

# CLIENT ALERTS

---

## Pandemic Poaching Lessons: *Tesla v. Rivian* – How to Protect Your Company's Top Talent and Most Valuable Assets

7.28.2020

Despite the current pandemic and nearly 30 million unemployed people on the sidelines, a number of companies are engaged in an intense battle to hire, attract, and retain top talent, all the while protecting their most confidential information and trade secrets. The most recent publicized battle pits Tesla, the world's leading electric-vehicle manufacture, against Michigan-based Rivian, an emerging competitor in the electric vehicle market.

On July 17, 2020, Tesla sued Rivian in California court alleging that Rivian wrongfully poached Tesla's employees and "is knowingly encouraging the misappropriation of Tesla's trade secrets, confidential, and proprietary information." The lawsuit alleges that Rivian has hired a total of 178 Tesla employees, 70 of whom went to Rivian directly from Tesla. While Tesla says that it respects legitimate competitive conduct, even recruiting Tesla's employees when done "fairly," it claims that it "discovered a disturbing pattern of employees who are departing for Rivian surreptitiously stealing Tesla trade secret, confidential, and proprietary information – information that is especially useful for a startup electric vehicle company." The lawsuit is in its early stages and Rivian denies the allegations.

This is not the first lawsuit Tesla has filed to protect its trade secrets. On March 20, 2019, Tesla filed two others suits, alleging the same pattern of former employees taking trade secrets as they left to join competitors; one against Zoox Inc., an autonomous vehicle start-up, and the other against Xiaopeng Motors, a Chinese electric car maker. While the Xiaopeng suit is still in discovery, on April 14, 2020, Tesla settled with Zoox for an undisclosed amount and a requirement to undergo an audit to ensure Zoox and its employees have removed all of Tesla's confidential information

### Related People

Javon R. David  
Shareholder

Phillip C. Korovesis  
Of Counsel

Ivonne M. Soler  
Senior Attorney

### Related Services

Non-Compete & Trade Secret

Trade Secret & Non-Compete  
Specialty Team

## CLIENT ALERTS

---

Notably, in the latest Tesla v. Rivian lawsuit, Tesla does not seek to enforce non-compete agreements with its employees and/or allege tortious interference by Rivian with such agreements. Utilizing and enforcing non-compete agreements (so long as they are reasonable and narrowly tailored) would normally make it easier for a company like Tesla to protect its top talent and trade secrets and make it harder for a competitor to poach its employees. But because non-compete agreements are banned under California law (Section 16600 of the California Business and Professions Code), Tesla has fewer legal tools at its disposal. To the extent companies like Tesla decide to move to states like Texas (which is apparently a strong possibility according to Elon Musk himself) or even Michigan, where non-compete agreements are common and enforceable (so long as they are reasonable and narrowly tailored), that may provide it and other companies who move to those states more legal protections.

So what can other companies do now to make sure they protect their top talent and most valuable trade secrets even during a pandemic?

1. **Ensure that Important Employees Have Signed Non-Competition, Non-Solicitation, and/or Confidential/Non-Disclosure Agreements.** While each state is different in some way, most states enforce reasonable and narrowly tailored non-compete agreements. California and a few other states are exceptions to the rule. Nearly all employees should sign at least confidentiality agreements. If employees are handling sensitive information and/or have access to such information (e.g. customer lists, secret formula, pricing, etc.), it is not unreasonable that they agree to keep that information confidential and not disclose it, even after they resign or leave the company. For higher-level employees and/or employees with more direct access to customers and/or secret information, it may be appropriate for them to sign non-compete and/or non-solicit agreements that better protect the company from undue competitive harm.
2. **Conduct a Trade Secrets Audit.** You should first identify your trade secrets and thereafter determine the best measures to protect them. The Butzel Long Non-Compete & Trade Secret Specialty Team recently wrote that now was the time to run a trade secrets audit.
3. **Remind Departing Employees of Their Contractual Obligations.** Even assuming you have all the appropriate agreements and security measures in place, it is always a good idea to remind the departing employees of their obligations to the company. This can be done in an exit interview and/or in a follow-up letter from the company reminding the employee of their contractual obligations and even providing them a copy of his or her contract. Most employees do not remember what they signed when they first started at a company. They fill out all kinds of forms and documents (including non-competes and/or NDA's). They may well not remember they even have those obligations.
4. **Remind Current Employees of Their Obligations to the Company.** Along with quick tip # 3 above, it is always a good idea to consistently remind employees of their confidentiality obligations to the company. This can be done in group sessions by key management, HR, outside counsel, or a combination of all of them. Among other things, a company should stress the importance of maintaining the confidentiality of certain information, go over the policy (in the handbook and the contractual documents), and address any questions or concerns the employees may have about all of it. At a minimum, this lays a foundation for successful legal action in the future (if necessary),

## CLIENT ALERTS

---

but it also proactively reminds the employees and oftentimes prevents theft of information and/or blissfully ignorant sharing of the information with their new employer.

5. **Get Your Experts Involved!** If your company suspects that a former employee is violating his or her contractual agreements and/or potentially stole sensitive company information, it is imperative that you act FAST. Among other things, the company should contact an attorney who is experienced in this area of the law and possibly an outside IT forensic expert to preserve and analyze key electronic information. A cease and desist letter, or even an immediate lawsuit, may be appropriate. As they say, once the genie is out of the bottle, it is hard to put it back in. If a company sits on its hands and/or fails to detect or address such violations, it will likely diminish the opportunity for relief from a court.

If you have any questions about this alert, the use or enforcement of non-compete agreements, or other measures to protect trade secrets, please contact the author of this client alert or any member of Butzel Long's Non-Compete and Trade Secret Specialty Team.

A special thanks to Butzel Long Summer Associate Mostafa Shanta for his help in putting this client alert together. Mr. Shanta is a rising 2L at Michigan State College of Law and received his Bachelor of Arts degree from Yale University in 2018.

**Bernie Fuhs**

313.225.7044

[fuhs@butzel.com](mailto:fuhs@butzel.com)