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"RESTRICTIVE COVENANTS"

by

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In this world of outsourcing, questions and challenges to the legality and enforceability of non-compete agreements run rampant.

Fundamentally, Pennsylvania is known and recognized as an "at-will" employment state. That is, an employee's employment is considered to be at the will of the employer. More specifically, absent an agreement otherwise, employers are free to terminate an employee with or without cause (i.e., at will), at any time provided doing so does not violate any public policy/laws (i.e., discriminating on the basis of race, creed, color, gender, age, etc.). As a general proposition, Pennsylvania courts disfavor non-competes, otherwise known as "restrictive covenants", as they inherently restrict the ability of an individual to work freely in their respective trade or profession. At the same time, courts have recognized the legitimate needs of employers to protect their interests. Accordingly, restrictive covenants are generally enforceable so long as they are entered into in connection with a new employment relationship or in connection with the sale of a business, and meet standards of reasonableness with respect to time and geographic scope.

Clearly, businesses/employers have a legitimate interest in protecting themselves from employees who are under the misguided belief that they may have some personal proprietary right or interest in the relationships they have developed and information they have learned in connection with their employment. To the contrary, Pennsylvania common law (case law) supports an employer's right to protect its confidential and proprietary information, including without limitation customer lists, vendor lists, contacts, pricing information, marketing plans, etc…whether or not restrictive covenants are in place. Those rights are enhanced dramatically under contract law when reduced to writing between an employer and the employee/independent contractor.

Timing is a critical aspect in the enforceability of the restrictions. Specifically, in order to be effective, the restrictive covenants must have been entered into prior to or contemporarily with commencing the employment relationship. Otherwise, there must be additional consideration paid for the employee giving up his/her right to compete in the future. The mere

continuation of employment is insufficient to satisfy this requirement. On the other hand, courts have held that as little as $100, continued employment and the right to two weeks of severance or notice prior to termination will suffice.

When measuring the reasonableness of the time element, employers should ask themselves how long it would reasonably take to replace the employee with a new person and bring them up to speed in that position to effectively eliminate the vulnerability associated with the former employee's departure. Likewise, in measuring the reasonableness of the geographic scope of the restriction, the area should reasonably reflect the territory relevant to the employer's business. Obviously, the shorter the term and the smaller the territory, the safer you are. Infinite time and/or worldwide scope will not fly in court.

Perhaps the most clear cut application of the non-compete is in connection with the sale of a business. Obviously, a buyer of your business will not subject itself to the risk of parting with good money for your good will, only to risk facing the prospect of your opening up across the street. Thus, courts are generally more lenient in connection with purchase and sale oriented restrictions than they are in connection with employment based restrictions. Likewise, the bigger the deal and the higher the level of employment, the stronger the likelihood of enforcing broader restrictions.

From the employee perspective, restrictive covenants may appear daunting, to say the least. Nonetheless, employees must weigh the benefits of the employment opportunity against the future restrictions they may face. In some instances, what the employee brings to the table may completely outweigh the ultimate concerns to management. On the other hand, more often than not, the employer makes all of its proprietary information available to its employees and thereby justifies the restrictions. In some situations, the parties are willing to negotiate and tailor the specific restrictions to be imposed in order to protect the interests of all parties. Regardless, it is critical that the parties address and resolve these issues in advance of commencing the employment relationship.

Realize of course that only <u>proprietary</u> information and skills can be restricted – i.e., a "non-compete" purporting to prevent a burger-flipper from McDonalds from taking a job at Burger King won't be enforced – nor one keeping a plumber from plying his trade elsewhere – compared to management level employees, salesmen with client contact information in their heads, etc.

On balance, restrictive covenants are important tools to owners and management in protecting their business interests. When properly drafted and implemented they will be enforced.