Navigating Non-Competes: How to Protect your Business while Minimizing Legal Risk

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Agenda

I. Obtaining enforceable non-competes
II. Enforcing a non-compete without litigation
III. Enforcing a non-compete through litigation
IV. Hiring someone who has a non-compete agreement with the prior employer
I. Obtaining Enforceable Non-Competes

- Governed by state law
- Choose your law carefully
- Enforceable in Minnesota
- Include a forum selection clause
- Different types of agreements serve different purposes
I. Obtaining Enforceable Non-Competes

• Must be reasonable
  – Time and geographic area
  – But: Are geographic restrictions obsolete?
  – Scope of activity prohibited

• Must be supported by consideration
  – New employment sufficient
  – Continued employment usually not enough
I. Obtaining Enforceable Non-Competes

• What to do when your existing non-competes are unenforceable?
• One judge or decision could invalidate every one of your agreements
• Re-draft: new consideration can be a reduced obligation on the employee
• Risks in presenting new non-compete to employees
I. Obtaining Enforceable Non-Competes

• Tips for drafting:
  – Garden leave clause
  – Liquidated damages
  – Arbitration clause
  – Forfeiture clause
  – Judicial modification
  – Assignability
  – Survival clause
  – Notice provision
II. Enforcing a Non-Compete without Litigation

• To litigate or not to litigate
  – Costs, resources
  – Can you head off a problem before litigation is necessary?
II. Enforcing a Non-Compete without Litigation

• Remind departing employees of non-compete obligations
  – Provide the employee with a copy of the agreement
  – Collect all employer property
  – Investigate whether employee has any employer information or data
  – Sign a letter of continuing obligations
II. Enforcing a Non-Compete without Litigation

• Forensic computer analysis
  – Best for high-risk cases
  – Complete copy of employee’s hard drive
  – Can catch problems before they happen:
    • Real world example: Computer analysis revealed a departing employee had copied dozens of files onto a disc. Called former employee in, presented with evidence, employee confessed and returned files before any damage had been done.
II. Enforcing a Non-Compete without Litigation

• Reacting To potential violations
  – Time is of the essence
  – What harm has the employee caused?
    • Investigate the suspected activity
    • Interview co-workers
    • Consider permissible monitoring of electronic data
II. Enforcing a Non-Compete without Litigation

• Social media/technology’s impact on non-compete cases
  – Best evidence often found in emails, social media messages, and on hard drives
  – Forensic experts can recover “deleted” items
  – Customer names and contacts available to employees through LinkedIn and other social media sites
  – Many judges have come to expect some evidence of bad behavior if you want a TRO
II. Enforcing a Non-Compete without Litigation

• Non-Litigation Enforcement
  – Cease and desist letter
  – Letter describing obligation to preserve any documents or other evidence
    • May serve to intimidate former employees considering breaking a non-compete
  – Letter to new employer
III. Enforcing A Non-Compete Through Litigation

Preliminary Considerations:

• Cost
• Time
• Consistency
• Signaling
• Merits
III. Enforcing a Non-Compete Through Litigation

Taking the First Step

• Injunctive Relief
  – Temporary Restraining Orders
  – Preliminary Injunctions
  – You are filing a lawsuit
    • Irreparable harm
    • Success at trial
  – Your harm outweighs the other party’s harm
  – There are no public interest concerns

• Lawsuit for Damages
III. Enforcing a Non-Compete Through Litigation

• Who Can You Sue?
  – The Departing Employee
  – The New Employer

• Anticipate Counterclaims
III. Enforcing a Non-Compete Through Litigation

• What Can You Sue For?
  – Breach of the non-compete
  – Unfair Competition
  – Misappropriation of Trade Secrets
  – Tortious Interference with Contract

• Establish Goals
  – Protecting your information
  – Deterrence
IV. Hiring Someone Who Has a Non-compete Agreement With the Prior Employer

- Tortious interference With contract
  - Elements: knowledge, breach, procurement, without justification, damages
  - Ignorance is not bliss: ask whether the new hire has a non-compete
  - Don’t rely on new hire’s word: ask for a copy of the non-compete
• Even when new hire does not have a non-compete…
  – Don’t induce new hire to breach fiduciary duties
  – Don’t induce new hire to take/use confidential information
  – Do not elicit confidential information during interview
IV. Hiring Someone Who Has a Noncompete Agreement (cont.)

• Reasons the non-compete may not be enforceable:
  – Employer breach
  – No consideration
  – Employer failed to fully disclose terms of noncompete
  – Mistake
  – Unreasonable restrictions
  – No survivability/assignability language
  – Vague
  – Material change
IV. Hiring Someone Who Has a Noncompete Agreement (cont.)

• Building a defense
  – Get an outside legal opinion as to enforceability
  – Make a reasonable inquiry into all circumstances surrounding new hire’s non-compete
  – Put restrictions on new hire’s employment
  – Ask new hire to acknowledge limits
  – Forbid new hire from bringing anything from old employer
  – Instruct new hire not to solicit customers and employees before resignation
IV. Hiring Someone Who Has a Noncompete Agreement (cont.)

• Consider negotiating a resolution with old employer
  – Don’t have to wait to be sued
  – Consider sharing profits for duration of non-compete to avoid litigation
  – Consider buying out noncompete
  – Consider negotiating a list of customers that new hire can and can’t solicit (e.g., no legacy customers)
  – Consider agreement not to hire other employees from old employer for a period of time
IV. Hiring Someone Who Has a Noncompete Agreement (cont.)

• If you can’t negotiate a resolution… prepare for litigation
  – Be sure you have clean hands
  – Talk to new hire about indemnification, payment of legal fees, separate counsel, etc
  – Consider seeking declaratory relief
  – Consider getting customer cooperation
  – Consider what impact your position in the litigation will have on the enforceability of your own non-competes
Questions?

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