



Non-Competition Agreements **Are They Enforceable?**

When hiring a new employee, employers frequently require the new employee to sign an agreement restricting the employee's ability to take certain actions after leaving their employment. The basic purpose of these restrictive covenants is to prohibit the employee from soliciting the employer's employees or using the employer's confidential and proprietary information, and to restrict the employee's ability to compete with the employer for a period of time after the employee resigns or is terminated. While employers may feel justified in asking new employees to sign these agreements, they must be mindful that the burden of enforcing these agreements is on the employer and if litigation is required to do so, they must prove to the court that their "legitimate business interests" need to be protected.

In New York, courts may enforce a restrictive covenant if the restriction is reasonable. Although courts determine reasonableness on a case-by-case basis, restrictive covenants can be reasonable only if they: (a) are no greater than required to protect an employer's legitimate business interests, (b) do not impose undue hardship on the employee, (c) do not cause injury to the public and (d) are reasonable in duration and geographic scope (which will vary depending upon the particular company and industry). Legitimate business interests are generally limited to the protection against misappropriation of an employer's trade secrets or of confidential customer information, or protection from competition by a former employee whose services are unique or extraordinary.

Since restricting a person's ability to work is frowned upon, the courts will heavily scrutinize agreements containing restrictive covenants. Therefore, employers should take the time to consult with counsel regarding their agreements that contain restrictive covenants. Consideration should be given to the following:

- Does the agreement accurately reflect the needs of the business without being overbroad?
- Should restrictive covenants be required of all employees or only higher-level employees who have access to genuine trade secrets or who can potentially harm the company through unfair competition?

- Does the agreement restrict competition with all customers or only customers with whom the employee had direct contact during his/her employment?
- Does the agreement give the employer the right to seek injunctive relief if an employee violates the agreement?
- To strengthen the likelihood of enforceability, should the employer pay severance or other compensation to the employee whose competition could have a significant impact on the employer's business?

Restrictive covenant agreements should not be taken lightly. There will always be employees that will leave the employer and be hired by another company. While former employees may be able to work in their new jobs without violating their agreement, they may breach those provisions in the hope that such breaches will not be discovered, or they may overtly breach the agreement and challenge the former employer to actually do something about it. Unless there are payments due under the agreement that can be terminated as a result of the breach, the employer's only true recourse is to pursue litigation, which is an expensive and uncertain proposition. But an employer may have no choice but to pursue the ex-employee who is now in breach and to send a message to other current employees that their agreements also will be enforced. With this in mind, employers should consider whether they are willing to enforce such provisions should a breach occur.

Finally, employers should also keep in mind that employees they may be thinking of hiring may themselves be bound by restrictive covenants that they agreed to with their previous employer. Potential employees should be specifically asked if they are bound by restrictive covenants and employers must take this into account during the hiring process to understand how their businesses can be impacted if they hire people who are subject to restrictions.

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