Drafting and Enforcing Post-Employment Restrictive Covenants on Competition

Crafting the Best Agreement to Protect Your Information, Customers, and Employees.

Why Use Restrictive Covenants?

- Protect Customers and Information
- Retain Employees
- Provide a Deterrent Against Employees Cooperating with Competitors
- Provide the Ability to Enforce an Action for Theft of Information or Customers
- Provide Vehicle for Immediate Injunctive Relief
- Provide Opportunity to Review Security of and Access to Company Information

Types of Restrictive Covenants

- **Confidentiality Provision – Restricts an employee from sharing or using confidential information learned through employment during or after employment. This includes trade secrets, but also can include other confidential information.**
- **Non-Solicitation Provision – Restricts an employee from soliciting existing or previous customers of the employer.**
- **Non-Competition Provision – Restricts an employee from competing with the employer's business during or after employment and generally includes potential customers.**
- **Non-Solicitation of Employees – Restricts an employee from hiring other employees or soliciting employees away from the employer.**

Drafting Valid Restrictive Covenants

The governing law of a restrictive covenant is dependent on each State's law…

General Standard for All Restrictive Covenants In Illinois

- A restrictive covenant that imposes a partial restraint on trade will be upheld if the restraint is reasonable and the agreement is supported by consideration. *Reliable Fire Equip. Co v. Arredondo*, 965 N.E.2d 393 (2011).
- In enforcing restrictive covenants Courts review reasonableness of an agreement given the totality of the circumstances.

“Rule of Reasonableness” Test

- The restriction must be no greater than is required to protect a legitimate business interest of the employer
- The restriction may not impose undue hardship on the employee
- The restriction may not be injurious to the public

Confidentiality Provisions

- Should not broadly discuss “any and all non-public information”
- Should be limited to confidential information received while working for the employer.
  - *AssuredPartners, Inc. v. Schmitt*, 44 N.E.3d 463, 474 (Ill. App. Ct. 2015).

Too Broad:

“Employee is prohibited from sharing any and all items of whatever nature or kind which the Employee has learned of, acquired or obtained knowledge of, conceived, developed, originated, discovered, invented or otherwise become aware of during the period of his employment, provided that this paragraph shall not apply to information within the public domain and generally known within the industry."

Reasonable Limitation:

““The employee is obligated to keep confidential and never disclose, use, misappropriate, or confirm or deny the veracity of, any statement or comment concerning any of the Company’s Confidential Information. The phrase "Confidential Information" as used in this policy, includes but is not limited to, any and all information which the employee obtained or learned while in the Company’s employ that is not generally known to the public, “related to or concerning: (a) the Company’s business; or (b) the business activities, dealings or interests of the Company and/or its officers, directors, affiliates, employees or contractors; and/or (c) the Company’s employment practices or policies applicable to its employees and/or contractors.'"

Non-Solicitation Provisions

- A non-solicitation clause is valid if it is reasonably related to the employer's interest in protecting customer relations. Courts are reluctant to enforce provisions that prohibit former employees from servicing customers that they never had contact with while working for their original employer.
- Courts often favor non-solicitation provisions over non-compete provisions, particularly when the protection of existing customers is the employer's primary concern.
- Generally the following should be considered:
    - Employee had contact with the customer.
    - The customer was a customer at the time of employee's employment.
    - Temporal restrictions are reasonable (0-24 months).
    - No geographic limitation required

Employee Non-Solicitation Provisions

- Generally, agreements prohibiting solicitation of employees that are reasonably calculated to protect the employer's interest in maintaining a stable work force are enforceable under Illinois law.
  - *Xylem Dewatering Sols., Inc. v. Szablewski*, 2014 IL App (5th) 140080-U, ¶ 28 (Ill App. Ct. 2014); *Arpac Corp. v. Murray*, 226 Ill. App. 3d 65, 76, 589 N.E.2d 640, 168 Ill. Dec. 240 (1992).
- LinkedIn Requests – In *Bankers Life & Cas. Co. v. Am. Senior Benefits LLC*, 83 N.E.3d 1085 (Ill. App. Ct. 2017), the Illinois Appellate Court held that generic invitation requests from LinkedIn were not solicitations in violation of the parties' agreement even though the recipient could choose to link to a job description.

Non-Competition Provisions

- For restrictive covenants regarding competition, there must be a legitimate business interest AND reasonable activity, time and geographic restrictions.

Courts look at several factors for reasonableness:

- Permanence of Relationships – How significant and developed are the employer's customer relationships?
- Confidential Information – What type of information did the employee have access to?
- Geographical Reach – Usually the restricted area should be coextensive with the area in which the employer is doing business.
- Activity Restriction – What types of activities are limited and do they relate to the former employee's position with the employer?
- Limited in Time – How long does the restriction last?
- Employee's Ability to Earn a Living – How does the restriction affect the employee's ability to work?

Consideration for Non-Compete Agreements

- There must be some type of consideration given to the employee in exchange for the employee's agreement to a restrictive covenant.
- Illinois may adopt bright-line rule when employment or continued employment is the only consideration given for the restrictive covenant:
  - In *Fifield v. Premier Dealer Services, Inc.*, 2013 IL App (1st) 120327 (2013), the Illinois Appellate Court held that any employment length less than two (2) years is not adequate consideration for a non-compete agreement, unless some other consideration was provided to the employee.
  - The standard has been followed by some courts applying Illinois law and questioned by others – the Illinois Supreme Court has not weighed in on this bright-line standard yet.
- Offering other consideration at the time of signing is recommended. Monetary consideration should not be nominal and should generally be proportional to the salary paid for the position.

Other Limits on Non-Competition Agreements

- Illinois Freedom to Work Act – Non-competition agreements with employees who earn $13.00 per hour or less are not enforceable as of January 1, 2017. If the minimum wage increases above $13.00, the minimum wage will be the new threshold.
- Labor Negotiations – In *Minteq v. NLRB*, 855 F. 3d. 329 (D.C. Cir. 2017), the Court of Appeals affirmed an NLRB holding that an employer committed an unfair labor practice under Section 8(a)(5) of the National Labor Relations Act by failing to notify and bargain with the union over the requirement that new employees sign a non-compete and confidentiality agreement as a condition of employment.

Enforcing Restrictive Covenants

- Selectivity – Be selective about which employees have such agreements. Ideally a restrictive covenant agreement is unique for each type of employee. For each agreement, the employee's position, access to confidential information, interaction with customers, and geographical location should be considered.
- Scope of Restrictions – A restrictive covenant should be narrowly drafted to protect the employer's legitimate business interest and no more. Employers should avoid trying to use overly broad restrictions which may be found unenforceable.
- Choice of Law and Venue – Because the enforcement of restrictive covenants varies by State, an employer should consider where the employee is located and where the employee performs work when proposing such an agreement. Every agreement should have venue, jurisdiction, and choice of law provisions when possible.

Enforcing Restrictive Covenants (cont'd)

- Attorney's Fees Provisions – Restrictive covenant agreements should hold the employee responsible for the employer's attorney's fees should the employer need to enforce the agreement.
- Tolling Provisions – Because litigation can take time, restrictive covenant agreements should provide that the time limitations do not run during a period of breach. This assures that the employer will get the full advantage of the restrictive covenant.
- Define the Terms "Customer" and "Solicit" – The terms "customer" and "solicit" and other important terms should be carefully defined so that it is clear who the former employee may not contact and what actions violate the parties' agreement.

Enforcing Restrictive Covenants (cont'd)

- Acknowledgements – Employers can include provisions whereby the employee acknowledges he or she has access to confidential information, the employer takes reasonable steps to keep its information and customers a secret, and that customers belong to the employer not the employee.
- Electronic Data Preservation – In order to prove that the employee has violated the agreement, it is often helpful to have evidence of the actions the employee took immediately before termination of employment. Confiscate and review computers and other technology immediately after separation of employment, and preserve such technology in case of a breach.

Common Pitfalls When Enforcing Restrictive Covenants

- Blue-Lining – A Court Can Find the Language Overbroad and Alter Restrictions
- Cost of Enforcement – Injunctive Relief Can Be Expensive
- Length of the Case – The Length of Case Can Exceed the Time of the Restriction
- Alienation of Customers – Customers Could Dislike Such Actions against Former Employees

Questions and Discussion

James M. Allen
Rockford
815-490-4922
jallen@hinshawlaw.com

Devin B. Noble
Rockford
815-490-4946
dnoble@hinshawlaw.com

Eileen M. Caver
Rockford
815-490-4936
ecaver@hinshawlaw.com