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“Tip of the Month”

Enforcing Non-Compete and Non-Solicitation Agreements

Employment agreement provisions can impose restrictions on an employee’s options following termination of employment. Non-competes traditionally follow one of two formats, (1) distance and duration, or (2) customer-based. Distance and duration might restrict the employee from working in the same industry, for example, within 20 miles of the employer’s location for a period of two years.

The customer-based restriction is sometimes called non-solicitation. The former employee shall not solicit the employer’s customers to work with a competing business. Non-solicitation provisions can also restrict the employee from enticing away the employer’s other employees to work elsewhere. Non-solicitation of customers is usually viewed as less restrictive than a distance-and-duration non-competes provision.

Employment restrictions are considered restraint of trade and are allowed only to the extent of the employer’s reasonable need to protect its business. Therefore, all employment restrictions are viewed with suspicion and closely scrutinized by the courts when employers try to enforce them. If the restrictions are too broad, the court will sometimes interpret them in a less restrictive way, and will sometimes throw them out altogether.

The former employee might try to work around the non-solicitation clause by having the new employer send out the email notice to all the customers, announcing that their favorite sales rep is now working for a new company. That way, it is not the former employee soliciting the customers. Then when the customers call, the competing company can refer those accounts to the new employee. Will that work?

No, according to the U.S. First Circuit Court of Appeals as stated in *Corporate Technologies, Inc. v. Brian Harnett and OnX USA, LLC*. In that case, the court found that the employee violated the non-solicitation terms of his employment agreement by serving the customers of his former employer on behalf of his competing new company. In addition to the employee’s breach of the agreement, the new employer was also found liable for interfering with a contract.

When enforcing a similar non-competes agreement, a lawsuit would likely be filed not only against the former employee, but also against the competing new employer. This approach adds leverage to the enforcement lawsuit. Tortious Interference with Contract Rights and Advantageous Relations is how the matter would be characterized in the complaint filed by the former employer against the new employer.

The complaint would also allege breach of contract by the former employee. It would seek injunctive relief and damages. An injunction is a court order that would prohibit the defendants from violating the non-solicitation provisions of the employment agreement. Damages might be awarded to the extent of business lost to the new employer.

If you need help with employment contract questions, give us a call at 668-1971 or contact us by e-mail at [mailbox @ biz-patlaw.com](mailto:mailbox@biz-patlaw.com).

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