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Representing The Wiping Materials, Recycled Clothing, New Textile By Products and Fiber Industries

President's Column

Non-Competes, Etc.

By SMART President Bill Schapiro

I think any good business owner knows the key to success is the quality of the people with whom they surround themselves. Management books are written on how to attract talent and motivate people in organizations.

I know one of my greatest pleasures as a business owner is seeing talent grow and prosper over the years with our company. On the other hand, there are times when individuals and organizations aren't a fit and a split is inevitable. I have found myself on both sides of this coin, losing a talent to the competition and wanting to attract a talent from the competition. All I can say is that the contention involved to resolve this sort of conflict has lead to some of the most stressful, emotional and least productive times I have spent in my business career.

There are two valid and yet, incompatible interests at work: businesses have the need to protect their investment in talent and to guard the trade secrets and customer lists developed over many years. At the same time, we live in a free economy and the legal bias in most states is toward freedom of choice and the feeling that one should not be deprived of their right to make a living.

My experience has resulted in two well learned, lessons, trite as they may seem:

1) Before partnering with a prospective employee, be sure you are a philosophical and financial match. If there are any questions about compatibility, forgo to the opportunity because business divorce can be very painful.

2) If you are involved in a personnel hiring dispute with another company, do all you can to put egos aside, find possible synergies between the companies for the future, and try to settle the issues quickly. Litigation of this sort is outrageously expensive and since public policy is generally against strict enforcement of non-competes, the court will most likely make a compromise. It is better for the actual parties to control the results than to pay a fortune to the legal system to do so with an uncertain outcome.

I thought this area of business life was so important that I asked the attorney from our firm who specializes in this area of law to write a brief analysis of the issues involved in non-compete and trade secret type cases. Randi Kochman of the firm, Cole, Schotz, Meisel, Forman & Leonard, PA was kind enough to do so and her article is reprinted below.

HOW EMPLOYERS CAN MAKE THE MOST OF RESTRICTIVE COVENANT AGREEMENTS
by Randi W. Kochman, Esq.

Restrictive covenant agreements have become an increasingly common tool used by employers throughout the country to protect corporate trade secrets, confidential and proprietary information and general business know-how. Unfortunately for employers, restrictive covenant agreements have long been disfavored in many states and in some, have even been declared unenforceable as a matter of law. Employers seeking to uphold these agreements are therefore often forced to litigate the enforceability of such covenants against former employees.

Although the laws governing restrictive covenants vary from state to state, in general, to enforce such an agreement, an employer must establish that the restriction is "reasonable." To satisfy this requirement, the employer must demonstrate that the noncompete protects the employer's "legitimate" business interests, imposes no undue hardship on the employee and is not injurious to the public. In keeping with the goal of protecting only "legitimate" business needs, these agreements are often inappropriate for all employees in one's business, and should be reserved for only those with insight and knowledge of information that could harm the company.

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In order to support a restrictive covenant, the agreement should be narrowly tailored to protect the employer's legitimate business needs, but not be so broad that a court will determine that its main purpose is to stifle competition. In some states an overly harsh restriction (ex. one that prohibits the employee from engaging in any activity competitive with the employer, anywhere, until the end of time) may be thrown out entirely. If the court does not conclude that the restriction is entirely designed to prevent competition, but it still deems the restriction to be overly broad, often the court will simply modify the agreement to provide for what is "reasonable." In deciding what is really needed to protect the business, and with the goal of developing a restrictive covenant that will be upheld by a court, employers should consider the type of restriction needed. In other words, is a "noncompete" (a provision that prevents all competition), a "nonsolicitation" (a provision that prevents the employee from calling on customers/accounts that he/she or the company itself worked with, for a period of time) or simply a confidentiality provision (a provision that prohibits the employee from disclosing confidential information to which he/she became exposed through employment with the company), or some combination thereof, appropriate. While employers often include all 3 provisions (and more) with the hope of covering all bases, from a litigation perspective, the better practice is to carefully analyze what is truly needed and include only those necessary provision in the agreement.

Employers should also be aware that in most jurisdictions, in addition to contract claims that will arise from a breach of the restrictive covenant, employers also have "common law" claims against the wrongdoing employee such as theft of trade secrets, unfair competition, and breach of duty of loyalty. In other words, the employer will have recourse against an employee who steals/lies/injures the company whether or not they have a restrictive covenant agreement in place.

Give the above concerns it is crucial that before employers ask their employees to sign these agreements, the covenants first be reviewed by legal counsel. There is nothing worse than investing in an agreement that you think will protect you and then finding out when you need it the most that it is overly broad, overreaching and thus unenforceable.

Thanks to SMART President Bill Schapiro for sharing this article written by one of his attorneys, Randi Kochman of the firm, Cole, Schotz, Meisel, Forman & Leonard, PA expressly for SMARTTAlk.