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Protecting Your Business from Start to Finish: Identifying Your Objectives When Using Restrictive Covenants in Employment Agreements.

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When hiring an employee, many employers do not think much about the newly hired employee's inevitable departure. However, in today's world, it is exceedingly rare for an employee to spend his entire career with one employer and it is more reasonable than ever to anticipate the employee's departure, even before he has worked his first day. By thinking through the potential ramifications of an employee's departure as part of the hiring process, a business can significantly enhance the protection of its customer base, its resources, and its valuable, confidential and proprietary information.

When an employer begins the hiring process, it should answer a few simple questions to ascertain the kinds of protection that are needed:

- What information will the employer make available to the employee?
- What is the employee's role with the employer?
- Where is the employee going to work?

By answering these questions, an employer can ascertain the components necessary to prepare an employment agreement that protects its interests, but which is also fair to both parties and will be enforced by the Courts.

The most common (yet most misunderstood) means to protect a company's investment in its employees, and its information and customer relationships, is through the use of restrictive covenants in employment agreements. Generally, such contractual provisions can be divided into four categories: covenants against competition; covenants against solicitation of customers; covenants against the use or disclosure of confidential information; and covenants against the recruitment of other employees. Although all of these provisions restrict what an employee can do following the end of his employment, each covenant has fundamental differences. This article will address only covenants against competition and solicitation; non-disclosure and non-recruitment covenants are beyond the scope of this article.

A covenant against competition is intended to protect the employer's investment in the employee and restrain competition by former employees. Such a provision can restrain the employee from providing competitive products or services to a client, regardless of who initiates the discussion. In contrast, a covenant not to solicit customers is more limited and is designed to protect the employer's customer relationships. A covenant not to solicit is intended to limit the employee's ability to affirmatively solicit the employer's clients in an effort to provide competitive services.

What Information Will The Employer Make Available to The Employee?

If the employer provides specialized training or imparts knowledge of highly competitive, technical, or sensitive information to the employee, the employer may be most concerned with limiting competition by the employee. Thus, a covenant against competition may be more beneficial to the employer. However, if the employee is primarily involved in sales, or another position where he does not receive such "special" information, the employer may be most interested in preserving the business relationships with its customers. In this instance, a covenant not to solicit may be sufficient.

Why not use both a covenant against competition and covenant not to solicit? While there are many instances in which doing so makes sense, using both is not always necessary or advisable. Georgia courts will enforce restrictive covenants as long as they are reasonable. If any portion of the covenant is found to be unreasonable, the entire covenant may be thrown out and declared void. Further, despite their fundamental differences, Georgia courts look at covenants against competition and solicitation as one. That is, even if the two different covenants are incorporated into two different contractual provisions in the employment agreement, if one covenant is declared unenforceable, the other will automatically fail, even if the other is not unreasonable. Thus, the more restrictive covenants at are included in an employment agreement, the greater the chance the employee may have to invalidate all of the covenants in his employment agreement, leaving the employer without protection.

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What Is The Employee's Role With The Employer?

The employment agreement should clearly identify the role the employee will play for the employer. For instance, if an employee will simply be an employee, but not an officer, director, shareholder or owner, the employment agreement should state this and the restrictive covenants should not prohibit the employee from serving in a capacity beyond that which the employee served for the employer. Additionally, if the company has many different types of positions, the employment agreement should specifically describe the position the employee is being hired for and, if, during the term of employment, the employee's position changes, a new employment agreement should be prepared to reflect the changes.

Importantly, over time, the employee's change in position and/or acceptance of new responsibilities may require the employer to reevaluate what it is seeking to protect – the knowledge imparted to the employee or the client relationships – and the employer's needs may change. Whereas a covenant not to solicit was originally appropriate, a covenant against competition may become more prudent, or vice versa. Thus, a new agreement should be executed to reflect these changes

Where Is The Employee Going To Work?

Both covenants against competition and solicitation require some variant of a territorial restriction. The employee must be able to ascertain, at the time he signs his employment agreement, what restrictions will be placed upon him when he departs. Once it is determined where the employee will work, the employer can then evaluate what restrictions are reasonable. Does the employee work in one location? If so, perhaps restricting post-employment competition or solicitation using a radius from a specified, fixed location, i.e., fifteen miles from 123 Main Street, Any town, Georgia 12345, might be appropriate. If the employee travels and visits many different locations, then a regional, geographic limitation, i.e. the States of Georgia, Florida and Alabama, may be appropriate. In either case, it is imperative that the territory reflect where the employee works for, or represents, the employer, not where the employer generally does business. If the employee switches to another office, or acquires (or losses) certain territories, a new employment agreement should be executed that adjusts the restrictions to accurately reflect where the employee truly works. Otherwise, the employer risks having the original covenants declared unenforceable.

One benefit of a covenant not to solicit is that, in some circumstances, a specific territory is not required. If the restriction on solicitation is limited to those clients with whom the employee had contact, and developed a business relationship, a territorial restriction is not required. That said, the covenant not to solicit should be limited to those clients the employer has a current or recent relationship with.

In summary, by answering a few questions when hiring a new employee, an employer can best determine what type(s) of restrictive covenants to put into the employment agreement and can seek to properly limit the covenants to accurately reflect the particular characteristics of the employment relationship. Then, if (or more likely, when) the employee departs, the employer should have proper, reasonable, and effective restrictive covenants in place to limit the employee's ability to harm the employer's competitive advantage.