Understanding the Enforceability of Non-Competes in All 50 States

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What we’ll be talking about today …

• The Basics of Restrictive Covenant Law in ALL 50 States
  – Whether a non-compete is generally enforceable in a particular state.
  – Industry specific restrictions
  – Notification requirements
  – At-will employment as “consideration”
    – At time of hire
    – Continued at-will employment if executed during employment
  – Whether a court will modify an overbroad agreement and, if so, how it will do so

• Best practices
CURRENT OR FORMER EMPLOYER
STRATEGIES AND
CONSIDERATIONS
Common Litigation Issues

• Restrictive covenants are typically governed by state law, which varies in many different respects

• General Enforceability Issues: To be enforced, a restrictive covenant must:
  - be allowed in the State
  - not involved a prohibited industry
  - satisfy notice requirements (if any)
  - be supported by consideration;
  - protect a legitimate business interest; and
  - be reasonable in scope, duration and geography.
In What States Are Non-Competes Prohibited

- California
- North Dakota
- Oklahoma
Non-Competes Are Prohibited/Limited In Certain Industries

• Medical
  − Doctors (Alabama, Arizona,* Arkansas, Colorado, Connecticut,* Delaware, Massachusetts, New Hampshire, Rhode Island, South Dakota, Tennessee,* Texas*)
  − Veterinarians (Alabama)
  − Physical Therapists (Alabama)
  − Licensed medical professionals
    − Psychologists, Nurses (Arkansas, Massachusetts, New Jersey*)
    − Social Workers (Massachusetts)
    − Health Care Professionals (New Mexico)

• Broadcast
Non-Competes Are Prohibited/Limited In Certain Industries (cont’d)

• Security Guards
  – Connecticut

• Mediators
  – Florida

• Lawyers

• Technology Business
  – Hawaii

• Non-Key Employees
  – Idaho

• Car Salesman
  – Louisiana

• Secretaries/Clerical
  – Missouri

• Barbers & Cosmetology Students
  – Vermont
NOTICE – Can A Company Roll Out Non-Competes Whenever It Wants?

• Cannot **sign** before beginning employment (Alabama)

• Must provide before commencing employment
  - New Hampshire
  - Oregon – two weeks advance written notice
Consideration

• Restrictive covenants are contracts, require consideration

• What consideration is sufficient?
  – Money (✓)
  – Grant of stock (✓)
  – Offer of employment (('?')
  – Providing confidential information or specialized training (('?')
  – Continued employment (('?')
  – One vacation day (('?'))
At-Will Employment As Consideration For Non-Competes

Two Scenarios

• At Time of Hire
  – NOT Enough
    – Illinois,* Texas

• During Employment -- Continued At-Will Employment
  – NOT Enough

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What Is At Risk? “Legitimate Interests”

- Restrictive covenants are not self executing
- Breach of contract does not trigger right to injunction
- Must protect a “legitimate interest”
  - Confidential information
  - Trade secrets
  - Good will
  - Specialized training
  - Workforce Stability*
When is a Restrictive Covenant Reasonable?

• What is reasonable?
  – Fact-specific inquiry
  – Restriction must relate back to legitimate business interest
  – Unnecessary restrictions are “overbroad”
  – Duration: Can be defined by industry standards, or by statute
  – Geography: Can be worldwide

• Be aware of your own agreements
  – “What’s good for the goose is good for the gander.”
Blue Pencil Rule

• What happens if a restriction is overbroad?
  - “Blue Pencil” Rule – courts which follow rule will enforce overbroad restrictions by paring down overbroad language ... sometimes
    - Reformation
    - Strict Blue Pencil Rule
    - No Blue Pencil Rule
  - “… for a period of twenty-four (24) months, or if that period is deemed to be overbroad, for a period of eighteen (18) months, or if that period is deemed to be overbroad, for a period of twelve (12) months...
Will a Court “Blue Pencil” Your Non-Compete?

• Where are you?
  – Blue pencil state
  – Strict blue pencil state (AZ, CT, DC, IN, LA, MD, MT, NC, NM, UT, VT)
  – No blue pencil state (SC, VA, WI)
  – Non-compete void (CA, ND, OK)
  – Other (e.g., quirky statute or case law – AL, CO, FL, GA, IL, OR, TX, WI)

“One size does not fit all.”
Is the Departing Employee “Clean” or “Dirty”?

- Pre-termination conduct that was suspicious, inappropriate or illegal?
  - Take confidential information on the way out the door
  - Solicit other employees to join him/her at new employer
  - Identify new employees for hire
  - Contact customers
Is the Departing Employee “Clean” or “Dirty”? (cont’d)

- Forensics
  - Email activity
  - Flashdrive(s) accessing computer
  - Network/database access
  - Phone logs
  - Copier usage
Investigation/Discovery (cont’d)

• Recruiting Process
  – Individual basis or groups/teams together?
  – Was a headhunter/recruiter used?
  – Where did recruiting occur?
  – Any discussion of confidential information or trade secrets during recruiting/hiring process?
  – Any discussion of co-workers or others who may be targets for employment?
Is Your Trade Secret At Risk? Beware The Litigation Catch-22

• Can you satisfy a court that a trade secret is at risk of being lost without further exposing the trade secret to the public?
What was the Employer’s Motivation for the Hire(s)?

Hurt competitor

vs.

Help own company
Bad Motivation – Hurting The Competitor

• Raiding Claims
  – Elements:
    – Using “improper, dishonest or unfair means” during hiring process; or
    – Acting solely for the purpose of injuring the other company:
      – Intent to harm found based on number of employees hired
      – Paying far above market rates
      – Stole information when leaving
      – Did new employer’s knowledge of employees’ salary or benefits play any part in decision-making process
      – Threaten to hire other employees to damage other company
Where Do You Commence Litigation?

• Is there a choice of venue clause?
  – Will that be honored?

• Is there a choice of law clause?
  – Will that be honored?

• State Court vs. Federal Court?

• Arbitration
Where Do You Commence Litigation? (cont’d)

• Multijurisdictional Litigation
  – Where do you start?
  – What you say in one jurisdiction will bind you in another
  – Broad TRO’s

• U.S. Supreme Court’s Atlantic Marine opinion
“Boomerang” Issues

• Bilateral Attorneys fees clauses
• D & O Insurance
• Trade Secret Fee Shifting Provisions
• Affidavits
NEW EMPLOYER STRATEGIES AND CONSIDERATIONS
Good Motivation – Fair Competition → Clean Hands

• BEST PRACTICES – documents used for each and every hire:
  1. Interview Ground Rules
  2. Offer Letter
  3. On-Boarding Checklist
The “Clean Hands” Process: Laying the Groundwork for Hiring Communications

- Recruit on a one-on-one basis
- Never recruit at candidate’s place of business
- Focus on the positive strengths of your company
- Avoid negative remarks concerning candidate’s current or former employer
- Focus on candidate’s general knowledge, skills, and experience.
- Candidate cannot do anything on behalf of new company
- Candidate cannot be involved in the recruitment process
Investigation/Discovery

• Information to Gather Concerning Post-Employment Restrictions
  – Does employee have an agreement(s) with former employer?
  – Position/function – is the employee being hired for the same role s/he had with prior employer?
  – Agreement(s)
    – Applicable state law (choice-of-law provision)
    – Scope of restricted activities
    – Arbitration provision
    – Liquidated damages
    – Attorneys’ fees
  – What common law duties may apply?
Is the “Confidential Information” Really Confidential?

• Does candidate have a prior relationship with customer – free to take with him?

• Information generally available to the public (published on website, internet, social media or trade journal)
Is It Really a Trade Secret?

“Any formulation, pattern, device or compilation of information which is used in one’s business, and which gives him an opportunity to obtain an advantage over competitors who do not know or use it.” Restatement of Torts (Second) 757

Factors:

1. Extent known inside v. outside the business
2. Measures taken to guard secrecy
3. Value to the business and competitors
4. Effort or money expended in development
5. Ease of duplication
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