Managing Restrictive Covenants for a Multi-National Workforce: A Primer for U.S. In-House Counsel

Insights
10.31.11

Back in July 2011, we wrote in our Noncompete News blog about the challenges posed for in-house attorneys who are tasked with drafting and enforcing restrictive covenants when a company does business in many different states throughout the country. In recent years, however, we are hearing from more and more companies facing an analogous challenge that is even more daunting: managing non-compete and trade secret issues on a multi-national basis. This isn't just a problem for Fortune 500 companies. A recent study by Deloitte Consulting found that 52% of U.S.-based middle market companies surveyed derive some of their revenues from abroad and that 48% already have employees outside the U.S. Looking into the future, Deloitte's survey also found that within three years 65% of middle market companies anticipate they will be operating abroad; 10% expect overseas revenues to outstrip domestic revenues within three years; and nearly 30% report they will have at least a quarter of their employees based abroad. More and more middle market companies are grappling with the need to manage a global workforce, and those that aren't grappling with it yet likely will need to do so in the near future.

As a result, we thought it might interest our readers to offer a series of blog posts on the emerging challenge of managing non-compete and trade secrets issues when operating in a multi-national environment. In general, managing these issues on a multi-national basis requires the same skills

and discipline that allow a company to effectively create and implement a program of protecting competitive assets domestically. Key first steps in drafting any restrictive covenants include:

•Carefully identifying the business risks the company faces when employees jump ship • Cataloguing the types of employees who pose these risks • Considering what types of post-employment protections could be used to minimize the risks • Tailoring contractual restrictions to match the risks as closely as possible, so that the company seeks no more restraint than necessary to protect against specific risks

With this information in hand, a basic template agreement can be created. This template functions as a "default setting" of what the company ideally would like to have in place. The next step is to catalogue the countries in which the company has employees whose functions place them in one of the categories against which the company would like protection. Once that list is in place, the process of determining what protections are possible in the various locations can commence. In-house attorneys undertaking this process will find that many of the legal structures internationally are not all that different from what we already manage every day in the 50+ jurisdictions within the United States. Just as there are dramatic differences betweenCalifornia, Delaware and Louisiana, so too are there important differences in the restrictive covenant laws in India, Mexico and China.

With this in mind, we offer our series of blog posts offering a primer for in-house counsel on the non-compete and trade secrets law in key nations around the world in which U.S. companies increasingly find themselves (or expect to soon find themselves) employing people and facing the attendant risks of employee departures.

Tune in soon. We'll start first with Mexico. . . .

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