Breakfast Bites®-

RESTRICTING EMPLOYEES FROM **COMPETITION AND SOLICITATION:** CONSIDERATIONS FOR COMPLYING WITH AND SEEKING TO ENFORCE RESTRICTIVE PROVISIONS IN AGREEMENTS

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Overview

 Understand how to craft restrictive covenants in employment agreements to protect vital business interests.

 Learn about alternatives to non-competition provisions – and when to use them.

 Establishing claims and defenses related to breach of a restrictive covenant.

UNDERSTAND HOW TO CRAFT RESTRICTIVE **COVENANTS IN EMPLOYMENT AGREEMENTS** TO PROTECT VITAL BUSINESS INTERESTS

NON-COMPETITION AGREEMENTS EMPLOYMENT AGREEMENT to between the Employing Company and the Employee: RESTRICTING EMPLOYEES FROM COMPETITION AND SOLICITATION: CONSIDERATIONS FOR Greakfast Bites MH |4| COMPLYING WITH AND SEEKING TO ENFORCE RESTRICTIVE PROVISIONS IN AGREEMENTS

An agreement or clause in a contract specifying that an employee must not enter into competition with an employer after the employment period is over

A carefully crafted non-compete can prevent employees from being able to "sell" information for a new job at a competitor

Note: rules vary by jurisdiction



Step 1: Is the covenant tied to a specific business interest?

Step 2: Is the covenant reasonably limited with regard to:

- Scope
- Geography
- Time

While protecting your vital business interests is permissible, you can't prevent someone from working in their chosen profession

Protectable business interests:

- Trade secrets, know-how, proprietary processes
- Client/customer relationships, supplier/vendor relationships
- Confidential information like business strategies or financial reports
- Investment in training employees
- Other reasonable interests...

Limited as to scope of employment

- Define "competition"
- List competitors
- List "hands-off" customers or all customers
- Vendors and Suppliers
- Other special relationships



Reasonable geographic restriction

- Radius area around office/factory/facility?
- Market area?
- Jurisdiction?
- National?
- Global?



Reasonable time limit:

1-3 years is generally enforceable on a sliding scale with other limitations

 Include a provision that extends the restricted period during time which employee is in breach



What is "<u>reasonable</u>" in each instance will vary based on the individual circumstances of your business, market, and industry

Be narrow where you can so you can be broader where you want to be



WHAT IF YOU OVERREACH?

Blue Pencil States:

The Court is empowered to "blue-pencil" the restrictions, meaning that the Court will re-write the terms to fall within "reasonable restrictions."

"Reformation States" permit the Court to rewrite the entire agreement to capture the intent of the parties.

WHAT IF YOU OVERREACH?

Red Pencil States:

An over-broad non-compete is unenforceable in its totality. It is stricken from the agreement, or the agreement, itself, is void



ENGAGE COUNSEL!!

If you want a binding and effective non-compete Agreement, you must have a frank, honest, and open discussion with your lawyer to determine how best to individually craft a non-compete to your specific business.

DO NOT USE ONLINE FORMS



NON-COMPETE VS NO-POACHING AGREEMENTS

A non-compete agreement must be between the employee and employer

An agreement between competitors to not "poach" employees is often a violation of anti-trust laws

In 2015, Google and Apple paid \$415 Million in a settlement over their use of no-poaching agreements



LEARN ABOUT ALTERNATIVES TO **NON-COMPETITION PROVISIONS – AND** WHEN TO USE THEM

WHY <u>NOT</u> USE A NON-COMPETITION AGREEMENT

- You Can't. You are in a state that does not allow noncompete agreements (or your employee is)
- Use it or Lose it. You are not prepared to incur the cost to enforce your non-compete agreements in court
- Misuse it and Lose it. Overuse of non-compete agreements is drawing increasing legislative scrutiny

NON-COMPETE AGREEMENTS ARE UNENFORCEABLE (OR OTHERWISE RESTRICTED)

District of Columbia (D.C. Code §23-209)

California (Cal. Business & Professions Code §§16600-16602.5),

Oklahoma (OK Stat. §15-219A),

North Dakota (N.D. Cent. Code §9-08-06)

Virginia (Va. Code §40.1-28.7:8) (employees who earn less than the average wage)

Washington (RCW §§49.62.005-900) (employees who earn less than \$100,000)

Maine (Me. Rev. Stat. Ti. 26, c. 7, §599-A),

New Hampshire (RSA §§275:70, 275:70-a),

Rhode Island (R.I. Gen. Laws §§28-59-1-3),

Maryland (Md. Code, Lab. & Empl. §3-716)



REMOTE OR HYBRID EMPLOYEES

What law applies?

Medtronic, Inc. v. Walland, 2021 U.S. Dist. LEXIS 172235 (S.D.N.Y. Sep. 10, 2021) held that a California resident-employee's non-compete is unenforceable under California law, even though the company specifically put in the employment agreement that New York law applies

See also: Massachusetts' non-compete statute looks at the location where the employee lived and worked in the last 30 days of employment, regardless of what the contract says.

USE IT OR LOSE IT—TWO DEFENSES

 The former employer has waived its right to enforce the non-compete

Former employer cannot establish that it is trying to protect legitimate business interest

If you are not prepared to enforce for your non-compete agreements, it might be worth considering an alternative

MISUSE IT AND LOSE IT

- In a 2019 national survey, 49.4% of employers reported that at least some employees were subject to a non-compete agreement. 31.8% reported that *all* employees were subject to a non-compete agreement
- Sandwich maker <u>Jimmy John's</u> has been repeatedly sued over its non-compete agreements with its retail employees and, as a result, has voluntarily agreed to abandon the practice altogether
- The growing legislative trend is to limit or outright ban non-compete agreements

CONSIDER ALTERNATIVES

Garden Leave

Severance Forfeiture/Clawback-for-Competition

Fee-Splitting Agreements

Non-Solicitation Agreements and Confidentiality/NDAs



ESTABLISHING CLAIMS AND DEFENSES RELATED TO BREACH OF A RESTRICTIVE COVENANT

WHAT TO DO IF YOU SUSPECT A BREACH

- ENGAGE LEGAL COUNSEL ASAP!
- Hopefully, your documents and agreements are in order (see above)
- Protect your important relationships
- Did the former employee actually violate the noncompete?
- Look for evidence on your systems; emails, activity logs, etc.
- Demand letter to the new employer and former employee



WHAT TO DO IF YOU SUSPECT A BREACH (CONT'D)

- Protect your important relationships
 - Notify vendors and customers who interfaced with the former employee, and introduce the replacement
 - Monitor relationships in which the former employee was involved



EMPLOYER CLAIMS

- Possible claims against employee:
 - Breach of agreement
 - Violation of fiduciary duties as an employee
 - Violation of confidentiality obligations (under contract and common law)

- Possible claims against new employer:
 - Unlawful interference with business or contractual expectations



EMPLOYEE CLAIMS

- Possible claims against former employer:
 - Non-compete agreement unlawfully overbroad (e.g., no legitimate business interest protected; too broad geographically; too long in duration)
 - Violation of agreement to pay severance during the restrictive period, if there is such an agreement.
- Possible claims against new employer:
 - If disclosed agreement and requested indemnification from the new employer in the event of dispute, possible request for enforcement of indemnification.

Reality is that typically an employee and new employer may present a joint defense, either through joint counsel or separate counsel.



NEW EMPLOYER'S STRATEGY AND DEFENSES

If your employee has breached an agreement with a prior employer:

- ENGAGE LEGAL COUNSEL ASAP! There is a real risk of liability!
- Require disclosure of restrictive covenants as part of your hiring process
- Don't make things worse by creating additional claims
- Conduct an honest assessment of how important the new employee is to your business and how likely the old employer is to fight



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QUESTIONS



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THANK YOU



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