New York Law Journal
GC New York
WWW.NYLJ.COM
An ALM Publication
VOLUME 250—NO. 52
THURSDAY, SEPTEMBER 12, 2013

EMPLOYMENT COVENANTS

Proactive Strategies to Reduce Post-Employment Covenant Risks

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While many people hired in today's market are subject to some post-employment covenants, that doesn't mean an employee subject to restrictions presents any more of a litigation risk than a contractually unrestricted new hire. If problems arise, they often occur because of a lack of clear communication, misunderstandings regarding what property is (or is not) owned by a former employer or simple but avoidable mistakes in the departure process. This article will focus on strategies aimed at reducing the likelihood that a lawsuit will be included with the new hire's onboarding paperwork.

The Basics

Restrictive employment covenants take several forms and include covenants restricting the use or misappropriation of confidential information, soliciting employees to join a new employer, soliciting a former company's clients or customers, and those that outright ban employment with a competitor. Unlike most private contractual provisions which, absent extraordinary circumstances, will typically be enforced by the courts without question, a restrictive covenant will only be enforced in New York if a court deems it "reasonable." In this context, "reasonable" means the covenant (1) is no greater than is required to protect an employer's legitimate interests, (2) does not impose undue hardship on the employee, and (3) does not injure the public.[1]

But whether or not a covenant is reasonable is beside the point absent proof that its enforcement is necessary to forestall unfair competition: An employer only has a "legitimate interest" in protecting itself from competition that is unfair, not competition generally.[2] While unfair competition may appear easier to establish when an employee joins an enterprise competitive with his or her former employment, other interests may also satisfy this standard, such as proof that an employee's new position poses a substantial or documented risk of disclosure of confidential or proprietary information or trade secrets, or proof of the poorly understood and sometimes misapplied "unique" or "extraordinary" services analysis.[3]

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Advance planning within this framework may mitigate or even reduce prospective liability when hiring an employee subject to post-employment covenants, whether that liability threatens the newly hired employee or the new employer. Here is some practical guidance for employers (and employees), which may be useful in avoiding—or at least mitigating—claims that an employee (or the new employer) committed or contributed to a restrictive covenant's breach.

Practical Guidance

Hiring is a two-way street. The employee hired today is the employee who resigned—or someone else fired—yesterday, and who may be an ex-employee tomorrow. As a result, employers should treat the playing field as level. The hiring practices an employer puts in place today are the departure guidelines for the former employee tomorrow. It is a true mutuality of obligation.

Leave the Family Photos on the Desk. An employee who removes digital or tangible property from a prior employer tempts a finding of legitimate protectable interest because if property is valuable enough to be removed, perhaps it is valuable enough to warrant confidentiality or trade secret status to merit legal protection. While clearly there are circumstances where an employee means an ex-employer no harm when materials leave the workplace, removing information, particularly digital information which, these days, leaves heavy evidentiary fingerprints regardless of its transitory nature, is bad practice. Employees who remove property belonging to an ex-employer may not only be violating the rights of the ex-employer, but those actions may reflect poorly upon them.

One approach to this issue is to instruct prospective employees, at the time a job offer is made, that he or she should bring nothing from their former job—including the family photographs on their desk. The latter gesture, while it might seem extreme, is an effective way to communicate to the prospective employee and his or her soon-to-be former employer that the employee will take absolutely nothing

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when leaving a job. While no employer would seemingly dispute that family photographs or other clearly personal effects are proprietary or even remotely business-related, the instruction provides excellent evidence of intolerance to misappropriation and respect for a former employer's property rights.

Housecleaning Obligations. The corollary to prohibiting an employee from removing property from a former employer is the direction to return an employer's property that may have found its way into an employee's home, car, or personal electronic devices. It is becoming an increasingly common litigation tactic to ask for a forensic review of an individual's personal electronic devices.

While not all courts are amenable to such requests, the far better approach, if such information exists, is to notify the former employer that such information exists and to ask for instruction as to its removal.[4] Prospective employees should be instructed that if they return any tangible material, they should do so in a manner that tracks its return to avoid any claims that the materials were not returned, and instead were retained—which may lead to the inevitable allegation in the ensuing litigation of intentional misappropriation.

Darn You Autocomplete and the Social Media Effect. A cardinal rule for prospective employees leaving one employer for another is a simple one: Don't lie about your new job. Making false statements about an employee's new position may be twisted in litigation to make the employee look guilty where guilt is unjustified. And in this day and age, there is no hiding a new position, though legitimate concerns exist around disclosing that certain officers are on their way in (or out of) leadership positions at public companies.

Starting a new job is fodder for social media, and LinkedIn, Facebook and Twitter may electronically advertise that fact instantaneously, whether or not the employee affirmatively acts to communicate it. And technology is making it easier to unmask an employee's activities—simple things like autocompletes of addresses in electronic mail may unwittingly provide the old employer information about the employee's new activities. Employees should consider how and when to communicate a new position to their friends and colleagues and plan the communication to their existing employer in advance of those communications.

Don't Make Covenants the Subject of Casual Conversation. The attorney-client privilege protects a client's confidential communications between clients and lawyers if the purpose of the communication is to seek and deliver legal advice. The privilege may not extend to communications among businesspeople concerning hiring or other business topics, even if an attorney happens to be incidentally (or conveniently) copied on a communication chain.

Obtaining legal advice prior to hiring an employee subject to a restrictive covenant is not only wise but highly desirable. But it is best to leave the legal pontification to the lawyer—chatter among businesspeople speculating about this topic is unhelpful at best and potentially harmful at worst. Businesspeople should be instructed not to communicate about a prospective employee's restrictive covenant, unless the purpose of the conversation is to obtain and implement legal advice.

Fit the Position to the Restriction. An overbroad covenant does not serve a legitimate business purpose because it is not tailored to remedy the specific harm posed by an employee's new position. For example, if the employee worked in a particular region of the country and therefore only had contacts with customers in that region, it is difficult to imagine the legitimate business purpose that would be served by barring the employee from working in an entirely different and new region where an employee could not leverage any confidential information concerning a company's customers. Gerrymandering a covenant makes excellent sense where the lines are drawn for the express purpose of protecting against the real or potential disclosure of information that could not possibly be relevant to an employee's new position.

Policies, Procedures and Monitoring. Finally, clear and consistently applied policies prohibiting existing employees from using or disclosing confidential or proprietary information belonging to third parties are important evidence of an employer's care in protecting its own and others' confidential information. These policies may be included in offer letters, employee handbooks, standalone policies, or in all three for the belt and suspenders approach.

The importance of these policies cannot be overstated: If a claim of intentional misconduct, such as tortious interference, is levied against the new employer, it may become important to demonstrate that the new employer proceeded honestly and cautiously in dealing with a new hire who it knew was subject to post-employment restrictions. An occasional sweep of the new employer's electronic mail system to confirm that nothing suspect was downloaded is not a bad idea, provided of course the appropriate notification is provided to employees regarding monitoring of the employer's digital systems.

Conclusion

There is no foolproof way to prevent a restrictive covenant claim, but simply paying attention to details can go a long way. Having proper policies and procedures in place, as well as standing orders with respect to what is expected of a new hire may not only significantly reduce the chances that a new hire will attract a lawsuit, but it will constitute excellent proof that the new employer took reasonably measured steps to prevent any bad (or misinterpreted) acts from taking place in the first instance.

1. *Renaissance Nutrition v. Kurtz*, 08 Civ. 800S, 2012 U.S. Dist. LEXIS 2490, at *8 (W.D.N.Y. Jan. 7, 2012); *Cenveo v. Diversapack*, 09 Civ. 7544(SAS), 2009 U.S. Dist. LEXIS 91535, at *31 (S.D.N.Y. Oct. 1, 2009); *Payment Alliance Int'l v. Ferreira*, 530 F.Supp.2d 477, 484 (S.D.N.Y. 2007) (citing *BDO Seidman v. Hirshberg*, 93 N.Y.2d 382, 388-89, 690 N.Y.S.2d 854, 856-57, 712 N.E.2d 1220, 1223 (1999)).

2. *BDO Seidman*, 93 N.Y.2d at 391 ("the only justification for imposing an employee agreement not to compete is to forestall unfair competition").

3. *Lazer v. Kesselring*, 13 Misc.3d 427, 433, 823 N.Y.S.2d 834, 839 (N.Y. Sup. Ct. 2005). The "unique employee" analysis typically involves a subset of the other legitimate interests. See *Cenveo*, 2009 U.S. Dist. LEXIS 91535, at *37-38 (requiring proof of competition); *Ticor Title Ins. v. Cohen*, 173 F.3d 63, 70-71 (2d Cir. 1999) (employer had legitimate interest in preventing insurance salesmen from moving to competitor where employee would use customer relationships to divert business to new employer). However, being critical and key to an employer's operations does not make an employee's services "unique." *Pure Power Boot Camp v. Warrior Fitness Boot Camp*, 813 F.Supp.2d 489, 510 (S.D.N.Y. 2011) (the services at issue must be "truly special, unique or extraordinary and not merely of high value to his or her employer"); *Heartland Secs. v. Gerstenblatt*, 99 Civ. 3694(WHP); 2000 U.S. Dist. LEXIS 3496, at *23-24 (S.D.N.Y. March 22, 2000) (no uniqueness where employee merely had intimate knowledge of company's trading system).

4. Given the potential sanctions a litigant faces for destroying information or making it inaccessible once a claim appears reasonably likely, proactively destroying information in an employee's possession may invite the wrong sort of judicial attention.