Restrictive covenants and legally protecting your business in a tight labor market

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With unemployment in the United States continuing at a historic low – reported at 4 percent last month by Trading Economics – employees are more mobile than ever. A consequence of employee mobility is the unauthorized "mobility" of a company's business assets with those employees. Now more than ever, employers must look to protect their business assets from unfair competition through the use of reasonable restrictive covenant agreements. However, a restrictive covenant agreement is only as good as it is legal. It is imperative in using restrictive covenants to recognize the fundamentals in drafting a legally enforceable document.

The nature of these covenants can range from benign to more stringent depending upon the protectable business interest involved. For example, a confidentiality agreement may be sufficient for a certain level of employee who has minimum business contact with customers and clients. In contrast, a reasonably crafted non-competition and non-solicitation provision may be required for those employees with more customer interaction and greater access to business data such as executives and sales managers.

It is critical for an employer to identify the legitimate business interest(s) that is/are to be protected as the first step in drafting an appropriate covenant to protect that interest(s). Typically, these interests fall into two categories: confidential, proprietary and trade secret information and customer and client goodwill.

Once those interests are specifically identified, an employer is then able to draft reasonable restrictions to protect each from unfair competition. The standard tools used to protect those interests are as follows, from least restrictive to most:

1. Confidentiality Agreement
2. Non-Solicitation Agreement (both as to employees and customers)
3. Non-Competition Agreement

For the appropriate level of employee, all three of these components will often be included in a single agreement. To ensure that an agreement is enforceable, an employer must also give consideration to the scope of the geographical and time limitations of the restrictive provisions. Indeed, enforceable time and geographical limitations, among other components, can vary based on the interest being protected and the applicable state law – which includes the very legality of any type of restriction provisions at all. In drafting an enforceable restrictive agreement, it is definitely not one-size-fits all. With an organization's business assets at risk, designing a legally permissible restrictive covenant program that is best suited to an organization's needs requires proper counsel.

The first step for any employer in this process is identifying their protectable interests. McDonald Hopkins has developed a unique initial client intake questionnaire that helps identify the necessary protectable interests, geographical footprint and other relevant data to tailor a legally enforceable agreement that protects your organization against unfair competition. We have experience in developing comprehensive restrictive covenant programs across the country and litigating to protect employers' interests. Contact the attorney below for questions on protecting your organization's most valuable business assets.

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