

## Duty of Loyalty vs. Free Economic Competition

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When a new employee is hired, there's a familiar litany of processing and paperwork that must be completed before the new hire can hit the ground running. In addition to tax and payroll forms, an employer may also require the new employee to sign an employment contract or handbook, a non-compete or confidentiality agreement, or some combination of the above. If things go awry in that employer/employee relationship (yes, it happens), these types of agreements are among the most common points of contention, and sometimes even give rise to litigation.

South Carolina courts have recognized the importance of protecting an employer's business from unfair competition resulting from an employee's breach of his duty of loyalty to his employer.

The story isn't all one-sided, though. The challenge for courts is harmonizing two important, yet often conflicting, interests: (1) the employee's duty of loyalty; and (2) society's interest in promoting free and vigorous economic competition.

Although employees may take some steps in early preparation to begin competing with their employers (after they leave), those that go too far risk violating their duty of loyalty to their employer. Among the things that will likely violate the duty of loyalty: misappropriation of trade secrets; misuse of confidential information; solicitation of an employer's customers prior to the end of the employment period; conspiring to bring about mass resignation of the employer's key employees; and misappropriation of an employer's business opportunity.

With respect to these two competing policies, courts have stressed that "while employees may lay plans and take limited steps to begin competing with their employers, employees who go too far risk violating their duty of loyalty." *Futch v. McAllister Towing of Georgetown, Inc.*, 335 S.C. 598, 607, 518 S.E.2d 591, 595 (1999). In other words, the right of an employee to make certain arrangements or lay plans to begin competing with his employer is "by no means absolute and the exercise of the privilege may, in appropriate circumstances, rise to the level of a breach of an employee's fiduciary duty of loyalty." *Maryland Metals, Inc. v. Metzner*, 282 Md. 31, 41, 382 A.2d 564, 569 (1978). Thus, an employee is not protected from liability where he has committed some "fraudulent, unfair or wrongful act in the course of preparing to compete in the future." *Id.* at 40, 382 A.2d at 569.

The balancing of the two conflicting interests is difficult for courts and employees alike. Understanding the agreements between an employer and employee is the first step in

navigating these complicated and potentially contentious situations.