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Overview

Considerations for employers on the use of post-termination non-competition and non-solicitation restrictions in employee agreements, which are subject to an evolving and complex mix of individual state laws and seemingly imminent federal oversight.

Contents

Companies invest significant resources to develop unique technologies, products, services, client relationships, and industry expertise. A company's strategic implementation of restrictive covenants, such as non-competes and non-solicits, can

be a useful tool to protect its investments in these areas. This article provides a basic guide for employers considering non-competes and non-solicits and is intended for informational purposes only. It does not constitute legal advice, and readers are strongly encouraged to consult with a qualified legal professional to address specific legal concerns.

Non-Competition Restrictions

A non-compete is an agreement between an employer and an employee that limits the employee from working for a competitor and/or engaging in competitive activities for a specified period, such as:

- During the term of employment (a “during-term non-compete”); or
- For a specified period after leaving the company (a “post-termination non-compete”).

Non-competes can play a critical role in protecting a company’s business interests by preventing former employees from using any confidential information, trade secrets, or goodwill acquired during the tenure of their employment. It is particularly prudent for start-up companies to consider including non-competes when hiring a new employee, because many start-up employees gain access to material proprietary information, such as the company’s core intellectual property and trade secrets.

Post-Termination Non-Compete Enforceability Considerations

The enforceability of non-competes generally depends on state law. While non-competes during the term of employment are enforceable in most jurisdictions, several states have enacted regulations banning or otherwise limiting the enforceability of post-termination non-competes. California, Oklahoma, South Dakota, and Minnesota all ban non-competes. All other states allow, but limit the enforcement of non-competes. In these states, the law will not enforce overly-restrictive agreements that clearly go beyond what is reasonably necessary, and the law will generally permit only non-competes that are reasonable in time and scope, and that are necessary to protect the employer’s legitimate business interests, such as confidential information, trade secrets, and goodwill. Some states restrict non-competes to highly-compensated employees (e.g., Illinois, Colorado, Maryland, Virginia, and Washington), and some impose other unique requirements on employers (e.g., Massachusetts, which requires additional compensation to employees subject to non-competes).

On December 14, 2023, we reported on new California laws that (1) require employers to notify certain employees of post-termination non-compete provisions in

their employee agreements, and (2) invalidate post-termination non-competes imposed on California employees, regardless of where or when they were signed. See, e.g., *Navigating California's New Non-Compete Laws*.

Employers who include invalid non-compete provisions in employment agreements, or pressure workers to sign an agreement that includes an invalid non-compete, may be liable for civil penalties and the worker's alleged damages and attorneys' fees (e.g., California, Virginia). In rare circumstances, pressuring a worker to sign such an agreement may even constitute a criminal offense (e.g., Colorado). Employers who attempt to enforce invalid non-competes may be liable for civil penalties and fines, as well as the worker's damages and attorneys' fees (e.g., Illinois, Virginia, Washington).

Given the complex and ever-changing nature of these regulations, it is important for employers to consult with experienced counsel to ensure compliance with current laws before including non-competes in any employee agreements.

Drafting Non-Competes

To maximize the enforceability of post-termination non-competes, they should be carefully drafted and considered with the assistance of counsel. As a general rule, non-competes should:

- Cover the scope of prohibited activities in a narrowly-tailored manner to protect legitimate business interests only;
- Limit the scope of the restriction to reasonable timeframes and geographic boundaries;
- Include reasonable tolling provisions that suspend the restrictive period in the event of any violation by the employee;
- Establish remedies for the company, such as monetary damages, injunctive relief, and possibly attorneys' fees;
- Implement notification provisions that require departing employees to disclose their new employer and position;
- Include company-favorable choice of law and venue selection clauses;
- Be drafted in a manner maximizes enforcement and to benefit from the "blue-pencil" doctrine that allow courts to modify or re-write unenforceable portions of the non-compete; and

- Account for and comply with state law applicable to the Company and employee.

Non-Solicitation Restrictions

Non-solicits present a less-restrictive alternative to non-competes, and are more likely to be enforced by courts. Non-solicits generally forbid employees from approaching other employees, clients, customers, vendors, or business partners of the employer with the intent to hire, retain, or establish business relationships with them. Non-solicits can cover a variety of activities, including direct solicitation of business, encouraging clients or customers to move their business away from the employer, or recruiting former colleagues to join a new employer or venture. Note, however, that some states, like California, consider client and customer non-solicits to be a form of a non-compete prohibited under state law.

Post-Termination Non-Solicit Enforceability Considerations

State laws governing post-termination non-competes vary by jurisdiction, and the enforceability and interpretations can be nuanced. In most jurisdictions, restrictions on solicitation of clients or customers are subject to legal scrutiny similar to that of non-competes. Some states, such as California, also view employee post-termination non-solicits as anti-competitive and prohibitive. Given the enforcement uncertainty, employers typically opt out of including employee post-termination non-solicits in employee agreements governed under California law. Whereas, other states view non-solicits more favorably than non-competes since a non-solicit does not outright restrict an employee from taking a particular job, but instead merely limit their actions in the new position.

While non-solicits are generally enforceable and not as heavily regulated as non-competes in most jurisdictions, employers should ensure that non-solicits are carefully drafted to protect legitimate business interests and do not create a broad “no-hire” or “no-poaching” agreement that may violate federal or other state laws.

Recent Trends: State and Federal Regulations

The last decade and a half have seen an unprecedented surge of state legislative activity regarding non-competes—an area of the law that had traditionally been governed mostly by court decisions. Since 2011, 30 states (and Washington D.C.) have enacted legislation limiting the use and/or enforcement of non-competes. Many other state legislatures are considering such measures. Gunderson Dettmer actively tracks and periodically reports on such legislative changes. See, e.g., *2024 Salary Thresholds and Notice Requirements for Non-Competition and Non-Solicitation Provisions in Employment Agreements*.

Further, as of February 2024, several federal agencies are advocating nationwide restrictions on non-competes, and similar legislation has been introduced to the U.S. Congress. We reported on several of these developments in 2023. See, e.g., *FTC Proposes Nationwide Ban on Post-Termination Non-Compete Agreements* and *Update Regarding Non-Competition Agreements – FTC, NLRB, AND STATE LEGISLATURES*.

Conclusion

The legal landscape surrounding non-compete and non-solicit restrictive covenants continues to evolve. It is important for employers who are considering using these types of agreements with their employees to discuss with counsel to ensure compliance with state and federal laws. Please reach out to your Gunderson Dettmer attorneys if you have any questions or to discuss further.

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