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June 30, 2020

EMPLOYEE'S DUTY TO PROTECT CONFIDENTIAL INFORMATION AFTER TERMINATION

More than sixty years ago, the Connecticut Supreme Court held that "[t]he law is well settled that knowledge acquired by an employee during his employment cannot be used for his advantage to the injury of the employer during the employment; and after the employment has ceased the employee remains subject to a duty not to use trade secrets, or other confidential information, which he has acquired in the course of his employment, for his own benefit or that of a competitor to the detriment of his former employer." *Allen Manufacturing Company v. Loika*, 145 Conn. 509, 514 (1958).

As the Connecticut Supreme Court explained, "[i]t matters not that there is no specific agreement on the part of the employee not to disclose knowledge he has so acquired. The law will import into the contract of employment a prohibition against a betrayal of the employer's trust and confidence against imparting confidential information to others. In fact, such a stipulation is probably part of every employment, whether actually expressed or not. Employees are bound by such an implied obligation even though they be not under [a written] contract at all." *Allen Mfg*., 145 Conn. at 514.

Twenty years ago, the Connecticut Supreme Court affirmed its holding in *Allen Mfg*. and again held that even when employment ceases, an employee may not use confidential information gained during his employment. *Elm City Cheese Company, Inc. v. Federico*, 251 Conn. 59, 69 (1999) ("Even after the employment has ceased . . . the employee remains subject to a duty not to use trade secrets, or other confidential information, which he has acquired in the course of his employment, for his own benefit or that of a competitor to the detriment of his former employer."). The Connecticut Supreme Court also affirmed its other holding in *Allen Mfg*. that a former employee may be stopped from using confidential information, even if there is no express written agreement limiting the use of that information. *Elm City Cheese*, 251 Conn. at 85.

Now, a Connecticut Superior Court decision, *Dur-A-Flex, Inc. v. Samet Dy*, has called that into question. The court stated that:

> In Connecticut, former employees owe no common-law duty of confidentiality to their former employers. Employees certainly have fiduciary duties while they remain employed. They may have contractual duties during and after employment. They may have statutory duties during and after employment too, such as those designed to protect trade secrets. But they do not have a common-law duty to keep secret ex-employers' "confidential" information.

According to the court, the decisions in *Allen Mfg*. and *Elm City Cheese* predated Connecticut's adoption of the Connecticut Uniform Trade Secrets Act ("CUTSA"), which has a broad preemption provision. The court reasoned that the enactment of CUTSA effectively overruled the holdings in *Allen Mfg*. and *Elm City Cheese*, which

barred former employees from using their employer's confidential information.

The court did note that "employees may have contractual duties during and after employment" that would prohibit them from using their employer's confidential information. Given that the decision in *Dur-A-Flex, Inc. v. Samet Dy*, casts doubt on whether employees have a common law duty to protect confidential information after termination, employers are well advised to review their policies and, if appropriate, have employees contractually agree to protect the employer's confidential information regardless of the reason for the termination. Those contracts, if supported by adequate consideration, will protect an employer's confidential information.

If you have any questions about this or any other employment issue, please feel free to contact **Bernard E. Jacques** at **bjacques@mdmc-law.com**.

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