

RESTRICTIVE COVENANTS: NONCOMPETE, NONSOLICITATION, NONDISCLOSURE AGREEMENTS

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Many employers require new—and current—employees to execute agreements that contain restrictive covenants. Employers require such agreements to protect their customer relationships, confidential information and trade secrets, intellectual property, and general business interests. While employers *do* have legitimate business interests to protect, employees should be aware of what rights they are signing away when they execute such a document: The “I didn’t know that was wrong” excuse will likely not work when trying to defend against a claim for breach of such an agreement.

The increased use of social media has thrown another wrench into the mechanics of restrictive covenants.

As an initial matter, there are a few common types of restrictive covenants. These include noncompete, nonsolicitation, nondisclosure, and intellectual property provisions. While each type of provision protects different and specific business rights, it is important to note that states also have different laws that interpret how such provisions are enforced or their validity. Additionally, the increased use of social media has thrown another wrench into the mechanics of restrictive covenants. Moreover, the restrictive covenant “rules” apply to individuals regardless of whether they are paid employees or interns, paid and unpaid. As such, all applicants should be mindful of what agreements they are signing at the commencement of employment.

NONCOMPETE AGREEMENTS

Noncompete agreements limit an individual's ability to perform work in his or her chosen profession for a certain period of time. In this regard, a noncompete restricts former employees from working for competitors or defined groups of competitors in a specific geographic area for a defined time period. Employers require employees to sign noncompete agreements to protect corporate assets, such as trade secrets, proprietary information, and goodwill.

Each state has different laws that pertain to noncompete agreements, and they can differ significantly. For example, in Pennsylvania, a noncompete agreement has to be supported by adequate consideration and be reasonable in both temporal and geographic scope. In this case, a noncompete agreement that is signed at the commencement of employment provides “adequate consideration.” However, a noncompete agreement that is signed a year after an individual commences employment without receiving any additional benefit is likely to be deemed to have no consideration and, therefore, is unenforceable. This may vary depending on the state, and what constitutes “adequate consideration” may differ.

With regard to temporal and geographic scope, courts look to what is reasonable to protect the employer’s legitimate business interests. In most cases, a two-year noncompete agreement is deemed reasonable. For the geographic scope, however, there is no set standard. For example, if an individual works as a salesperson and has a territory of the East Coast, then a noncompete agreement that prohibits that person for working for a competitor on the East Coast may be reasonable, whereas a noncompete that prohibits that same person from working *anywhere* in the United States would likely be overly broad and unenforceable.

There are some states that have very strong limitations on noncompete agreements. California, for example, essentially prohibits the use of noncompete agreements for employees and has laws that indicate that such agreements are invalid and unenforceable. Other jurisdictions where noncompetes are unenforceable or enforced in limited situations only include Oklahoma, North Dakota, and Colorado.

In addition to general statewide prohibitions on noncompete agreements, there are some professions that restrict the use of noncompete agreements. Noncompetes are generally not enforceable against attorneys because of ethical prohibitions on preventing clients from retaining the attorney of their choice. Additionally, many states limit the enforceability of noncompetes in the medical profession. For example, in Pennsylvania, noncompete agreements with physicians are only enforceable if there is adequate medical coverage remaining if the agreement is enforced. Colorado, Texas, Connecticut, and Rhode Island all have similar laws that limit the enforceability of physician noncompete agreements.

The financial sector has further restrictions on noncompete agreements beyond those that may be imposed by an individual state. Under Financial Industry Regulatory Authority, which governs the financial sector, a noncompete agreement is unenforceable if it prevents customers from continuing to use the services of their registered representative of their choice.

Nonsolicitation agreements prohibit former employees (or interns) from soliciting customers or clients of their former employer for a competitor.

Regardless of the industry an individual is in, his or her position with the company is also important when determining the enforceability of a noncompete agreement. If a company makes every employee, from the CFO to the janitor, execute the same noncompete agreement, the ability to enforce such an agreement may be impacted. This is due to the fact that courts will generally hesitate to enforce a noncompete agreement for

lower-level employees unless such employees have access to confidential information or the agreement is needed to protect other legitimate business interests.

Finally, it is imperative that the person signing the agreement reads and understands what he or she is executing. Even if a noncompete agreement is ultimately deemed unenforceable, it may require legal action to get to that result. As such, understanding the terms and possibly negotiating a more favorable (or entire elimination) of such a provision is generally in the best interest of the employee or applicant prior to execution.

NONSOLICITATION AGREEMENTS

Nonsolicitation agreements are similar to—but not nearly as restrictive as—noncompete agreements.

Nonsolicitation agreements prohibit former employees (or interns) from soliciting customers or clients of their former employer for a competitor. Nonsolicitation provisions may also prohibit former employees from attempting to “pirate” or take away employees of the former employer for other competing business.

As a general matter, nonsolicitation provisions are much easier to enforce from an employer perspective than are noncompete agreements. While there are exceptions, such as California, if an employer drafts a limited nonsolicitation agreement that protects actual or prospective customers that a former employee (or intern) had contact with while employed, it will generally be deemed enforceable. In this regard, the definition of “customer” and “prospective customer” must be clearly defined and the temporal scope must be limited, e.g., the scope of the agreement is two years.

There are looser restrictions for nonsolicitations because courts are generally agreeable to allowing an employer a period of time to retain its customers. However, as noted, there are exceptions to that general rule. Nonsolicitation agreements are generally invalid for lawyers, physicians, or individuals in the financial field if they prohibit people from choosing their profession of choice. Accordingly, while nonsolicitations are given more latitude from the legal perspective, there are still limitations.

Regardless, as with noncompetes, applicants should be mindful of what they are signing at the commencement of employment. While not as restrictive as a noncompete agreement, a nonsolicitation agreement may still have an impact on an individual’s ability to obtain other employment. As such, it is recommended that applicants thoroughly read and understand who is covered by the nonsolicitation prior to execution.

NONDISCLOSURE AGREEMENTS AND INTELLECTUAL PROPERTY AGREEMENTS

A nondisclosure agreement prohibits an employee or intern from disclosing an organization's confidential and/or proprietary information to third parties during both the tenure of employment and after termination. The individual agrees that he or she will not reveal anything the company considers confidential, such as customer lists, research, and development plans.

Unlike other forms of restrictive covenants, a nondisclosure agreement does not restrict an individual's ability to obtain work upon the termination of employment, but merely protects an employer's proprietary information. In this regard, a nondisclosure agreement will provide a definition of “confidential information” and indicate that the employee is not permitted to disclose such information to any third parties. Nondisclosure agreements are

generally enforceable provided that there is a specific definition of what constitutes confidential information. Additionally, nondisclosure agreements generally do not have a temporal limit and are enforceable in perpetuity provided the information remains “confidential” to the former employer and does not become public knowledge.

Intellectual property agreements limit an employee’s ability to maintain ownership of inventions and ideas while working for an employer. In this regard, employees essentially sign over their rights to inventions or ideas if they were created using an employer’s confidential information or as part of an employee’s position with a company. Such agreements, however, can be overly broad and expand to areas outside of what should be protected. Accordingly, it is imperative that individuals carefully read over such provisions prior to execution, as failing to do so may cost the individual more than a job in the future—it may cost him or her rights to an invention.

THE SOCIAL MEDIA IMPACT

The significantly increased use of social media has changed the way employers (and courts) have handled restrictive covenant issues, specifically noncompete and nonsolicitation agreements.

Social media has increased the potential for violations of nonsolicitation agreements.

As noted above, most states have rules that provide that noncompete agreements must be reasonable in geographic scope. As such, most courts have viewed restrictive covenants that lacked any geographic restrictions as overly broad and unreasonable, and, therefore, unenforceable. With the use of social media and web-based companies, courts have expanded their view on the “limitless boundary” noncompete agreements. In this regard, some courts have allowed such broad geographic restrictions, provided the employer can show that there is a reasonable business interest in such language. For example, an employee uses social media to solicit customers on behalf of her employer and therefore does not have a geographic boundary.

In addition to expanded scopes of noncompete agreements, social media has increased the potential for violations of nonsolicitation agreements. Is it a violation of a nonsolicitation agreement to be “friends” with someone on social media, or to connect with him or her on LinkedIn? It all depends on the agreement and the actions of the former employee. Many employers are now specifically including limitations on post-employment social media activity in their agreements to address any potential issues. Even if such language is not specifically included, courts have indicated that an individual’s actions on social media can rise to a violation of a restrictive covenant.

By way of example, if a former employee “targets” former or prospective customers using social media, it has been construed as a violation of a nonsolicitation agreement. Conversely, if a former employee merely announces a new position and is not actively “soliciting” former customers or prospects, it may not be a violation of the restrictive covenant.

While courts sort out all of the new issues that arise as a consequence of the “Wild West” nature of social media, it is key that individuals understand what they can and cannot do. The individual who is bound by a restrictive covenant should be mindful of what he or she posts on social media and the manner in which he/she connects with former or prospective customers. Failure to do so could result in legal action.

STEPS TO TAKE BEFORE SIGNING

Regardless of the type of restrictive covenant agreement an individual is presented with, the steps before signing such an agreement are the same.

- The individual should carefully read and understand the agreement and have someone with expertise in the field do the same.
- If it is believed that the agreement is overly broad, the individual should do everything he/she can to negotiate better terms.
- If the employer is not willing to change a term, it is then up to the applicant to determine if the job is worth the restrictions that will come if, and when, the position comes to an end. Sometimes, the “juice” is not worth the future “squeeze.”
- *Note from KU Engineering Career Center – in addition to the suggested steps above, consider asking about any restrictive covenants before signing the job offer and have them reviewed by KU Legal Services for Students. For example, during the offer discussion process, ask “I know many companies have noncompete and confidentiality types of agreements that employees sign when they actually start work – is it possible to get a copy of those now?”*

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Easterly is slated to present at the NACE 2018 Conference & Expo in New Orleans, where he will discuss preemployment testing, internships, and other legal issues.

Courtesy of the [National Association of Colleges and Employers](#).