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Do You Have Restrictive Covenants In Texas? If So, Be Careful What You Ask For

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Many employers who have multistate operations know that the enforceability of a restrictive covenant depends largely on the state in question. While obviously no state will rubber stamp whatever restrictive covenant an employer can think up, even a properly structured and reasonable covenant – which would be enforced without question in most of the country – may not get any traction in some states.

Texas is not the hardest state in which to seek the enforcement of a restrictive covenant (that distinction surprisingly lies with North Dakota and Oklahoma, and then perhaps less surprisingly with California), but it historically falls on the "more difficult" end of the spectrum. Bolstering this perception is a new decision from the Texas Court of Appeals published earlier this week: *Ramirez v. Ignite Holdings, Ltd.,* Case no. 05-12-01024-CV.

The case involved a marketing subsidiary of an electricity and natural gas supplier. The company used a sales force of independent associates who each entered into restrictive covenant agreements that included a prohibition on competing with the company or soliciting products or services for its competitors. After entering into these agreements, several associates began to compete with the company by doing work for a competitor and solicited their colleagues to do the same.

The company sued and successfully obtained a temporary injunction. On appeal, however, the Texas Court of Appeals reversed several aspects of the injunction order on the grounds that the restrictive covenant language was not sufficiently specific and detailed. Here is one of the prohibitory paragraphs of the injunction that the Court of Appeals criticized (the key text is emphasized):

> possessing, disclosing to any third party, or using for their own benefit or to the detriment of Ignite and Stream Energy any of Ignite's or Stream Energy's *Proprietary Information/Trade Secrets* (*including but not limited to proprietary information* , *confidential information*, training materials, templates, or sales or customer lists).

And, during the injunction hearing, the trial judge had defined "Proprietary Information/Trade Secrets" to be "valuable business, training, and sales *techniques*, methods, forms, *materials*, guides, lists, downline associate and customer lists, including personal identifying information, and *other*

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confidential and proprietary information as discussed above."

The Court of Appeals found that the this language was too broad and general, and particularly the references to "techniques," "materials" and other "confidential and proprietary information" because these terms could encompass many different things and did not give enough specificity to the appellants to know what exactly they were restrained from doing.

Many employers use similar generic "catch-all" language-- based on the theory that more general terminology will allow more flexibility when it comes to enforcement. Then, when litigation occurs, that same language typically is adopted by the company's attorneys and set forth in the company's request for injunctive relief in court. Based on this latest decision, employers who seek to prosecute violations of restrictive covenants in Texas need to be specific about what they want to have limited, not only in their agreements, but in what they ask the courts to do . At the end of the day, a restrictive covenant is only as good as the injunction actually enforcing it.