

Confidentiality, Non-Compete & Non-Solicitation

While a cornerstone of employment law is employment-at-will, a doctrine which holds that the employment relationship itself is not a contract and therefore can be terminated at any time by either the employee or the employer, many companies add contract language to protect themselves both during and following an employee's tenure.

Confidentiality (or non-disclosure), non-compete and non-solicitation agreements are great tools to help protect an employer's interests. But it is important to remember that they are also "contracts" that are subject to enforcement by the courts, and therefore must be carefully crafted to ensure they cannot be seen as violating federal laws that protect the rights of employees.

Let's begin with confidentiality agreements. Courts recognize a legitimate business need to protect trade secrets such as client lists, marketing and pricing strategies, information systems and other such things. Indeed, these are the types of concerns confidentiality agreements should address – but they should do so with as much specificity as possible. Overly broad language could be considered a violation of the National Labor Relations Act, which protects employees' rights to discuss the terms and conditions of their employment, including their salary, benefits, policies and incidents in the workplace. The government also keeps a sharp eye on such agreements to ensure employees' rights aren't stifled when it comes to discussing internal investigations, filing protected complaints and exercising whistleblower rights.

The purpose of a non-compete agreement is to prevent a departing employee from going to work for a competitor or otherwise competing against the company for clients or business. The courts vary across states in whether they will enforce these agreements and to what extent. In California, for example, non-compete agreements are almost entirely illegal. But even where largely permitted, the overall feeling is that anything that interferes with an employee's right to be gainfully employed in his or her own profession is troublesome and will be met with exacting scrutiny.

Accordingly, non-compete agreements should be narrow in scope and carefully written to identify the specific business interests the organization is trying to protect, limiting the geographical range where the agreement applies and how long the agreement is in effect. Even the timing of introducing a non-compete agreement is critical, as the courts have held that employees should receive "consideration" or some monetary or financial benefit in exchange for signing the agreement and giving up rights they would otherwise have. While courts might find that being given a job at a particular compensation range amounts to due consideration, they often do not see it that way when a company insists that a current employee sign a non-compete without some additional consideration other than just "keeping one's job."

The purpose of a non-solicitation agreement is to ensure the departing employee does not solicit work from existing clients (regardless of whether that work is in competition with the current employer), take other employees with him or her, or engage in other practices that an employer feels significantly threatens its business in the form of unfair competition or loss of skills and talent. Like confidentiality agreements, non-solicitation agreements tend to receive less scrutiny from courts because they generally do not restrict a departing employee's ability to enjoy gainful employment in his or her field of work, but are focused primarily on protecting employers from suffering a loss of valuable business relationships and/or personnel.

So how should an employer approach these types of agreements? The answer to that question lies in the reasonableness of the restrictions placed on the employee.

For example, while employers often don't want any internal information being shared with non-employees, a court will look at whether information deemed confidential is truly so and actually protects a legitimate business interest. Information that is proprietary, that the employer can demonstrate actively works to keep secret or that provides the organization with a competitive advantage, is more likely to receive protection. Conversely, broad provisions that don't identify or reasonably relate to a bona fide business interest face an uphill battle in enforcement.

For example, courts will often decline to uphold a blanket prohibition against working for a competitor in any capacity without regard for the employee's role within the organization or his or her potential role at a competitor, and that simply going to work for a competitor does not by itself necessarily create an unfair competitive situation for a previous employer. There is, however, no magic formula for what is reasonable – industry, location, geographic reach, the specific position, and the prohibited activities an employee is precluded from all factor into what is appropriate for a given situation.

Clearly, there is a delicate balance between the rights of an organization to protect its legitimate interests and the rights of employees to have employment in their field after they leave the organization. Moreover, the burden of proof in demonstrating the necessity and reasonableness of these employment agreements typically rests with the employer. Therefore, organizations that wish to implement such provisions should seek guidance from an attorney who can help identify what types of information the organization might have that warrants legal protection as well as what restrictions have been imposed by the courts of the state in which the employee works. Even a minor provision, if deemed unenforceable by a court, can nullify the entire agreement, so it is critical to ensure the soundness of any agreement long before the need to enforce it arises.

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