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Legal Brief

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Non-Compete Agreements: *The Business of Protecting Business*

A long-term and valuable employee approaches you to break the news that he has accepted another job — with your competitor. As you consider the experience and information the employee could impart to his new employer, you recall the employee signed a non-compete agreement limiting his ability to work for any competitive business. Then a worrisome thought occurs to you: Is it enforceable?

As the work force becomes increasingly mobile, it is no surprise that many employers seek to have key employees execute non-compete agreements, also known as restrictive covenants. A non-compete agreement is used to prevent a former employee from working for a competing business for a defined period time. A non-compete agreement also can be used to protect an employer's confidential and proprietary information from misuse by a former employee.

In the situation above, the employer has good reason to pause: Non-compete agreements are generally disfavored in the law because they place limitations on an individual's ability to earn a living. Under Pennsylvania law, however, non-compete agreements are enforceable when they are: 1) supported by adequate consideration; 2) reasonably limited in duration and geographic scope; and, 3) reasonably necessary to protect the employer's legitimate business interests. Based on these factors, how can an employer increase the likelihood that a non-compete agreement will be enforceable?

Timing is Everything

Non-compete agreements must be supported by valid consideration; in other words, the employee must receive something of value in exchange for his or her promise not to compete with the employer in the future. Generally, it is wise to have an employee sign a non-compete agreement prior to the start of employment, making the employment itself the consideration for the promise not to compete or share information. Providing the requisite consideration to an employee already actively employed by the employer can be a challenge, but can usually be accomplished by asking the employee to execute the non-compete agreement in conjunction with a promotion, a raise or a benefit not part of the original employment package.

Be Reasonable in Your Expectations

Non-compete agreements must be reasonable in duration and geographic scope, and should not impose restrictions broader than necessary to protect the employer. The reasonableness of a non-compete agreement is generally determined on a case-by-case basis and depends upon the circumstances of the employee's employment, the interests to be protected, the types of activity the agreement precludes and the geographical area contemplated.

As to what constitutes a reasonable period of time, the courts have consistently found non-compete agreements that seek to limit employment for six months to two years reasonable. The courts will more closely scrutinize non-compete agreements that extend beyond two years. In terms of geography, courts will generally not enforce a non-compete agreement that prevents an employee from working in a geographical area where the employer does not conduct business. Employers, therefore, should strive to confine a non-compete agreement to the geographical area central to the employer's business.

Pay Attention to the Details

A non-compete agreement must protect the legitimate business interests of the employer rather than simply provide disincentives or penalties for leaving the company. When the employer seeks to have a non-compete agreement enforced, it must be able to identify, in detail, the specific business interests that require protection and the reasons that the employee poses a risk to those interests. For example, Pennsylvania courts have recognized that customer lists, trade secrets, and specialized training or skills acquired from an employer are legitimate business interests that may outweigh an employee's right to earn a living. An employer, therefore, will generally have to establish that a former employee received specialized training or had access to confidential information.

While there are no guarantees for ensuring that a non-compete agreement will be enforced by the courts, an employer that plans ahead, acts reasonably and can identify its legitimate business interests will be a step ahead if and when a key employee walks away. ⋆

For more information about non-compete agreements, contact Lisa Smith Presta at MacDonald, Illig, Jones & Britton LLP at 814/870-7656 or lpresta@mijb.com.