Noncompete and Confidentiality Agreements

The fast paced economy, high employee turnover, and changing notions of company loyalty have dramatically increased the risks of having intellectual property, confidential information, and customers walk out the door with ex-employees. An increasing number of companies are addressing these risks by developing (or enhancing) confidentiality policies and noncompete/ confidentiality agreements. The information provided below is for informational purposes only. **Noncompete/Confidentiality Agreements should be drafted by attorneys so they meet particular company needs and conform to relevant state laws. Unless applicable state law is followed closely, such agreements may be unenforceable.**

Under a non-competition agreement (or covenant not to compete) an employee agrees, as a condition of employment, not to compete with the employer after employment ends. Confidentiality covenants are generally also included in such agreements. In enforcing such agreements, courts must balance the company's need to protect its interests with the employee's need to make a living. Consequently, the documents must be very carefully drafted and the result is often a compromise between the conflicting interests of the parties.

A few issues to consider when implementing noncompete/confidentiality agreements:

- "Competition" must be carefully defined. Generally, such restrictions must be narrowly drawn.
- "Customers" or a "specific type of customer" must be clearly defined if customer relationships are to be protected.
- Goodwill (e.g., the good relationship an employee or company has with a customer) is an asset that belongs to the company. However, courts closely examine the nature of the employee's responsibilities and relationship with customers to determine whether goodwill is threatened.
- Key employees with significant responsibilities and/or regular customer contacts are more likely to be restrained from competing. Noncompetes for lower level employees are hard to justify.
- Confidential information must be clearly defined and identified. Only information that is "truly" confidential may be protected. Courts consider the importance of the information to the business, if the information is otherwise available to third parties, and what restrictions were implemented to prevent its disclosure. Be careful not to be over-inclusive in your definitions of what you consider to be confidential.
- Noncompete agreements must be supported by "consideration." In other words, the employer must give something to the employee in exchange for his/her promise not to compete. Hiring an applicant generally provides the necessary consideration. After employment has begun, additional consideration may be required, such as a "signing bonus," a promotion, or a pay increase. However, such agreements are stronger and more easily enforced if signed at the start of employment.
- Agreements must be negotiated in good faith and be restricted in time and geography. These concerns are particularly important in today's high tech environment where information becomes obsolete quickly and markets change daily. In some industries, one year can equate to several generations or an eternity.

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