

## Members Quarterly

Spring 2015 Edition

## Feature

# Is Your Organization Truly Protected?

*Use caution with post-employment restrictions and obligations policies*

In today's competitive business environment, an increasing number of companies are directing their attention toward safe-guarding their business interests from the potential competitive threat posed by their departing employees. To assess the appropriate approach on this issue for your organization, it is important to understand the basic applicable law as well as options and proactive approaches for additional protection.

**The Basics****Confidential Information**

All Employees are, at common law, required to keep the "confidential" information of their employer confidential both during their employment and post-employment. This obligation of confidentiality applies automatically to all employees without the need for any specific policy or agreement.

**Competition/Solicitation**

Generally, at common law, employees are not restricted from competing against former employers or even soliciting a former employer's clients or employees to their new competing venture. The exception to this is for "fiduciary" employees. Traditionally, the legal test for a fiduciary employee is a key employee that is part of the "operating mind" of the employer. In other words, when the employer sits down at the highest levels to make decisions, the employees at that table with input are viewed to be fiduciary employees. The additional obligations and restrictions on a fiduciary employee post--employment are that fiduciary employees are prohibited from soliciting the clients or employees of their past employer for a reasonable period. While case law varies on what the reasonable period is, the vast majority of the case law places this -reasonable period at no less than six and no more than twelve months.

**Proactive Tools for Employers****Confidentiality**

The difficulty in applying the general confidentiality rule is determining what knowledge acquired by the employee is "confidential" and subject to protection for the benefit of the employer. While various Court decisions provide some assistance in this regard, an element of uncertainty exists.

An effective tool to reduce the risk arising from uncertainty on the scope of confidentiality is to clearly express in writing to employees key items and types of information within the scope of confidentiality. This can be accomplished with something as simple as a letter or memo to employees reminding them of their general obligations of confidentiality and listing specific items



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of confidence and importance; or can be as clear, express and specific as a formal confidentiality agreement signed by both parties. The bottom line is that the underlying purpose of either approach is to clearly communicate to the employee specific items which are confidential to prevent the employee from later arguing that the items were not confidential or that they did not understand them to be so.

#### **Non-Competition and Non-Solicitation Agreements**

An employer may also wish to utilize non-competition and non-solicitation agreements to further minimize the potential threat associated with departing employees. A non-competition agreement prevents an employee from competing with the employer, either by working for or establishing a competing business, for a certain period of time and within a certain geographical boundary following termination of employment. A non-solicitation agreement prohibits the departing employee from soliciting clients and/or employees of the prior employer for a specified reasonable -period of time.

It is important to understand that, in the employment context, the Court has stated that they will presume such restrictions to be void, as restricting an employee's opportunity for further employment or self-employment is contrary to the public interest. As a result, an employer attempting to enforce these provisions must refute the Court's initial presumption of invalidity by establishing the employer's compelling need for the restriction; and that the restriction was drafted as narrowly as possible to protect the employers interests while still allowing the employee reasonable flexibility to obtain further and alternate employment and income. Another key factor is that there must be real and significant consideration to the employee at the time the employee agrees to the non-competition and/or non-solicitation agreement. Simply approaching the employee in the middle of their employment and asking them to sign an agreement will unlikely be enforceable even if they do sign. These provisions are best enforced when they are contained within the employee's initial offer of employment or clearly contained in an offer of promotion within the organization. A detailed discussion on enforceability and appropriate content of these clauses is beyond the scope of this article. However, here are some key tips to assist with the enforceability of such clauses:

Non-solicitation restrictions are generally more likely to be enforceable than non-competition.

Careful attention should be paid to ensure the clause still reasonably allows the employee to pursue reasonable alternate income and employment.

The presumption of invalidity of such clauses only applies within the employment agreement. If there is an opportunity to introduce such clauses within the context of a company purchase and sale agreement, the ability to enforce such clauses is dramatically improved within that context as opposed to the employment agreement.

We strongly recommend that employers who decide to utilize non-competition or non-solicitation agreements obtain prior legal advice to ensure that the form of the agreement is clear, appropriate and enforceable.

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