

AVOIDING LITIGATION: USING NON-COMPETE AGREEMENTS TO PROTECT YOUR BUSINESS ASSETS



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PRESENTED BY

PilieroMazza Litigation and Labor & Employment Groups

Paul W. Mengel III, Counsel
pmengel@pilieromazza.com
(202) 857-1000



Nichole D. Atallah, Associate
natallah@pilieromazza.com
(202) 857-1000





OVERVIEW

- Enforceability of non-compete agreements and other restrictive covenants
- Why using a form agreement is a bad idea
- Using restrictive covenants as a proper shield
- When and when not to use restrictive covenants
- What to do when an employee violates an agreement
- Q&A



RESTRICTIVE COVENANTS

- What is a Restrictive Covenant?
- Restrains the ability to freely share information or compete
- Examples
 - Confidentiality
 - Trade secrets
 - Non-Competition
 - Non-Solicitation



RESTRICTIVE COVENANTS DISFAVORED BY LAW

- Subject to state law
- Restraints on trade
- Some states ban them altogether except under certain circumstances



RESTRICTIVE COVENANTS

A SHIELD NOT A SWORD

- Prevent “unfair” competition
 - Get in the way of the free market
- Must be narrowly tailored
- Protectable interest
 - Confidential information
 - Trade secrets
 - Good will
- The facts matter



RESTRICTIVE COVENANTS PURPOSE

- Minimize uncertainty
- Promote fair competition
- Deterrence
- Contractual remedy
- Protect yourself from loss of confidential information, employees, and customers



RESTRICTIVE COVENANTS CONSIDERATIONS

- Position and duties
- Access to confidential information/trade secrets
- Contact with the customer
- What forms will the agreement, if any, take?



RESTRICTIVE COVENANTS

ESSENTIAL COMPONENTS IN AN AGREEMENT

- One size does NOT fit all
- Consideration
- Substance of the restrictive covenants
- General contract clauses



RESTRICTIVE COVENANTS CONSIDERATION

- Something to trade for the agreement
- State law
- Continued employment



RESTRICTIVE COVENANTS

SUBSTANCE OF THE CLAUSE

- Use your “magic” words
- Narrowly tailor to protect a legitimate interest
- Geographic scope
- Customer-based
- Duration of restraint
- Extent of activity being restricted



RESTRICTIVE COVENANTS CONFIDENTIALITY AGREEMENTS

- Truly proprietary information
- NLRB considerations
- Broad terms (e.g. HR information, compensation information)



RESTRICTIVE COVENANTS TRADE SECRETS AGREEMENTS

- What is a trade secret?
 - Formula, pattern, program, compilation, device, method, technique or process that is used in one's business
 - Derives independent economic value from not being known to others



RESTRICTIVE COVENANTS

TRADE SECRETS

- **How to determine what is a trade secret**
 - **The extent to which the information is known outside of the employer's business**
 - **The extent to which it is known by employees and others involved in the business**
 - **The extent of measures taken by the company to guard the secrecy of the information**
 - **The value of the information to the business and its competitors**
 - **The amount of effort or money expended by the business in developing the information**



RESTRICTIVE COVENANTS NON-COMPETE AGREEMENTS

- Non-compete three part test
 - From the Employer's Standpoint - is the agreement no more restrictive than is necessary to protect the employer in some legitimate business interest?
 - From the Employee's Standpoint - not unduly harsh or oppressive in curtailing the employees legitimate efforts to earn a living
 - Sound Public Policy



GENERAL CONTRACT CLAUSES AND WHY THEY ARE IMPORTANT

- Protect you in case a court finds a provision unenforceable
- Blue pencil provisions
- Jurisdiction
- Venue
- Equitable relief



WHEN VIOLATIONS OCCUR PREVENTING LITIGATION

- Provide the employee with a copy of the agreement when leaving employment
- Counsel employee on post-employment obligations
- Provide a new employer a copy of the agreement
- Analyze new employment, what position, and line of business
- What is an acceptable outcome?
- Negotiating with employee/new employer



WHEN VIOLATIONS OCCUR REMEDIES AGAINST THE EMPLOYEE/NEW EMPLOYER

- Contractual remedies
- Common law torts
- Trade Secrets Act/intellectual property statutes
- Injunctive relief



WHEN VIOLATIONS OCCUR LITIGATION HAPPENS

- Deciding on timing and venue
- Injunctive relief
- Phases of litigation
- Managing the discovery process
- Expectations
- Dispute resolutions



WHEN VIOLATIONS OCCUR FAILING TO ENFORCE

- Failure to promptly enforce could be deemed a “waiver”
- Failure to promptly enforce could trigger other employees to breach
- Failure to consistently enforce



DEFENDING AN EMPLOYEE SUBJECT TO A RESTRICTION

- Tortious interference: Hooking you in
- Pre-employment measures
- Employment agreements
- Enforceability
- Finding out what they want



PROTECTING YOUR INTERESTS

- Identify the issues
- Be careful when you share information
- Use written agreements when appropriate
- Be cautious of the “trust me” approach
- Take prompt action to enforce your rights



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ANY QUESTIONS?

Thank you for joining us today.

If you would like to speak with Nichole or Paul about this session, please contact them at:

Paul W. Mengel III

Pmengel@pilieromazza.com

(202) 857-1000

Nichole D. Atallah

natallah@pilieromazza.com

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