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Missouri Employers Need to be Careful in Drafting Non-Competes

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Noncompete agreements?and their enforceability?have been making headlines lately. While Missouri courts continue to generally enforce properly drafted and reasonable non-compete, non-solicit and non-disclosure agreements, Missouri employers are facing new challenges to such agreements where the employee works outside Missouri in employee friendly states and where the non-compete or non-solicit agreement specifies a choice of law other than Missouri law.

Mindful of perceptions that non-compete agreements can stifle competition and could make it difficult for employees to find other employment during a slow economic recovery, lawmakers in several states have shown they're ready to limit the use of non-compete agreements. States such as Massachusetts, Minnesota, New Jersey, and Virginia have considered legislative routes to limit their use.

Most recently, an **Illinois appellate court** drew attention by adopting a requirement that new hires placed under a noncompete agreement be employed for at least two years be-fore it becomes valid (unless something else of value is given in exchange for the non-compete). The **Illinois Supreme Court** did not overrule the court's decision. Therefore, there is some danger that other states may require that employment continue for a similar length of time before it will enforce a non-compete agreement. If that happens, it would place further restraint on your ability to restrict former employees from certain competitive activities.

Read further to learn what restrictions on non-compete agreements are being enacted by legislatures and courts across the country and what steps you can take to avoid these restrictions if you have employees in other states, if your non-compete agreements incorporate the law of a state other than Missouri or if Missouri follows the trend in some other states to restrict non-compete and non-solicit agreements. We have also included some drafting hints that apply to Missouri employers drafting non-compete, non-solicit and non-disclosure agreements for employees working in Missouri under agreements that apply Missouri law.

Spirit of contract law

Noncompetes and other restrictive covenants strike a delicate balance between employers' interests?protecting confidential information and institutional knowledge, preserving hard-won

customer and client relationships, and incentivizing key talent to remain loyal?and employees' interests in maintaining work mobility and the freedom to command competitive compensation for their skills.

Because different employers (and employees) have different interests to protect, such agreements may come in a variety of forms. The truest form may restrict direct competition, while other restrictive covenants may assign rights to intellectual property, prevent solicitation of clients, customers, and coworkers, and protect the confidentiality of trade secrets and confidential information.

Subdivisions?state law differences in enforcement

The law surrounding noncompetes varies widely from state to state. Some states' laws are more protective of employee interests since, arguably, the employee has less bargaining power and is not able to negotiate employment free from a non-compete or non-solicit agreement which meant that it may be difficult for the employee to find alternative employment.

Some states, such as California, Colorado, North Dakota, and Oklahoma, either prohibit noncompetes completely or restrict their use to very limited circumstances, such as the sale or dissolution of a business or partnership. Other states, such as Alabama, will allow them when they're appropriately limited in time and scope yet still prohibit their use for certain classes of employees, e.g., professionals such as doctors and lawyers. All states that permit the use of noncompete agreements require them to be reasonable and generally restricted to what is necessary to protect legitimate business interests.

In addition, state laws differ on how courts will approach unenforceable, overly restric-tive provisions of a contract. In some states, courts will "blue-pencil" or simply strike unenforceable language from the contract and leave the rest of the agreement intact. In other states, including Missouri, courts will often reform or revise the non-compete contracts, substituting or even rewriting the invalid language by narrowing it to more reasonable and enforceable restrictions. In the worst-case scenario, some courts will declare the entire agreement invalid if it is overbroad in some area. Also, courts in Missouri and in some other states have the power to refuse to enforce an overbroad non-compete agreement or to refuse to award attorneys’ fees that are provided for in the contract if the employer’s non-compete agreement is unreasonably overbroad and unenforceable.

Grace under pressure?tips for drafting effective noncompetes

Though noncompetes are most common among executives and sales professionals, their use has expanded to a range of positions in technology, medicine, and other industries. Some of you may not need a non-compete agreement or may need one only for a select group of employees, such as top managers and sales people. Other employers will need only an agreement to prevent former employees from soliciting customers or co-workers. Many of you may need only an agreement to prevent employees from taking confidential and trade secret infomation. If you believe a non-compete, non-solicit or non-disclosure agreement may be appropriate for some or all of your employees, consider the following tips:

- Territories: Check state law in the areas in which you do business. First, you must ensure that such agreements are valid and enforceable in the states in which you do business.

- If you operate in multiple states, you may be able to specify a choice of law in the contract that would be favorable to enforcement of the non-compete agreement. As a general rule,

Illinois non-compete law is less favorable to employers than Missouri non-compete law, and Kansas non-compete law is more employer friendly than either Missouri or Illinois non-compete law.

- Consider not only a favorable choice of law provision but also a choice of venue provision (meaning you specify the court in which any action to enforce or challenge the non-compete agreement). Some states will enforce these choice of law and choice of forum provisions and some states will not. Missouri generally en-forces both. Enforcement sometimes depends on the connection that the employee has to the state whose law is specified or whose court is chosen as the place where a lawsuit over the non-compete must be filed.

- Something for nothing: Consider your consideration. For a contract to be enforceable, there must be consideration?in other words; something of value must change hands in return for the security the employer has gained with enforcement of the noncompete. In some states, including Missouri, employment itself (or continued employment) has been held to be adequate consideration?that is, "If you sign this agreement, we'll start/keep paying you." But as the Illinois appellate court decision has demonstrated, some courts may require continued employment to last for a certain period of time or for a reasonable period of time.

Addressing consideration is particularly important if you're attempting to intro-duce a noncompete agreement during the course of employment. Generally, a bonus, pay increase, severance payment, or promotion will be acceptable consideration. Seek legal counsel to help you formulate the best plan for your organization if you are instituting non-compete or non-solicit agreements. You want to be careful not to inadvertently cause your best sales employee to quit rather than sign a non-compete agreement, but that same individual might sign such an agreement in return for a raise or bonus.

- Free will: Don't be overly restrictive. The "reasonableness" of a noncompete agreement will be a key factor in determining its enforceability. Whether an agreement is reasonable can depend on factors such as the duration of the non-competition period, the geographical area covered, and the activities deemed to be competitive. Courts are more likely to enforce a prohibition on soliciting customers than it is to enforce a prohibition against working in an industry. If your agreement prevents a former worker from soliciting customers and clients, be careful. If you restrict the employee from soliciting your entire customer base, a court might find the restriction overbroad if the employee never had any contact with some of the customers or if the customers are located in a state where the employee never worked. A court is more likely to enforce a non-solicit agreement that restricts an employee from soliciting customers with whom the employee built a relationship during his/her time with your company.

- When drafting such agreements, don't just assume that more is better and don’t assume that a court will automatically narrow and then enforce an overbroad agreement. If a noncompete agreement would make it extremely difficult for your employee to engage in her profession upon leaving your company, then your agreement probably won't hold up to review.

- Similarly, don't apply blanket non-disclosure provisions to employees who may not actually have access to any confidential information, trade secrets, or intellectual property. On the other hand, consider whether secretarial and other administrative staff in your organization have access to trade secret and confidential information -- the disclosure of which to a competitor could be very damaging to your business.

- Consider whether to restrict your employees from soliciting not only customers but also co-workers. It is bad enough to lose several customers, but it could be much worse to lose several key salespersons.

- Consider requiring the employee to pay reasonable attorneys' fees if the non-compete or non-solicit or non-disclosure agreement is breached.

- Consider requiring a departing salesperson or manager who has a non-compete or non-solicit agreement to notify you if he takes a job with a competitor within two years of his departure from your organization.

- Consider whether you have any independent contractors with whom you do busi-ness who should be subject to non-disclosure or non-compete agreements and determine whether such agreements are enforceable in the states where you operate. In Missouri, there is some legal authority that supports the use of non-compete agreements with independent contractors and numerous cases where in-dependent contractors can be required to comply with non-disclosure agreements.

- Cut to the chase: Be explicit. Along the same lines, noncompetes should be clear about the type of behavior that is being restricted. What is the legitimate business interest you're trying to protect? If your main concern is losing confidential information or trade secrets, spell that out (of course, without revealing the confidential information in the agreement). Recall that some states will hold noncompetes valid only under certain limited circumstances, so if your agreement is vague and it's at all unclear whether it falls under those circumstances, it may be invalid. Also remember that any ambiguity in the agreement is likely to be construed in favor of the employee since you the employer drafted the agreement.

- Armor and sword: Consider arbitration clauses. The **Federal Arbitration Act (FAA)** supersedes conflicting state laws, which means that a valid arbitration clause in an employment agreement will place resolution of disputes over the agreement in the hands of an arbitrator rather than a court. Particularly in states that greatly limit the enforceability of noncompete agreements, arbitration may often result in a more favorable outcome in the event of a contractual dispute. However, bear in mind that if you need to get a quick injunction (an order from a court that the employee stop competing or stop soliciting your customers or stop using or disclosing your confidential information), the horse may be out of the barn before you can get an arbitrator appointed, and an arbitrator has limited powers to enforce any order she/he may enter directing an employee to cease competing with your organization.

Double agent: Hiring an employee under a noncompete?

Finally, consider that the same laws that apply to protect the interests of employees also protect employers that wish to hire them. If you're considering an applicant who is under a noncompete agreement and it seems overly broad or restrictive, it may be unenforceable. If the employee would be a significant asset to your company, you may wish to consult with a non-compete lawyer who can review the restrictions. Similarly, be careful in hiring employees who are subject to non-compete and non-solicitation agreements because your organization could be sued for tortious interference by the former employer if you hire an employee who you know is subject to a non-compete agreement and you know that the employee will be breaching that agreement if he or she works for you. We strongly recommend that every new employee be asked if he or she has any type of non-compete or non-

disclosure agreement and then have that agreement reviewed by your counsel before you hire the individual.

Obtaining counsel familiar with non-compete laws in the states where you operate is important if you want an enforceable non-compete agreement. Remember that your trade secrets and customer relationships can be among your organization’s most valuable assets.

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