Top Ten Things to Consider When Drafting A Non-Compete Agreement

Insights
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Previously, we have written about the Top Ten Things to do When an Employee Resigns to Join a Competitor and the Top Ten Mistakes Made by Departing Employees. Given the favorable feedback, we continue with the following **Top Ten Things to Consider When Drafting a Non-Compete Agreement**.

1. Tailor restrictions to the jurisdiction in which employees work or reside. In some states, an overly broad non-compete clause can be fatal because courts will refuse to enforce the entire agreement even if the non-compete is slightly overbroad. In other states, courts will "blue pencil" overly broad provisions (i.e., simply strike the offending language). Still, other state courts will modify overly broad language to make it enforceable. If you are drafting agreements in a multi-jurisdictional context, generally a handful of versions – a few for "problem" states and others for "typical" states – will account for most variations in the law.

2. Include choice of law & venue provisions. Many employers are tempted to choose the law and venue of the state where they are incorporated or headquartered. If this requires the application of law contrary to the public policy of the state where the employee works or resides, or if it requires an employee to defend an action far from home, these provisions may not be honored. In many instances, tying the choice of law and venue provisions to the state where the employee works or resides is a good choice because it may spread the risk of negative court decisions and minimize the chance that the choice of law or venue provision will be rejected.

3. Tailor the contract to the employee's position. A common refrain among courts is that a non-compete or non-solicitation agreement must be no more burdensome than necessary to protect a legitimate interest of the employer. Legitimate interests commonly recognized by courts include confidential information, goodwill, and/or unique training. Tailoring the duration, scope, and geographic restrictions of the covenant to the particular position and circumstances of the employee (or category of employees) is likely to enhance the enforceability of the agreement.

4. Determine what constitutes sufficient consideration for the covenant. Virtually all states agree that covenants executed prior to the start of employment are supported by consideration (note, however, some states say that an agreement is not supported by consideration if it is executed after the offer is accepted by the employee). Other states hold that if execution of the agreement is followed by a substantial period of continued at-will employment, the employment will suffice as

followed by a substantial period of continued at-will employment, the employment will suffice as consideration. But other states require specific, additional consideration for agreements signed after the start of employment.

5. Determine what type of restrictions most appropriately protect the company. Do you need a non-competition, non-solicitation of customers, non-solicitation of employees, non-disclosure provision, or all four? Identify the legitimate interests that you seek to protect, and choose a restraint suited to protect each interest.

6. Include provisions regarding injunctive relief. Consider including clauses providing for a presumption that any harm done is irreparable and difficult to quantify, and consenting to injunctive relief. Including such a clause rarely makes injunctive relief a certainty, but the absence of such a clause can hurt even more.

7. Consider an attorneys' fee provision. You may be able to increase your leverage with a clause providing that the company will be reimbursed for reasonable attorney's fees and costs in the event litigation is required to enforce the covenants. However, be aware that some jurisdictions may not enforce a one-sided provision that purports to award fees only to the employer. Some jurisdictions may convert such a provision to a "prevailing party" provision, meaning that the "loser" is required to pay the other side's fees.

8. Require return of confidential documents and information. Contracts should require employees to return any information or documents relating to the company upon request or within a short time after their termination. Don't forget to cover copies, derivations of company documents, and information contained on electronic devices, such as cell phones, blackberries and the like.

9. Include an assignability provision. Many states will not enforce a restrictive covenant when the identity of the employer has changed (e.g., by an asset sale) unless an agreement includes a consent to assignability. Where the jurisdiction permits and/or requires such a provision, make clear the company may assign the covenant to an affiliated company or successor in interest without notifying the employee. Defining the "Company" at the beginning of the agreement to include the company, its successors and assigns is also a good idea.

10. Include language extending the term of the covenant in the event of a breach. If the jurisdiction permits such a restriction, make sure your contract states that the period of the covenant is automatically extended for any time during which it was being violated.

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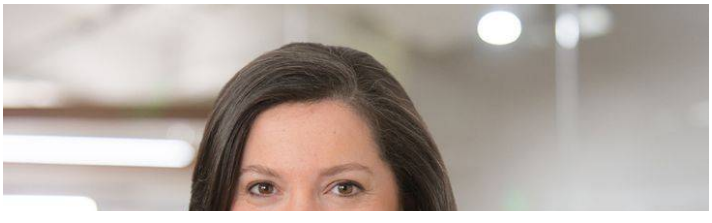

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