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Protect business with covenants not to compete

COVENANTS NOT to compete are designed to prevent, for a fixed period of time, your former employee from either contacting your customers or competing with you.

Enforcement of such covenants recognizes that your employee received something of value while in your employ, which he or she could then use against you to obtain an unfair competitive advantage on behalf of a competitor. A well-constructed noncompete can usually prevent the loss of business that often occurs when unrestricted employees go over to a competitor.

Such covenants, although carefully scrutinized by the courts, are frequently enforced in a wide variety of business settings. The overarching principle applied in enforcement actions is the balance between the employer's legitimate need for protection and the employee's legitimate need to earn a livelihood. This article provides some general practice pointers to employers for implementing and enforcing covenants not to compete.

One year's enough

Covenants not to compete can restrict an employee's solicitation of customers and/or restrict an employee from competing in a particular geographic area. The covenant must be for a fixed duration after which the employee is freed of all restrictions.

[tips]

1. It may be tempting to selectively enforce noncompete covenants against some employees but not others.
2. However, selective enforcement can be used as a defense by a former employee.
3. Uniform and vigorous enforcement of noncompete agreements sends a message to existing employees that such agreements will be enforced if violated.
4. That in turn deters future violations.

If your business depends on customer relationships, a restriction on contacting and soliciting customers will be important. On the other hand, if your business depends on pricing, specialized training or knowledge, or reputation, a geographic restriction may provide better protection.

A general rule of thumb is that a one-year noncompete provides adequate protection. The type of restriction and the duration of the noncompete will depend on your particular business.

It is advisable to retain an attorney experienced in this area to assist in drafting the covenant. Since courts require that covenants impose the narrowest restrictions on the employee necessary to protect the employer's legitimate business interests, be realistic about what interests really need protection.

Employers have much more credibility with the court if the covenant reflects obvious care in drafting restrictions that do not overreach.

Presentation matters

The employee must be advised of and have an opportunity to review the covenant not to compete prior to accepting an offer of employment and he or she must sign it prior to commencing employment.

To avoid a later dispute, have employees sign and date a separate document that acknowledges that they have read and understand the covenant, that they have had the opportunity to consult with an attorney before signing the agreement, that they were presented with the agreement prior to accepting employment and that they signed it prior to commencing employment.

If an employee signs a covenant not to compete after beginning employment, he or she must receive some payment for that beyond normal promotions and salary increases. The payment should be commensurate with the employee's position

and level of compensation. The covenant should expressly state that the payment is made as consideration for the signing of the noncompete.

All similarly situated employees should sign the noncompete agreement. If the language of your noncompete agreement has evolved over time, the older versions should be updated. Otherwise, a former employee may argue that he or she should be subject to the version containing the least restrictive covenant.

Saying goodbye

Before an employee separates from employment, conduct an exit interview in which the employee is reminded that he or she is subject to a covenant not to compete and that you will seek court enforcement of the covenant if it is violated. If the employee is to receive a discretionary severance payment, include in the separation agreement language by which the employee confirms the validity and enforceability of the covenant not to compete.

If the employee joins a competitor or forms a competing business, send letters to the employee and the new employer that reference the noncompete and your intention to enforce its provisions.

If litigation is necessary, your attorney will immediately seek an injunction which, if granted, would impose restrictions on your former employee until trial.

Courts have broad discretion to "blue pencil" an overbroad covenant; the court can effectively rewrite the covenant in order to narrow the restrictions imposed. An injunction may restrict the former employee from contacting some or all of your customers, from engaging in certain activities on behalf of a competitor, or from working for a competitor at all.

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>
> — **Chris Penwell,** Siegel Brill Greupner Duffy & Foster

The relief granted depends on the specific facts of each case. The employer must post a bond in an amount that the court determines is sufficient to protect the employee in the event the court later determines the covenant is not enforceable. Money damages are not determined until trial.

It may be tempting to selectively enforce noncompete covenants against some employees but not others; however, selective enforcement can be used as a defense by a former employee.

In truth, uniform and vigorous enforcement of noncompete agreements sends a message to existing employees that such agreements will be enforced if violated, thereby deterring future violations.

Covenants not to compete are a cost-effective way to prevent your employee and your competitors from taking unfair advantage of the time and money you have invested in the employee; from gaining access to valuable information you have shared with the employee; and from capitalizing on strong relationships developed by the employee with your customers at your expense.

When drafted and implemented correctly, noncompete agreements provide a substantial deterrent to your employees leaving and going into competition with you, and if they do, it provides a mechanism for immediate injunctive relief.

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