

Restrictive covenants help firms protect their interests

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SYRACUSE — Most businesses would say their greatest assets are their employees, and many companies invest a substantial amount of money in training their work force.

As a result, companies are sharing confidential information, such as business strategies and customer lists, in order to help their employees effectively do their jobs.

But when an employee decides to leave a given company to work for another firm, some businesses will have the departing employee sign, what is called, a restrictive covenant. It's a written agreement outlining a number of restrictions on what an employee can and cannot do when leaving an employer.

The document typically includes a confidentiality provision that would restrict the employee from disclosing trade secrets or other confidential information. The agreement could include a provision prohibiting the employee from recruiting his or her co-workers to join the new company.

The use of restrictive covenants has increased more than any other client issue in the last five years, says Christian Jones, a labor and employment-law attorney and partner with Mackenzie Hughes LLP, a Syracuse-based law firm.

"I've seen an increase in the use of

restrictive covenants, in client questions and concerns regarding restrictive covenants, and in litigated cases regarding restrictive covenants," says Jones.

He attributes the increase to more employers utilizing the documents, and to employees changing jobs more often.

Besides restrictions on disclosing trade secrets and recruiting former co-workers, such agreements also include a "non-compete" clause, which would prevent the employee from working for a competitor. The document could also include a provision restricting an employee from contacting or conducting business with the employer's established customers or clients.

Protecting interests

Through a written agreement, employers want to protect a variety of interests, such as confidential information or trade secrets.

"Those types of provisions are usually going to be enforced, assuming that the information sought to be protected truly is confidential or a trade secret," Jones says.

Courts are also usually willing to enforce provisions that restrict an employ-



Jones

ee's ability to solicit former co-workers to join them at the new company, as long as the restriction is of a reasonable length, usually about a year, according to Jones.

"What an employer is seeking to do is to not permit you to raid its work force," says Jones, noting it doesn't matter if the solicitation calls are made to former co-workers at the work site or away from it.

Jones also notes the courts usually frown on a "non-compete" provision in a restrictive covenant.

"As a general rule, courts are not in favor of provisions that are going to restrict the ability of an individual to earn a living," Jones says.

One of the reasons behind the judicial hesitancy is that the U.S. economy is a free-market system and competition is encouraged, says Jones. However, the courts will enforce certain areas of a restrictive covenant.

The provision that is among the most difficult to enforce, according to Jones, involves preventing a valuable employee, such as a television or radio personality or a high-level executive, from working for a competitor.

The courts are more willing to enforce such a provision where the employer faces a greater potential harm if the employee leaves.

Customer good will

The New York courts have also deemed

"customer good will" as a protectable interest, according to Jones.

It means a restrictive covenant can include an enforceable provision that limits the ability of an employee, such as an account executive, to solicit and conduct business with customers or clients with whom the employee worked in his or her previous job.

The courts are willing to enforce those provisions if they are reasonable in time duration, such as a year, says Jones.

But the courts have also limited the scope of such provisions, he adds. For example, the courts are unlikely to enforce a provision that seeks to prevent an employee from soliciting any of the former employer's customers, if the employee only had contact with a small number of the customers.

"To be enforceable, such a provision needs to be tailored toward the customers or clients with whom the employee had a relationship or at a minimum at least had contact with," explains Jones.

Another restriction on the enforceability of customer good will arises when an employee brings his or her own clients to the employer in question. Courts are generally unwilling to restrict an employee from continuing a relationship with those clients, if the employee moves on to another company.

COVENANTS: *An employer can review the restrictive covenant and make a determination about its legal standing*

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A candidate with restrictions

Jones says he receives calls from clients who are looking to hire a candidate who is subject to a previous company's restrictive covenant. Employers can approach the situation in several ways.

The safest option is to simply not offer employment, says Jones. If the employee would be considered a valuable asset to the company, a hiring manager might consider using the candidate in a different role and still honor the previous company's written agreement.

The other possibility is that the employer can review the restrictive covenant and make a determination about its legal standing.

"Is it likely to be enforceable as written?" Jones says is the question a hiring manager can ask.

In addition, a hiring manager should also consider: (1) if the employee's previous company would take steps to enforce the agreement with the individual, and (2) what are the potential damages if the new company doesn't honor the agreement and a court

deems the provisions enforceable?

Without a written agreement

Even in the absence of a restrictive covenant, Jones says an employee has a responsibility that survives the employment relationship to not disclose either trade secrets or other confidential information of his/her previous employer.

"The question that arises when this issue comes up is whether or not the information at issue is truly a trade secret or is truly confidential," Jones adds, noting a company can't restrict a former employee from disclosing information that is otherwise publicly available.

Customer lists are items that are frequently disputed, according to Jones, noting the confidentiality of such lists "really depends on the specifics of the case."

For example, an auto-parts manufacturer would have a difficult time arguing its customer list is private since it is usually well-known companies that buy those products. □

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