

Effective restrictive covenants are harder than ever to draft

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Are you considering asking employees to sign a confidentiality or nonsolicitation agreement? If so, have you carefully considered just what you're trying to protect? Before creating an agreement with postemployment restrictions, you must understand what you're seeking to cover and keep that legitimate interest in mind as you prepare the agreement. Trying to include more than what is legitimate and protectable may not survive legal challenges in an area that's proving to be increasingly difficult for businesses to enforce.

Why do you need restrictive covenants?

Restrictive covenants are needed to protect a company from a former employee taking the training he received, the customer base he fostered at your expense, or confidential information he learned and providing it to a competitor. They prevent a competitor from "purchasing" business by offering an employee an "over-market salary" to bring your business with him.

Unfortunately, courts don't like restraints on trade. Therefore, you must carefully draft the restrictive agreements.

Noncompete agreements

Noncompete agreements prohibit an employee from working in a competitive business for a set period of time and within a specific geographic area after separation from employment. Use noncompetes sparingly because courts frown on them as a restraint on trade.

Limiting noncompetes to employees who present a genuine competitive threat demonstrates the

importance and reasonableness of any restrictions and enhances the likelihood the agreements will be enforced. Moreover, they will be enforceable only to the extent the restrictions are no greater than necessary to protect your company's legitimate business interests and don't impose an undue hardship on the employee.

Antipiracy agreements

Antipiracy (also known as nonsolicitation) agreements are less restrictive. They permit a former employee to work in a competitive business but restrict him from interfering with customer relationships. You must ensure the restrictions are no broader than necessary to protect your legitimate business interests. Generally, the agreement must take into consideration the relationship the employee had with the customer.

The restriction cannot encompass all company customers regardless of the relationship the employee had with them. It also must be limited in time to what is no longer than necessary for the employer to put a new employee on the job and give the individual a reasonable opportunity to demonstrate his effectiveness. You should consider whether accounts will be reassigned to current employees or whether a new employee will need to be hired and trained. The approach you take may assist in selecting an appropriate duration.

Additionally, some nonsolicitation agreements prohibit departing workers from soliciting employees from their former employer. Again, the restrictions must be reasonably tailored in duration and scope to protect your company. If the restrictions are broader than necessary (e.g., they bar solicitation of employees regardless of their knowledge or the extent of their relationship), they're likely unenforceable.

Confidentiality agreements

Confidentiality or nondisclosure agreements prohibit an individual from using or disclosing a company's proprietary information both during and after the employment relationship has ended. They can protect only truly confidential information that isn't generally known to the public. Information available through public means but pieced together at significant time and expense by an employer isn't considered confidential.

Avoid trying to restrict an employee from using skill and general know-how acquired during employment. Those kinds of restrictions are overly broad and not enforceable.

Trade secrets

Although trade secrets receive added protection under the Arizona Uniform Trade Secret Act, they should be identified in confidentiality and nondisclosure agreements. You should limit access to trade secrets to only those employees who actually need it. Otherwise, the information should be password-protected, and access to it should be monitored.

The more protection given to trade secrets, the more likely a court may treat the information as a trade secret and the less likely an employee will be able to retain access after a separation from employment.

Bottom line

Restrictive covenants, such as noncompete or nonsolicitation provisions, should be considered only for key employees. Confidentiality agreements, on the other hand, should be used with all employees.

Keep in mind restrictive covenants are only as good as your willingness to enforce them. Employees are more likely to take the agreements seriously when you make it clear you'll seek enforcement as a result of any breach. Narrowly tailored agreements also may be regarded more highly as they don't aim to overly restrict departing employees.

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