Non-Competes in a Multi-State Environment

Insights
7.13.13

Many companies have employees located in states across the country. Drafting restrictive covenants for employees in all of these locations can be a daunting task. To minimize the burden, some employers opt for a one-size-fits-all approach -- that is, every employee across the country signs the exact same agreement. Depending upon the locations of these employees and the interests sought to be protected by the employer, this approach may work out. But just as commonly, it may not. This does not mean that employers need to draft fifty different agreements for use in all fifty states. Here's a quick sketch alternative to the one-size-fits-all approach:

1. Categorize Locations – Although the law governing restrictive covenants varies from state to state, most states can generally be placed into one of three categories:

(a) states where courts are empowered to modify, sever, or blue pencil overbroad agreements -- The vast majority of states fall into this category. For example, if you have employees located in Pennsylvania and Ohio, the law is substantially similar, and to the extent it varies, the courts in each state are empowered to modify contractual provisions they deem to be unenforceable. Consequently, employers might consider using one form of agreement for employees located in the states that fit within this category.

(b) states where overbreadth will be fatal to the entire agreement -– A handful of states fall into this category. In these states, if a non-compete is overly broad in any respect (e.g., if it lasts too long

this category. In these states, if a non-compete is overly broad in any respect (e.g., if it lasts too long or covers too broad of a geographic area), courts will strike the entire agreement even if a simple modification would cure the overbreadth.

(c) states where the law is so unique that nothing but a state-specific covenant will do -– California and Louisiana are the quintessential examples of states that fall within this category. The law in each state is so unique that virtually all covenants an employer may desire require adjustments to meet applicable legal requirements.

2. Categorize Employees and Interests to be Protected – It is well known that restrictive covenants come in all shapes and sizes ranging from non-solicitation agreements to full blown non-competition agreements to confidentiality and non-disclosure agreements. These different types of restrictions protect different types of interests. For example, a customer non-solicitation agreement protects employers from the exploitation of customer goodwill acquired by employees during employment, and it can also protect against the misuse of confidential information. In contrast, a confidentiality and non-disclosure agreement is more narrowly tailored to address the possible misuse of proprietary information. Companies should give some thought to the types of employees that will be signing agreements and the types of interest sought to be protected. If salespeople will be signing the agreements, the company may choose to require both a confidentiality and a non-solicitation agreement. If a non-sales related employee is signing the agreement, the company's interests may possibly be protected by a confidentiality agreement alone. In contrast, senior executives might be expected to sign a non-solicitation, non-compete and a confidentiality agreement.

Juggling the competing concerns raised by differences in state law can be difficult, but it is not impossible. Methodically identifying the types of employees who will sign covenants, the interests sought to be protected, and the jurisdictions within which each employee works will go a long way.

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