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THE DEVIL IS IN THE DETAILS: THE IMPORTANCE OF SOUND NON-COMPETE AND CONFIDENTIALITY AGREEMENTS

Posted by Autumn Gentry | Nov 13, 2017

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Though it may mean a few frantic days and maybe more than one sleepless night, most companies can manage the loss of a key employee relatively well. However, the thought of a key employee going to work for a competitor and calling on the employee's old contacts to divert business away from the company would have most companies seeing red and staying awake at night.

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Fortunately, most business owners are savvy enough to have their key employees sign non-compete and confidentiality agreements. Unfortunately these agreements are sometimes unenforceable. Thus, it is critically important to have a well drafted, narrowly tailored agreement.

When it comes to enforceability, the question becomes whether the non-compete or confidentiality agreements are sufficient to withstand court scrutiny? The issues outlined below are the ones courts most often look at to determine whether such an agreement is enforceable or not.

Is the restriction reasonable?

Many companies have the tendency to be heavy-handed in structuring their non-compete provisions; however, it is important to be reasonable. In the non-compete context, reasonableness takes two forms: (1) temporal reasonableness; and (2) geographic reasonableness. Excessive restrictions in a non-compete make it more likely that a judge will not enforce it. For example, attempting to bind someone for more than one or two years after the employee leaves the company may not be enforceable. While a company may reasonably demand a longer duration for higher level employees, like CEOs, or in the context of merger/asset sale, where three to five years is not unheard of, depending upon the facts and the jurisdiction, the standard is two years, and in some jurisdictions, one year. Courts are also likely to find a non-compete unreasonable in cases where a company seeks to restrict the distance in which a former employee can conduct business that extends beyond the geographic area where the company actually conducts business or, more specifically, the employee conducted business on behalf of the

company. Therefore, a regional business should not try to extend a non-compete to the entire country.

While some courts may *modify* an unreasonable term or terms of a non-compete agreement (these are called blue-pencil states), they do not have to and courts do have the option of simply *invalidating the entire* agreement if it finds credible evidence that the employer deliberately included overly broad language that renders an agreement unreasonable and oppressive.

Is the restriction industry, business, and employee-specific?

To enforce a non-compete, a company must show the existence of special facts over and above ordinary competition, so the agreement should be specific to the company's business, industry, and employee.

A company cannot simply restrain ordinary competition. A former employee may be difficult to lose and may provide unwanted competition by simply being intelligent, personable, and hard-working in his new job. That type of employee is valuable but is not going to be easily restrained by a non-compete. To be subject to an enforceable non-compete, that employee must have special facts that give him an unfair advantage in competing with you.

These special facts include:

- The company provided specialized training to the employee, If the company imparted to the former employee a unique knowledge or skill through specialized training, then the company has a good chance of enforcing a non-compete that prevents

that employee from leveraging this training against the company in a new job. Keep in mind that this specialized training may not be an actual training course; it could be obtained on-the-job. Records of all training provided to the employee or that were paid for by the company during the employee's tenure of employee go a long way in helping prove this issue in court.

- The employee was given access to trade or business secrets or other confidential information. A company has a legitimate business interest in keeping former employees from using its trade or business secrets or other confidential information in competition against it — and this is why employees should sign a confidentiality agreement, as well as a non-compete.
- The employee has become the face of the company to customers. Very often, key employees think the company's customers are actually their customers because they serve as the customers' main contact. This is especially true with sales employees; however, they are customers only because the company offers a service or product the customers are buying.

Is the issue set to be litigated in an employer-friendly jurisdiction?

Laws regarding the enforceability of non-compete agreements and confidentiality agreements vary by state. Not surprisingly, some states are more favorable to companies than others. As such, non-compete and confidentiality agreements should explicitly state the law under which any breach of those agreements will be adjudicated, and the venue in which all legal action arising from the agreement will be heard.

This may seem like a minor point – until a company finds itself in a New Orleans courtroom attempting to enforce your non-compete agreement under the Louisiana code of law (not that I'm speaking for personal experience or anything).

As with most contractual matters, the devil is often the details, like neglecting to narrow the agreement to the company's specific circumstances or failing to specify law and venue provisions. In these types of cases, it is that specific lack of attention to those details can cause the most pain. These are all the more reason to carefully draft and scrutinize non-compete and confidentiality agreements, and have an attorney look over them carefully with jurisdictional consideration in mind.

Businesses simply work too hard to see assets depleted, reputational harm, trade secrets exposed, etc. by weak non-compete and confidentiality agreements. A strong, carefully tailored agreement can give you confidence to safeguard your protectable business interests.

About the Author:

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