Webinar 8 – April 24, 2024

Are Your Confidentiality, Non-Solicitation and Non-Compete Agreements Enforceable and Up to Date?

WEBINAR OUTLINE

Defining Restrictive Covenants

Non-Compete Agreements

Non-Solicitation Agreements

Confidentiality Agreements

HRtelligence TIPS

WEBINAR CONTENT

Defining Restrictive Covenants

Although New York disfavors restrictive covenants based on public policy, which respects the right of people to earn their own living, these provisions are enforced if:

1. there is a legitimate business interest in enforcement, and
2. the scope of the restriction is narrowly drawn.

In New York, a restrictive covenant is considered enforceable if the employer can show that:

1. the restriction is no greater than what is required to protect the employer's legitimate interest,
2. the restriction does not create an undue hardship for the employee, and
3. the restriction does not harm the public.

Legitimate interests include protecting trade secrets, confidential information, customer relationships and information, and unique and extraordinary services. The scope of the restriction must be narrow in terms of the geographic scope, the duration of the restriction, and the business activity affected.

Types of Restrictive Covenants

- Non-compete. A non-compete is an agreement or contractual provision between an employer and employee that prohibits the departing employee from engaging in, or performing services for, a competing business for a period of time following their separation of employment.

- Non-solicitation. A non-solicitation clause prohibits a departing employee from soliciting the clients, customers or employees of their former employer for a specified period of time following their separation of employment.

- Non-disclosure. A non-disclosure agreement requires employees to keep confidential, and prohibits employees from disclosing, proprietary and confidential information and trade secrets that were disclosed to employees during their employment with the employer.

Non-Compete Agreements

What is a Non-Compete Agreement?

A non-competition agreement ("non-compete") prohibits an employee from working for a competitor or opening a competing business, typically for a certain period of time after an employee leaves a job. A non-compete may be one section of an employment contract or a standalone contract that an employee signs before or after employment begins.

While non-competes in New York are enforceable, courts scrutinize them closely and generally disfavor them.

A non-compete is only allowed and enforceable to the extent it:

1. is necessary to protect the employer's legitimate interests
2. does not impose an undue hardship on the employee
3. does not harm the public, and
4. is reasonable in time period and geographic scope.

An employer's legitimate interest may include protecting an employer's trade secrets and confidential information and preventing employees from taking specialized skills they gained on the job to a competitor.

A non-compete's restrictions must be no greater than necessary to protect the legitimate interests of the employer.

Protectable Interests Justifying Non-Compete Agreement Enforcement

Legitimate interests that support the enforcement of a non-compete agreement include the following:

- Protecting goodwill or customer relationships.
- Preventing disclosure or use of confidential customer information or trade secrets.
- Employee's services that are unique or extraordinary
- Reasonable time restrictions for non-compete agreements

Reasonable Temporal Restrictions and Geographic Scope for Non-Compete Agreements

New York law requires that a non-compete be reasonable as to its temporal restriction. To be reasonable, the restraint must be necessary to protect the employer's interest. Whether a time restriction is considered reasonable is based on the facts and circumstances of each case. Courts usually find time restrictions from three months to one year reasonable.

Avoid adopting the same temporal scope for all levels of employees.

While a non-compete period of one year or more post-termination may be reasonable for more senior employees or executives, the same period may be unreasonable if applied to mid-level or more junior employees.

New York law requires that a non-compete be reasonable as to its geographic scope. Like temporal limitations, whether a court considers a geographic limitation reasonable is based on the facts and circumstances of each case.

Consider the geographic footprint of the business. Courts will determine the reasonableness of a geographic limitation based on the facts and circumstances of each case. Some of the important factors that New York courts may consider in this analysis are:

- The nature of the employer's business
- The competitiveness of the industry
- The location of clients or customers
- The locations of the employer's offices and other facilities –and–
- The type of interests or information being protected by the non-compete

Overbroad v. reasonable. Depending on the particular facts and circumstances of each case, a prohibition on competition in a single city may be deemed overbroad and a prohibition on competition worldwide may be deemed reasonable.

Consider the geographic footprint of the employee's work for the business. Courts may also consider the nature of the employee's responsibilities when assessing a reasonable geographic scope. Even if the employer does business in multiple territories, the employer should not overreach if the employee's work and customer contacts are limited to a particular region.

Enforceability of Non-Compete Agreements

Courts must weigh the need to protect the employer’s legitimate business interests against the employee’s concern regarding the possible loss of livelihood, a result strongly disfavored by public policy in New York.

A non-compete agreement that is reasonable in time and geographic scope will be enforced only to the extent necessary:

- to prevent an employee’s solicitation or disclosure of trade secrets,
- to prevent an employee’s release of confidential information regarding the employer’s customers, or
- in those cases where the employee’s services to the employer are deemed special or unique.

Be sure that the non-compete is intended to protect genuine trade secrets or confidential information rather than ordinary business techniques. The types of information that may be protected as trade secrets depending on the facts and circumstances include information about the employer's business strategies, recruiting plans, quality control measures, manufacturing processes and confidential client information, among many others.

In cases where the employee's job was not unique and the employee did not possess trade secrets or confidential information, New York courts will not enforce a non-compete agreement because it would not be necessary to protect a legitimate interest of the employer.

New York courts are most likely to enforce a non-compete on the following personnel who may have broad access to trade secrets or key customer relationships:

- Executives or upper management
- Employees with key relationships with customers
- Personnel with highly technical skills, such as engineers, software developers or scientific professionals

New York courts consider the following factors to be relevant in determining what constitutes a trade secret: '"

1. the extent to which the information is known outside of [the] business;
2. the extent to which it is known by employees and others involved in the business;
3. the extent of measures taken by the business to guard the secrecy of the information;
4. the value of the information to the business and its competitors;
5. the amount of effort or money expended by the business in developing the information;
6. the ease or difficulty with which the information could be properly acquired or duplicated by others.'"

Tips for Drafting Enforceable Non-Compete Agreements

- Ensure the agreement includes a reasonable scope of restricted or prohibited activities. The scope of business activities restricted by a non-compete agreement must be only as broad as necessary to protect the legitimate interests implicated.
- Clearly define the restricted activities. A non-compete agreement must specify the restricted conduct.
- Consider the specific industry and the employee's specific job, business line, or division when formulating the restricted activities. It may make sense in some instances to restrict the employee from working for specifically identified competitors or in a specific line or areas of business.
- Avoid a one-size-fits-all approach. While it is tempting for employers to use a single form of non-compete for all employees, such an approach may ultimately undermine the enforceability of the covenant. Instead, employers should:

- Balance limitations. Balance the required scope limitations with the employer's need to protect its competitive advantage in the market. For instance, if the employer is nationwide and cannot limit the geographic scope of the non-compete, consider setting a shorter time frame or narrowing the range of prohibited activities.
- Correlate restricted activities to the employee's level. The restrictions on the employee's non-compete activities should correlate with the employee's seniority or level of access to trade secrets or confidential information. For example, an employer may generally enforce a broad non-compete agreement, both in time and geographic scope, with an executive who has a high clearance level and a significant capacity to cause competitive harm to the employer. Conversely, for a mid-level manager, a much narrower non-compete or shorter duration would likely suffice to protect the employer's interests.
- Consider the Field of Employment - New York State prohibits non-competes in certain fields and professions, such as the broadcast employee and legal fields.

Non-Solicitation Agreements

What is a Non-Solicitation Agreement?

A non-solicitation agreement is a contract in which an employee agrees not to solicit a company's clients or customers, for his or her own benefit or for the benefit of a competitor, after leaving the company. A nonsolicitation agreement can also include an agreement by the employee not to solicit other employees to leave when he or she quits or otherwise moves on.

A typical non-solicitation agreement between a business and an employee would include:

- Contract language that defines how long the employee must abide by the agreement, counting both time of employment and after, and in what geographical area
- A statement that the employee has received "sufficiency of consideration" for signing the agreement
- A statement by the employee that they won't violate the agreement as an individual or as any other kind of entity (as a partner, salesperson, etc.) for the benefit of themself or anyone else.

The main part of the agreement is a list of types of restricted solicitations, including restrictions against:

- Selling to the company's customers and prospective customers
- Recruiting anyone associated with the company to change their employment or business relationship with the company
- Employing or soliciting or attempting to employ or solicit anyone who was an employee of the company within a certain time of their employment

Two Types of Non-Solicitation Agreements

Non-Solicitation of Employees.
Good employees are difficult to find!

A company may have spent many years training a valuable employee. The employer wants to prevent another employee from leaving the company and soliciting that valuable employee to leave and join the new company.

Non-Solicitation of Customers.
In the same way, an employer may want to prevent a former employee from soliciting customers to draw them away from the business. This situation happens in sales and also in professional practices, with clients or patients.

A customer non-solicitation agreement in New York is enforceable only if it is "reasonable in time and area, necessary to protect the employer's legitimate interests, not harmful to the general public and not unreasonably burdensome to the employee.

New York's three-prong test: a restraint is reasonable only if it:

1. is no greater than is required for the protection of the legitimate interest of the employer,
2. does not impose undue hardship on the employee, and
3. is not injurious to the public.

Protectable Interests and Reasonable Scope of Prohibited Activity for Customer Non-solicitation Agreements

An employer's legitimate interests that support the enforcement of a customer non-solicitation agreement include:

- Protecting customer relationships and goodwill
- Protecting confidential customer information
- Protecting trade secrets
- Unique or extraordinary services performed by the former employee

Courts in New York recognize the protection of customer good will and relationships as a legitimate and protectable business interest. If relying on the protection of customer goodwill and relationships as the protectable interest:

- Consider defining the customer relationships being protected as those employees who the employee had some interaction with on the employer's behalf.

Reasonable Time and Geographical Restrictions for Customer Non-solicitation Agreements

The temporal scope of a customer non-solicitation agreement must be reasonable. Whether the restriction is considered reasonable is based on the facts and circumstances of each case.
New York courts have found one-year and two-year customer non-solicitation restrictions to be reasonable.

At least one court has upheld a five-year customer non-solicitation agreement, but five years will likely be too long for a customer non-solicitation agreement in most instances.

Customer non-solicitation agreements must be reasonable in geographic scope. Depending on the facts and circumstances of the case, however, it may not be necessary to limit the geographic scope, especially if the agreement imposes customer-based restrictions.

Considerations for Drafting Customer Non-Solicitation Agreements

When drafting non-solicitation agreements, employers should carefully consider what legitimate interests they are trying to protect and take steps to tie these provisions to safeguarding trade secrets, confidential information, unique employees and client relationships.

Employers should consider limiting these agreements to competitive businesses.

Employee Non-solicitation Agreements

An employee non-solicitation agreement in New York is enforceable only if it is:

- No greater than is required for the protection of the legitimate interest of the employer
- Does not impose undue hardship on the employee –and–
- Is not injurious to the public

Courts have noted that employee non-solicitation agreements are “inherently reasonable and less restrictive” than non-compete provisions as they do not restrict an employee from engaging in their profession, but rather only limit who the employee can recruit away from the employer.

Protectable Interests and Reasonable Scope of Prohibited Activity for Employee Non-solicitation Agreements

Employee non-solicitation agreements are not enforceable unless they protect an employer's legitimate business interest(s). Legitimate business interests include:

- Protecting confidential or proprietary information

- Protecting trade secrets
- Unique or extraordinary services provided by an employee which cannot easily be replaced
- Protecting client relationships

Reasonable Time and Geographical Restrictions for Employee Non-solicitation Agreements

The temporal scope of an employee non-solicitation agreement must be reasonable. Whether the restriction is considered reasonable is based on the facts and circumstances of each case.

The geographic scope of an employee non-solicitation agreement must be reasonable. Whether the restriction is considered reasonable is based on the facts and circumstances of each case. An employee non-solicitation agreement that is not limited in its geographic scope can be reasonable if warranted by the nature of the employer's business.

Confidentiality Agreements

Confidentiality Agreements or Nondisclosure Agreements are agreements between an employer and its workers in which the employee promises not to disclose any sensitive information about the organization gained during their time at the company.

Confidentiality agreements are enforceable to the extent that they are

1. reasonable in time and area,
2. necessary to protect the employer's legitimate interests,
3. not harmful to the general public and
4. not unreasonably burdensome to the employee.

Confidentiality agreements cannot violate an employee's rights under Section 7 of the National Labor Relations Act (NLRA) and an employer cannot force an employee to sign an agreement that does.

Protectable Interests and Reasonable Scope of Protected Information for Confidentiality Agreements

Courts will enforce reasonable restrictions related to the disclosure of trade secrets or confidential information will be enforced.

Whether a customer list or other proprietary information constitutes a confidential information or a trade secret or is readily ascertainable from public sources is often a triable issue of fact. Where an employee engages in no wrongful conduct and the names and addresses of

potential customers are readily discoverable through public sources, information is not protectable.

Reasonable Time and Geographic Restrictions for Confidentiality Agreements

A confidentiality agreement may be reasonable even if it is for an unlimited duration, regardless of whether an employee's services are unique or ordinary.

A confidentiality agreement must have a reasonable geographic restriction.

Courts have enforced confidentiality agreements with no stated geographic limitation, or a large geographic limitation, even without mentioning or analyzing the reasonableness of the geographic restriction.

Protection of Trade Secrets and Confidential Information

Courts in New York recognize the protection of trade secrets and confidential client information as legitimate and protectable business interests. If relying on the protection of trade secrets or confidential information as the legitimate protectable interest:

- Be sure that the agreement is intended to protect genuine trade secrets or confidential information rather than ordinary business techniques.
- The types of information that may be protected as trade secrets depending on the facts and circumstances include information about the employer's business strategies, recruiting plans, quality control measures, manufacturing processes and confidential client information, among many others.

Take Additional Steps to Safeguard the Trade Secrets Being Protected

New York courts will not recognize trade secret protection unless employers take steps to protect the information. New York courts consider the following factors to be relevant in determining what constitutes a trade secret:

1. the extent to which the information is known outside of the business;
2. the extent to which it is known by employees and others involved in the business;
3. the extent of measures taken by the business to guard the secrecy of the information;
4. the value of the information to the business and its competitors;
5. the amount of effort or money expended by the business in developing the information;
6. the ease or difficulty with which the information could be properly acquired or duplicated by others.

The drafting of restrictive covenants requires a careful review of the facts regarding:

- the legitimate business needs of the employer,
- the role of the employee and the common practices in the applicable industry,
- the law in the jurisdictions applicable to the employer and employee.

Courts are more likely to enforce restrictive covenants that are tailored to balance both the legitimate business interests of the employer and the employee's legitimate need to earn a livelihood in their chosen profession.

Courts also take into account the impact restrictive covenants will have on the collective public interest.