Non-Compete, Non-Solicit and Non-Disclosure Agreements: How to Avoid These Risks When Onboarding Employees

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It Could Happen to You …

• Your company has successfully recruited a perfect candidate to fill an important position within your organization
• The candidate interviewed extremely well, their references checked out, and their background check was crystal clear
• The candidate’s first day is Monday and management is very pleased with the HR team’s role in recruiting and onboarding their new rock star
• Everything changes on Tuesday …

It Could Happen to You …

• Tuesday morning, the CEO receives (via email) a cease and desist letter from a lawyer
• The letter advises that your new rock star had a written employment agreement with his former employer, which contained non-compete, non-solicit, and non-disclosure clauses
• The letter also claims your new hire forwarded customer lists, pricing data, and confidential documents to his Gmail account before he resigned and that he has already contacted some of those customers
• The letter threatens legal action against your company if it continues to employ your new hire and demands that your company return any data it may have received from him
Let’s Cover Some Basics …

- Written agreements between an employer and an employee that try to restrict the employee’s post-employment actions are commonly referred to as “restrictive covenants”
- These agreements generally fall into three categories:
  1. Non-compete agreements
  2. Non-solicitation agreements
  3. Non-disclosure agreements
- Many employment contracts contain all three of these restrictive covenants or a combination of them

Non-Compete Agreements

- These agreements commonly restrict a former employee from accepting a job with a competitor
- The law requires that they be reasonable in geographic scope and temporal duration
- One year is a common temporal duration, but two years or more may be upheld in some circumstances
- Courts may not completely enforce non-compete agreements as written and they often scale them back
- Caution: Do not believe the myth that non-compete agreements are unenforceable (most states allow them)
Non-Compete Agreements (Cont.)

- Tennessee courts will likely uphold non-compete agreements in some form if the employer is found to have a “protectable interest,” which can include:
  1. Protection of confidential information/trade secrets;
  2. Investment of “specialized” training in the restricted employee; or
  3. A close relationship between the restricted employee and the employer’s customers
- The overarching consideration is reasonableness


Non-Solicitation Agreements

- These agreements commonly restrict employees from doing two things:
  - Soliciting business from their former employer’s customers
  - Soliciting employees of their former employer to resign and go to work for the restricted employee’s new employer
- Non-solicitation agreements are often easier for companies to enforce as written, as compared to non-compete agreements

Non-Disclosure Agreements

- Also known as “confidentiality agreements”
- These agreements restrict employees from disclosing or using their prior employer’s confidential information or trade secrets
- Tennessee law permits these to have unlimited duration, as do many state laws
- Many states (including Tennessee) have statutes and case law that protect an employee from misappropriating their employer’s trade secrets or confidential information regardless of whether the employee signed a written non-disclosure agreement
Why Should You Care?

- Restrictive covenants are contracts between another company and the person you are about to hire, so they do not involve you, right? ... WRONG!
- It is very common for the restricted employee’s former employer to sue the restricted employee’s new employer
- One reason the former employer sends the new employer a cease and desist letter is to notify the new employer that the person it just hired (or is about to hire) is bound by restrictive covenants
- Putting the new employer on notice in this manner is a common predicate to the former employer suing the new employer under several legal theories

Inducing/Procuring a Breach of Contract

The essential elements of this claim are:

1) A legal contract;
2) Defendant’s knowledge of the contract;
3) Defendant’s intent to cause the contract to be breached;
4) Defendant’s malice;
5) The contract is in fact breached;
6) Defendant’s actions were the proximate cause of the breach; and
7) Plaintiff has been damaged by the breach


And There’s More …

- Tenn. Code Ann. § 47-50-109 – Permits a plaintiff to recover treble damages in the event they prevail on their procurement of breach claim by clear and convincing evidence
- As a result, procurement of breach claims are a real threat to employers that hire employees who are restricted by non-compete, non-solicitation, or non-disclosure agreements
- Kitchens was employed by Hanger Prosthetics as an orthotist in Knoxville, Tennessee  
- He signed a non-compete agreement that prevented him from working for a competitor for a period of 2 years  
- After signing the non-compete, Kitchens received extensive training funded by Hanger Prosthetics and he developed close working relationships with physicians who practiced at area hospitals  
- Kitchens resigned and went to work for Choice Medical, providing the same orthotic services at Knoxville area hospitals and working with many of the same physicians  
- Hanger Prosthetics sued Kitchens, but they also sued Choice Medical for inducing Kitchens to breach his non-compete  

Hanger Prosthetics (Cont.)  
- At trial, the court entered judgment against Kitchens and Choice Medical jointly for $240,182 (representing Hanger's lost profits) and against Choice Medical for an additional $480,364 (trebled per Tenn. Code Ann. § 47-50-109)  
- “The evidence is overwhelming that Choice was not engaged in the orthotics and prosthetics business in the Knoxville area and that the hiring of Kitchens gave them access to a ready market based upon the long standing physician relationships developed by Kitchens as an agent of Hanger. The proof is overwhelming that it was the business plan of Choice to have Kitchens contact these physicians ..., notify them that he was no longer working at Hanger, and induce them to continue to use Kitchens as an agent of Choice rather than continuing their relationship with Hanger.”

Tortious Interference  
The essential elements of this claim are:  
1) An existing business relationship with a specific third party or a prospective relationship with an identifiable class of third parties;  
2) The defendant's knowledge of the relationship;  
3) The defendant's intent to cause the termination of the business relationship;  
4) The defendant's improper motive or improper means; and  
5) Damage resulting from the tortious interference  
Steps to Take Before Making an Offer

• Inquire whether the candidate recalls signing any form of restrictive covenant with any of his former employers
  – If not, request a written acknowledgement from the candidate certifying that he is not bound by any form of restrictive covenant
  – If so, ask the candidate for a copy
• If the candidate produces a copy of a restrictive covenant, seek counsel from a lawyer who practices in this area of law
• If the candidate “recalls signing something,” but cannot produce a copy, seek counsel from a lawyer who practices in this area
• You simply must vet this issue before making an offer of employment

Making an Offer: Unrestricted Candidate

• The candidate has denied signing a restrictive covenant, but you still may want to protect your company
• Consider stating in the candidate’s offer letter (or employment contract if applicable) that:
  1. Your agreement to employ him is based on his disclaimer of any restrictive covenants with former employers;
  2. His employment with your company is premised on this disclaimer; and
  3. Your company reserves the right to terminate his employment, or change the terms of his employment, if it turns out that he is restricted in any way
Making an Offer: Restricted Candidate

• The candidate admits a restrictive covenant with a prior employer, but you still want to employ him
• Consider stating in the candidate’s offer letter (or employment contract if applicable) a combination of the following:
  – He will not share with anyone employed by or associated with your company any information or data that could be considered the confidential information or trade secret of his previous employer; and
  – He will not use in any manner connected to his employment with your company any information or data that could be considered the confidential information or trade secret of his previous employer …

Making an Offer: Restricted Candidate (Cont.)

• If he has non-solicitation covenants with his former employer:
  – He will not solicit, or assist anyone else to solicit, business from any customer or his former employer; and/or
  – He will not recruit, or assist anyone else to recruit, anyone employed by (or associated with) his former employer to terminate their employment and come to work for your company
• If he has a non-compete covenant with his former employer and your company still wants to employ him, seek counsel from a lawyer who practices in this area
• Even if the candidate’s restrictive covenants are disclosed after he has already been hired, you should still consider documenting the foregoing points, perhaps with a memorandum of understanding

Other Measures to Consider

• Communicate the foregoing terms of the new employee’s employment to appropriate managers and other key employees
• Develop a plan to monitor the new employee’s compliance with the foregoing terms
• Consider asking a trusted IT resource to inspect your network for evidence of suspicious uploads of documents or data from the new employee or his co-workers
• Remember the goal: Eliminating or reducing your company’s liability for inducement of breach/tortious interference claims in the event that things go wrong
QUESTIONS?

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