers typically use to prevent unfair competition from former employees. In short, a non-competition agreement prohibits a former employee from working in another competitive job (for example, for another brewer). While some states, such as California, ban non-competition agreements entirely, many others, such as Massachusetts, will enforce "reasonable" agreements.

That said, even where they are permitted, non-competition agreements are not always enforced according to their

strict terms. Preventing competition, in itself, does not provide a basis for enforcing a non-competition agreement. Instead, a court will enforce a non-competition agreement only if it protects a legitimate business interest, such as goodwill or confidential information, and these interests can be difficult to substantiate in some cases. Further, even if a legitimate business interest exists, a court may limit the duration of a non-competition agreement, either in time (for example, cutting a two-year non-competition agreement down to one-year) or geography (for example, allowing an employee to work in a competitive position so long as the employee relocates sufficiently far from the original employer).

A non-solicitation agreement is in many ways a scaled-down version of a non-competition agreement. It does not prohibit a former employee from working in a competitive position (i.e., the person can hold a job in the industry), but it does prohibit the former employee from soliciting business from the original employer's clients or customers. While courts generally are more receptive to non-solicitation agreements than non-competition agreements, an employer still will need to show some threat to goodwill or confidential information to ground the non-solicitation restriction.

In sum, a brewer should consider what aspects of its business are most important to protect and then can prepare an agreement with an employee tailored to protect those aspects. While no agreement can guarantee that an ex-employee will not try to unfairly compete, if drawn up correctly a non-disclosure, non-competition and/or non-solicitation agreement can put a brewer in the best possible position to prevent this from occurring.