



Non-compete, no-solicitation and confidentiality agreements

TODAY'S PRESENTERS



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Overview

- Restrictive covenants – agreements limiting activities by employees
 - Non-compete agreements
 - No-solicitation agreements
 - Confidentiality provisions
- Those potentially affected
 - Former employer
 - New employer
 - Employee



Overview *(cont'd)*

- Discussion
 - From new and former employer's standpoint
 - Whether and how these agreements are enforceable
 - What to do about these issues for departing employees or new hires



Defining the terms we'll be using

- Non-competition provision or agreement
- No-solicitation provision or agreement
- No-poaching provision or agreement



Multi-state challenges

- Enforceability governed by state law
- Where an individual works and resides
- Choice of laws provisions in contracts (may be disregarded)



Non-compete provisions or agreements

- Traditional non-competes are unlawful in Oklahoma
 - Exception: In conjunction with sale of goodwill of a business or dissolution of a partnership



Oklahoma law

- One of the strictest anti-non-compete laws
- A **statutory right** to engage in the same business
- Supreme Court of Oklahoma has confirmed Oklahoma's statutory prohibition of non-compete agreements
- Unlikely to circumvent Oklahoma's non-compete law with choice of law provision



Enforceability of non-compete agreements in other states

- To some degree, permit non-compete agreements
- Reasonableness standard
 - Valid interest to protect
 - Geographic scope of restrictions must not be overly broad
 - Reasonable time period



No-solicitation provisions or agreements

- No-solicitation agreements in Oklahoma
- Prohibiting a former employee from soliciting customers is enforceable if limited to **direct** solicitation of **established** customers
15 O.S. § 219A



Oklahoma law

- Requires narrow drafting of restrictive covenants
- May refuse to enforce a no-solicitation agreement if so broad that it includes non-established customers
- An agreement that prohibits the solicitation of “past clients or customers,” “all customers,” or “all customers with whom the employee dealt during his or her employment” may be unenforceable
- Best: Agreements tracking the “**direct solicitation**” of “**established customers**” language of 15 O.S. § 219A.



Enforceability of no-solicitation agreements in other states

- Majority of states allow no-solicitation agreements for customers and employees
- Analyze enforceability of no-solicitation agreements by applying same reasonableness test as they do to non-compete agreements



No-poaching provisions or agreements

- After the contract or particular project has concluded, the parties agree that they may not solicit for employment any person employed by the other party
- Examples:
 - Engineering consulting business working on a construction project
 - Joint venture between two companies



Federal law

- U.S. Department of Justice announcements in October 2016 and February 2018 – “Antitrust Guidance for Human Resource Professionals”
 - Triggering events: Apple, Google, Intel and Adobe
 - No-poaching agreements between companies (particularly between competing companies) violate the Sherman Antitrust Act
 - DOJ expressed intention to criminally prosecute



Federal law *(cont'd)*

- Distinction: “Naked” no-poaching agreement v. one that protects legitimate, pro-competitive business interests
 - Joint venture
 - Consulting relationship – not competitors



Federal law *(cont'd)*

- Distinction: Overly broad no-poaching agreement v. not an absolute prohibition against hiring
 - OK when initiated by employee
 - Hired through company's typical recruiting or search process, rather than being targeted



Confidentiality provisions or agreements

- Drafting tips:
 - Define confidential information
 - Identify owner of confidential information
 - Acknowledge access/use of confidential information
 - Prohibit certain use, disclosure of confidential information
 - Contact person for questions
 - Receipt/acknowledgment
 - If possible, obtain at commencement/transfer



Confidentiality provisions or agreements *(cont'd)*

- Other tips:
 - Educate the workforce
 - Group or individualized meetings
 - Opportunity to ask questions
 - Monitor and enforce
 - Guard against potential waiver
 - Training refreshers
 - Update policy



Onboarding new employees

- Inquire about obligations to previous employers
 - No restrictions on timing
 - Request and obtain copies of prior agreements
 - Review, advice of counsel



Onboarding new employees

(cont'd)

- Discuss expectations
 - If an NDA exists: No disclosure of previously obtained confidential information belonging to others
 - In writing
 - Reference preexisting agreements specifically
 - Consequences of disclosure
 - Monitor during employment
 - Notify supervisors of preexisting obligations
- Document discussion



What to do about departing employees

- Review agreements on file and remind departing employee of obligations
 - Discussion and in writing
 - Identify specific examples of confidential information
 - Identify consequences of noncompliance
 - Consider notifying new employer of existing agreement



What to do about departing employees *(cont'd)*

- Transition period? Possible to limit access/use during transition?
- Monitor electronic activities, ESI during last several weeks/months and during transition period
- Collect property and obtain certification of return
- Provide copy of signed agreements at time of termination



Action steps once the employee has departed

- Consider providing copies of agreements to new employer
- Monitor
- Take immediate action in the event of potential disclosure – cease/desist



What to expect when restrictive covenant disputes arise

- First: Cease and desist letter
- Brought by employers attempting to enforce restrictive covenants
- Former employee may bring a lawsuit
- New employer pays the employee's litigation expenses in fighting the enforceability of a restrictive covenant



Temporary injunctions

- Temporary injunction: Asking court to prevent the former employee from violating the restrictive covenant during the pendency of the lawsuit
 - Must demonstrate at the beginning of the lawsuit that you are likely to succeed on the merits
 - Difficult to convince a court you are likely to succeed in a lawsuit if the restrictive covenant at issue is clearly overbroad



Enforceability challenges

- Each case is fact- and agreement-specific
- Results can vary by court/judge
- Courts reluctant to “fix” agreements
- Agreement language is critical to enforcement
 - Non-solicitation agreements likely to be strictly interpreted
 - Emphasis on strong, clear and enforceable confidentiality provisions



Wrap-up

- Look at current practices
 - What restrictive covenants do you have in place?
 - Are they enforceable?
- Update your onboarding and departure processes
 - Make sure your company is addressing
 - Identify restrictive covenants
 - Ask incoming employees about their obligations to former employers
 - Remind departing employees of their obligations to you

