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## It's Over! I Need a Data Divorce From My Employee

It's time for a separation. Perhaps you and your soon-to-be-former employee are parting on amicable terms, or maybe it's contentious. Either way, as with any divorce, there comes a time to divide up the property. Sometimes separate property is clear – family photos belong to the employee; the ergonomic chair bought with company funds belongs to the employer. But what about when boundaries are less clear or the employee refuses to cooperate?

### Plan Ahead with a Good Prenup

The employment equivalents of a prenuptial agreement – employee handbooks, employment-related agreements and termination protocols – should be designed with a potential separation in mind. Audits should confirm that these documents:

- Require return of company property upon separation and upon any earlier request by the company.
- Include participation and oversight by information technology personnel as dictated by the company, prior to an employee taking action (e.g., an employee should not be able to simply claim to have deleted files without allowing the company to approve that deletion in advance or confirm it occurred).
- Allow for remote wipe of company data from electronic equipment, even if the equipment actually belongs to the employee as part of a “bring your own device” program.
- Apply to the company's tangible property (e.g., electronic equipment, credit cards, keys), documents, logins and passwords, and electronic information, even if at the employee's home, stored on the employee's own device used for business or maintained in cloud-based storage.
- Protect not only the company's information but that of clients or other third parties who have shared such information with the company in confidence.
- Protect reasonable competitive interests of the employer and comply with any applicable laws regarding employer confidentiality restrictions.
- Make clear that the employee should have no expectation of privacy in any data, documents, or any other activity involving company electronic systems or devices.
- Require reimbursement for retained, lost or damaged property to the greatest extent permitted by law.
- Address who owns LinkedIn profiles or business contacts attached to such profiles where a LinkedIn account is in the employee's name but maintained by the company or integral to an aspect of the company's business, and when the employee should remove any indication the employee is still employed with the company.

### Assigning Value

Certain company data and other property are more valuable than others. At the earliest possible moment in the process the company should consider property

value in order to strategically allocate recovery resources.

“Value” considerations include:

- How much of a competitive threat is the employee?
- What trade secrets or competitive intelligence may have just walked out the door?
- If we do not aggressively pursue this employee, are we conceding for the future that the property/information is not that valuable?
- Is there any information the company must aggressively protect pursuant to applicable law (e.g., Social Security numbers, bank accounts, protected health information) or pursuant to a nondisclosure agreement with a third party? Similarly, are there any legal or other reporting obligations if such information has been removed?
- Does the employee have information subject to a current litigation hold or potentially relevant to developing litigation?

### Dividing the Property

Information technology professionals should be brought into the conversation as early as feasible, particularly in the case of a planned separation where high-value company property is at risk. Network lock-outs and remote wipe activities should be coordinated in advance.

If available, security should be on call in the event the employee attempts to leave the premises with company electronic equipment or other company property. Set an action plan with the employee regarding return of company property at home and employee personal property at the office. Finally, if the employer installed monitoring software on the employee’s own device, the company should delete or deactivate that software as appropriate.

### Divorce Court

Sometimes the separation goes very wrong, and court intervention becomes necessary. “Prenuptial agreements” and the company’s legitimate business interests in securing the property play a critical role in the success of any legal action. Consult with legal counsel for guidance specific to your industry and the laws applicable to your operations.

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Breaking up is hard to do. It is important to plan ahead and follow an action plan regarding division of property, with the goal of an amicable and professional separation that does not sacrifice the company’s competitive or property interests.

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