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Business Insights

Post-Employment Restrictions: A Roadmap to Preventing Problems

By Stephen Wagner

Non-competition, non-solicitation, and non-recruiting agreements are common examples of what are known as employment restrictive covenants. These agreements play an important role in helping a business protect information, trade secrets, talent, and other assets. The value of this property is high, and when it is stolen or misappropriated, it can destroy competitive advantage and the market position of a business.

However, the law governing the validity of these agreements is continuously changing, and precise wording can make all the difference in whether a company's property and people are ultimately protected. This outline of important considerations provides a roadmap to the source of problems we often see in disputes.

> Regular review is essential to protecting a company's most valuable assets.

Regular review. Agreements used by a business five or ten years ago are likely out of date in important ways. A recent New York decision, *Brown & Brown v. Johnson*, adds guidance to other New York court decisions handed down in 2010 (*Eastman Kodak Co. v. Camosino*) and 2004 (*Scott, Stackrow v. Skavina*). The main lesson for business executives is that these cases each affected the law of restrictive covenants, and this area of law will continue to change. Businesses should review these agreements regularly, just as they review finances, operations, systems, and other parts of the enterprise.

Legitimate business interest. Courts look skeptically upon broad or highly restrictive covenants. On the other hand, they are more forgiving if the covenant provides a stated legitimate business interest. Business executives should work with their attorneys to identify the business goals of these restrictions, why they are important, and what value may be lost in case of a breach. Articulating this in agreements itself may increase the chance that the restrictive covenant survives a challenge.

Presenting the agreement prior to acceptance of an offer. Courts will also be more forgiving when an employee has made a choice to accept restrictions—for example, in exchange for continued benefits following termination. However, the law frowns on the practice of presenting an employee with restrictions after a decision has already been made to leave his or her previous job and to accept the new one. Business executives should consider presenting these agreements to a new employee earlier in the onboarding process.

These are just a few of the considerations that executives should keep in mind when asking employees to agree to certain restrictions. By defining their goals and articulating what is at stake and why it warrants protection, executives can work with their legal counsel to craft restrictive covenants that will be more effective over the long term.

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