

Preface

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Employees are undoubtedly one of the most important assets in the success of almost any business, but they can also be a source of some of the most damaging unfair competition and intellectual property loss a company experiences. Our goal with this new and expanded version of our previous book is to provide a one-volume, easy to use reference book for the advising attorney tasked with providing contract and policy advice and trial attorneys litigating unfair competition cases.

This new book covers much more than what we covered in its predecessor (*DRAFTING AND ENFORCING COVENANTS NOT TO COMPETE*). We have not merely updated previous material, but have also expanded the scope in an effort to cover the field of unfair competition and intellectual property protection in employment more comprehensively—from basic principles of policy and law, to contract solutions, to litigation guidance—in a one-volume reference book. To add a stronger contextual framework, we have started this book with a discussion of protection concepts related to employees at a basic law and public policy level. From there we provide practical risk v. benefit analysis and chapters designed to help the reader identify issues that may be particular to his or her circumstance—such as unique state issues and job category issues.

Contract solutions are a prominent feature of this book. Our new book now covers an even more extensive range of contract solutions than was previously covered. For example, in addition to nondisclosure, noncompete and nonsolicit restrictions, it covers contract solutions such as:

- Invention assignment and copyright protection agreements
- Garden leave and fixed term contracts
- Forfeiture and clawback agreements
- Stock option and other equity based agreements
- ERISA covered plan agreements
- Severance and settlement agreements

- Sale of business related restrictions, and
- International noncompete and nonsolicitation issues.

Along with these contract solutions, we have included a number of practical checklists and guideline chapters to address the many different practical challenges employers and employees face in working to avoid unfair competition. Some examples of these guidelines and checklists are:

- Guidelines for hiring safely from a competitor
- Risk assessment checklists concerning the use of certain contracts
- A list of unique state specific requirements
- Unusual rules for particular types of employees by category of employee, and
- A litigation checklist from both plaintiff and defense perspectives.

Finally, our new book contains a complete Litigation Guide section that takes the trial attorney through the process of evaluating litigation alternatives and defenses, on through the pleading and discovery stages, through injunction hearings, and ultimately through trial. It covers unusual procedural and evidence issues that arise in unfair competition disputes along with a section explaining some of the trial strategies and themes commonly seen in these cases. In so doing, it has been our goal to add some conceptual structure and organization to an area of law that can often appear quite disorganized and inconsistent, and to provide a practical single volume resource for attorneys involved in unfair competition matters – from both the preventive advice and the practical litigation perspectives.

The opinions expressed in this book are those of the authors only, and not those of Littler Mendelson P.C. Nothing in this book is intended as legal advice. We have attempted to provide comprehensive and balanced coverage of subjects, sometimes even articulating arguments made or recognized in decisions with which we may personally disagree or argue are not legally correct. Individual facts and circumstances will often change the outcome in many areas of law, but nowhere is this more true than in unfair competition law where equitable remedies are applied in highly discretionary, fact-based balancing tests at the trial court level. Consequently, many of the generalized statements and tests described in this book will apply

differently or become inapplicable when important factual differences arise.

Please note that this book is also designed to be a companion to the outstanding coverage provided by the ABA/Bloomberg BNA series of state-by-state survey and international restrictive covenants books. You will see these books referenced frequently. The titles most heavily relied upon here are:

- Brian M. Malsberger, *Covenants Not to Compete: A State-by-State Survey* (Vols. I – III).
- Brian M. Malsberger, *Employee Duty of Loyalty: A State-by-State Survey* (Vols. I – II).
- Brian M. Malsberger, *Trade Secrets: A State-by-State Survey* (Vols. I – II).
- Brian M. Malsberger, *Tortious Interference in the Employment Context: A State-by-State Survey*.
- Lazar & Siniscalco, *Restrictive Covenants and Trade Secrets in Employment Law: An International Survey* (Vols. I – II).

The coverage provided by these multi-volume survey treatises is far more detailed and in depth than what we attempt to provide here. No serious practitioner focused on the field of unfair competition should be without them in our opinion.

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