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NEWSLETTERS

Amidst The Commotion, Make Sure You Are Handling Noncompete Basics

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2015 has been a busy year in terms of mainstream and business media attention to covenants not to compete. Everybody has read that Jimmy John's reportedly requires some sandwich makers to sign noncompetes. That has little if any substantive impact on noncompetes related to more highly trained and compensated employees, but certainly has fed the appetites for change by people who assert that noncompetes are invariably bad. What seems to be an annual legislative debate in Massachusetts over whether to restrict noncompetes has been joined by talked of federal restrictions on noncompetes, the passage of restrictions on noncompetes on tech employees in Hawaii, a new noncompete statute in Alabama and talk of restrictions in other states. Finally, the subject of what constitutes sufficient consideration for a noncompete has continued to be a hot topic in the courts, with an important decision on the topic from the Wisconsin Supreme Court, one pending at the Pennsylvania Supreme Court and lots of activity in Illinois.

Certainly an awareness of developments in other states is critical for businesses. As discussed in this newsletter before, if you might be "competed with" in another state, you need to discuss with counsel the possible impact of that state's law on your ability to protect your confidential information and important business relationships through restrictive covenants. Courts in those states may not care that you have specified that your state's law applies.

However, something about noncompetes seems to cause people who write about them to get carried away. There always seems to be a "trend" towards chipping away at noncompetes, yet the reality does not seem to support that perception. States' laws evolve, but it is not clear that they do so in a particular direction. Commentators seem to want to think that. In fact, while Hawaii has restricted noncompetes for one class of workers, the Wisconsin Supreme Court has issued a pro-employer decision on the subject of what consideration is necessary to support a noncompete. While one Illinois appeals court in 2013 seemingly made it harder for employers to enforce noncompetes, this year Illinois courts seem to be grappling with how far to take that decision. In short, there is a lot of talk, but thus far it is not clear that there is a trend.

Thus, amid unprecedented conversation about noncompetes, it is timely to revisit the basics of noncompete drafting and enforcement that every business should follow in utilizing this important – and in almost all states still legal and enforceable when done correctly – tool for protecting your

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business resources:

1. Your agreement must have a ***strong choice of law and choice of venue*** provision. While as noted above a choice of law provision is far from bullet proof – most courts will disregard a choice of another state's law if the other state's law would be contrary to the forum state's – it is nonetheless critical to have that provision as a starting point. Then the agreement should make the strongest possible statement of a choice of venue or forum. Courts give these provisions more deference than choice of law provisions, so it is critical to try to direct any disputes to what you consider to be your business's home court.

2. Agreements should be ***drafted to address documented identifiable business needs***. Do not simply choose one year for all types of employees. Why should the restricted period be one year? Is it because a business cycle is considered a reasonable time for the company to reinforce a customer relationship? Is it because that is the approximate time that it takes confidential research to get to market? These and other bases for restrictions are good reasons. Identify what those reasons are for different kinds of employees and, working with counsel, write them down. That memorandum will be a powerful exhibit in support of your next action to enforce a noncompete.

3. ***Be disciplined in administering noncompetes.*** If you are implementing noncompetes for the first time, before you roll them out, ask: What are we going to do when our best salesperson refuses to sign it? If you do not have a reasoned plan for dealing with that situation, then you are not serious about having noncompetes. Each breach of the noncompete that you disregard will heighten your inability to enforce other noncompetes. Holes in your enforcement can also arise from oversights; each year, you should audit whether every employee you think has a noncompete really does. This time investment will pay off in your ability to enforce a noncompete when you need to.

4. ***Figure out how you will solve the consideration puzzle***. As suggested above, different states have different rules for what consideration is necessary to support a noncompete agreement. In some states (such as Ohio) the right to come to work the next day supports a noncompete. An employer can walk in and demand that a long-term employee sign a noncompete or be terminated and that noncompete will be enforceable.

In some states (such as Pennsylvania, though this may change depending on the pending state supreme court case), for a noncompete to be enforced it must be signed in conjunction with the provision of a job (even at will) or other consideration. Other states – such as Illinois since 2013 at least – require something additional.

How does an employer doing business in each of those states strike the balance so as to optimize enforcement yet also be mindful of employee relations issues across state lines? There is no easy answer to this question; it requires thorough analysis of the employees and the applicable laws. It is critical, however, that the employer goes through this analysis.

Regardless of how debates turn out in Massachusetts and Washington state and Washington, D.C., and anywhere else that the headlines tell us

is in play, most businesses will be doing business in states with different rules about consideration (see item 4 above) as well as about the extent to which courts are permitted to modify overly broad noncompetes. Your counsel needs to tell you how those laws are changing, but nothing is likely to change the four fundamentals of using noncompetes for years to come.

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