Limiting Employee Activities: Enforcing Restrictive Covenants, Blogging Limits and Social Media Controls

November 9, 2010, Jacksonville

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True or False

- Restrictive covenant agreements are not worth the paper they are written on
True or False

- Restrictive covenant agreements, like signed written contracts are enforceable
Answer

- Neither statement is true or false in all situations
- Restrictive covenant agreements can be enforceable
Their enforceability depends on a number of factors including:

- How is the contract drafted, and is it reasonable?
- How does your company treat its confidential information?
- What are the circumstances surrounding the breach?
Enforceability factors (continued)

- What is the evidence of the breach and irreparable harm?
- When and where you seek enforcement?
- Which judge is hearing the case?
General Principles

- Non-compete agreements are unenforceable, as against public policy which favors competition
- However, properly drafted and implemented non-compete agreements, may be enforceable in many jurisdictions
Non-compete Agreements

Enforceability

- Non-compete agreements are not enforceable for the sake of preventing business competition
- Non-compete agreements are not enforceable for the sake of preventing employees from working at the jobs of their choice
- To be enforceable, non-compete agreements must serve some legitimate business purpose
Non-compete Agreements
Enforceability cont’d

- Reasonably necessary to protect an employer’s legitimate business interests i.e. goodwill, confidential and proprietary information, trade secrets, specialized skills and training
- Reasonably drawn in time, geographic scope and scope of business
Restrictive Covenants Reasonableness

- Length of Restriction
- Geographic Scope of Restriction
- Fairness of Protection Accrued to Employer
- Restraint on Employee
- Interference With Public Interest
Devise practical ways to protect confidential information

Create contractual obligations through restrictive covenants

Enforce the contractual obligations through creative litigation
Practical Ways to Protect Confidential Information

- Treat your confidential information like it is confidential

- Simply calling information “confidential” or a “trade secret” is not sufficient. You must make reasonable efforts to maintain the confidentiality and secrecy of the information. How can you do that?

- Provide training to employees

- Stamp information “confidential” or “trade secret”
Practical Ways to Protect Confidential Information

- Limit access to confidential information
- Limit access to computer files
- Require passwords for confidential information or trade secrets maintained on a computer
- Keep confidential information locked up
- Confidential information and trade secrets should be shredded before they are put in the trash
- Do not disclose confidential information or trade secrets to a third party
Employees should sign well-drafted contracts

- Who should sign?
- What should these contracts provide?
- How should these agreements be implemented?
Protecting Business Interests Through Contracts

- Who should sign these contracts?
  - *Everyone* who has access to confidential information should sign *some* form of agreement
    - All employees with access to confidential information must be restricted, both management *and* clerical staff

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What should these contracts provide?

- Definition of confidential information
- Non-disclosure of confidential information
- Return of documents and material upon termination or request
- Non-competition
Protecting Business Interests Through Contracts

- Non-solicitation of customers
- Non-solicitation of employees
- Severability/blue pencil clause
- Choice of law and forum clause
- Costs and attorney’s fees
- Agreement that the employer may disclose the agreement to the employee’s new employer

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Protecting Business Interests Through Contracts

- Agreement that the employee had access to trade secrets, and if employee were to become employed in a particular position with a competitor, it would be inevitable that he or she would use or disclose the trade secret
- Successors and Assigns Clause
Protecting Business Interests Through Contracts

- How should these agreements be implemented?
  - New hires
  - Current employees
    - Additional consideration?

- Review covenants periodically to make sure they meet your needs. (Employees are promoted, territories change, new responsibilities are added, etc.)

- An employee’s yearly performance review is a good time to review the covenants
Protecting Business Interests Before Separation of Employment Through Exit Interviews

- Prepare for the interview – prepare checklist and maintain
- Discuss confidential nature of information
- Discuss the employee’s contractual obligations
- Find out from the employee:
  - When leaving
  - Why leaving
  - Where going
  - New position/duties
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- Give employee copies of contractual agreements
- Keep the door open
- Make sure all company property is returned
- Be careful when drafting severance agreements [“Entire Agreement” clause]
Protecting Business Interests Before Separation of Employment Through Investigation

- Conduct a covert investigation upon suspicion of resignation through:
  - Examination of e-mail, computer files, laptop computers, electronic devices
  - Review employee’s expense reports, telephone records, GPS reports
  - Check to see if any high volume copying done by or for employee
  - Check for any unusual hours activity
Protecting Business Interests Through Litigation

- **Enforcement**
  - What are your expectations from litigation?
  - Goal: Change the former employee’s behavior
  - Evaluate your case
    - How good is your case?
    - What do the agreements say?
    - What facts will you need to win?
Protecting Business Interests Through Litigation

➤ Who to sue?
  • Former employees
  • New employer
What to sue for?

- Various counts of breach of contract
- Breach of duty of loyalty
- Misappropriation of trade secrets
- Tortious interference
- Conspiracy
- Unfair competition
- Business defamation
- Replevin/conversion
- Examine possible criminal violations
Protecting Business Interests Through Litigation

➢ Where to sue:
   • What jurisdiction?
   • What court?

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Protecting Business Interests Through Litigation

- Pre-litigation steps
  - Write cease and desist letters
  - Do a thorough investigation
  - What was the employee doing in the time before he or she left?
  - Review the employee’s e-mails
  - Review the employee’s computer
  - Review the telephone log for the employee’s telephone
  - Segregate and preserve evidence paying attention to chain of custody issues
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- Interview co-workers for suspicious activity
- Review web site of new employer
- Review your web site
- If appropriate, interview customers
- Timeliness is important
Protecting Business Interests Through Litigation

- TRO
  - Go for the TRO
  - Have all papers prepared in advance
  - Be prepared to try case right away
  - Consider offering to pay the employee his salary if you are proved wrong
Protecting Business Interests Through Litigation

- Discovery
  - Document demands and Interrogatories
  - Look for what the key players did in the months before the employee’s departure
  - T&E records of the new employer to see how many dinners they had with new employee
  - Electronic discovery
  - Potential depositions – include former employee’s new assistant
Protecting Business Interests Through Litigation

- Telephone records of the new employer
- Records regarding the new employer’s clients
  - If they object, get them to assert that their own information is confidential
- Look for indemnification agreements
- Put your competitor on the defensive
Protecting Business Interests Through Litigation

- **Trial**
  - Invest the time and resources
  - Use expert witnesses
  - Use demonstrative evidence
  - De-mystify your business
Protecting Business Interests Through Litigation

- **Settlement**
  - You can achieve things in settlement you cannot out of litigation
  - Additional agreements not to solicit customers and employees
  - Longer time periods

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