STRATEGIC THINKING ON SELECTED ISSUES IN THE EMPLOYMENT RELATIONSHIP

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I. NON-COMPETITION PROVISIONS AND OTHER RESTRICTIVE COVENANTS

For employees, restrictive covenants imposed by an employer can be one of the more anxiety-evoking components of any employment relationship. Non-competition provisions in particular can impose significant burdens on an employee's freedom to move from an undesirable employment environments and yet still work in a desired field and maintain a positive career trajectory. Employees often overlook these covenants when beginning new jobs, not envisioning the time when they will separate for voluntary reasons or otherwise. Yet, employees typically have the most bargaining power over the existence or terms of non-competition agreements and other restrictive covenants at the very beginning of employment. Most employees, however, only confront these issues at the end of employment, and must be able to assess the enforceability of the various covenants and the potential risks they pose.

Employees and their representatives must therefore be well-armed with an understanding of how the courts interpret and enforce these agreements when disputed. This section will describe the various factors applied by courts when determining whether to enforce non-competition provisions, as well as the prevailing views on some other commonly used restrictive covenants.

A. Reasonableness Factors

Jurisdiction is a key factor when assessing the viability of covenants not to compete, as every state has its own interpretation of what qualifies as enforceable. California, North Dakota, and Oklahoma stand at one end of the spectrum by generally prohibiting non-competition provisions, though even they have some limited exceptions.[2] The vast majority of states do

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[2] See, e.g., Scanline Med., LLC v. Brooks, 259 P.3d 911, 913 (Okla. Ct. App. 2011) (citing OKLA. STAT. tit. 15, § 219A(A)); Edwards v. Arthur Andersen LLP, 189 P.3d 285, 290 (Cal. 2008); Pruco Sec. Corp. v. Montgomery, 264 F. Supp. 2d 862, 869 (D.N.D. 2003) (citing N.D. CENT. CODE § 9-08-06). For example, California

enforce non-competition provisions so long as they are structured as reasonable restraints of trade.[3] Definitions of a reasonable restraint can differ from state to state, but here are some generally unifying factors used by the courts when determining whether to enforce such provisions:

1. Duration

Courts typically accept restraint periods of one year following the separation of employment, although periods of up to two years are commonly approved as well.[4] Courts are extremely hesitant, however, to enforce provisions extending beyond two years and will require employers to show compelling circumstances that justify an extended restriction.[5] The more reasonable the other terms of the non-competition provision restrictions, the more likely a court is to accept an extended time period.[6]

Aligning severance pay with the duration of the non-competition provision can also impact the perception of reasonableness. Tying an employee's severance pay to the duration of the covenant not to compete makes intuitive sense because, after all, the employee will be restricted in his/her ability to earn income for that length of time.[7] In practice, employees have difficulty achieving this sort of arrangement, especially if they wait until after separation to raise the issue. An employee's appeal to an employer's notion of fairness regarding aligning severance to the non-competition period is more likely to succeed if proposed while negotiating the initial employment agreement.

2. Geographic Scope

A court's assessment of a non-competition provision's geographic restriction is dependent on the nature of the employer's business activity. Where a reasonable connection

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will enforce agreements entered into as part of a sale of a business and prohibit the sellers from carrying on a similar business after the sale. See Edwards, 189 P.3d at 290-91 (citing CAL. LAB. CODE §§ 16601, 16602, & 16602.5).

[3] See, e.g., Reliable Fire Equip. Co. v. Arredondo, 965 N.E.2d 393, 397 (Ill. 2011); Mansell v. Toys R Us, Inc., 673 F. Supp. 2d 407, 416 (D. Md. 2009).

[4] Compare Brainware, Inc. v. Mahan, 808 F. Supp. 2d 820, 827 (E.D. Va. 2011) (holding a one-year duration for a non-compete provision to be reasonable), with The Cmty. Hosp. Grp., Inc. v. More, 869 A.2d 884 (N.J. 2005) (holding two years to be a reasonable period).

[5] See Roth v. Gamble-Skogmo, Inc., 532 F. Supp. 1029, 1031-32 (D. Minn. 1982) (enforcing five-year restrictive covenant because former CEO possessed extensive knowledge about the internal workings of the business).

[6] See, e.g., In re Spradlin, 284 B.R. 830, 836 (E.D. Mich. 2002) (enforcing a non-competition agreement of five years because it was limited in geographic scope, reasonable as to subject matter, and reasonable given the circumstances of the parties' relationship).

[7] See Roth, 532 F. Supp. at 1031 (noting that the non-compete provision did not have a durational limitation and tying the duration of the non-compete provision to the period during which the employee would receive deferred compensation payments).

exists between the location of the business activity and the proposed restricted geographic scope, a court is more likely to uphold a non-competition provision.[8]

On the one hand, more localized businesses such as dental practices, restaurants, etc., have little need to restrict their former employees beyond a few miles.[9] On the other hand, companies with operations across the country, such as internet-based sales companies, are more likely to persuade a court to enforce geographic restrictions extending nationwide or even through North America.[10]

As with the duration factor, the court's assessment as to the reasonableness of a geographic restriction is also influenced by the relative permissiveness of the other restrictions. Thus, a shorter time period may pave the way for a greater applicable geographic area, and vice-versa.[11] Restrictions designated to a specific product line or set of customers will also make larger geographic limitations appear more reasonable.[12] The failure to define a geographic scope, or leaving one that is ambiguous or subject to change, militates against enforcement.[13]

3. Breadth of Activity Restricted

This factor is often articulated in different ways by different courts, but essentially amounts to a balancing test between (1) the employer's legitimate needs to protect its customers

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[8] See, e.g., N. Star Mgmt. of Am., LLC v. Sedlacek, 762 S.E.2d 357, 363 (N.C. Ct. App. 2014) (requiring the trial court to make findings regarding the reasonableness of the geographic scope of the non-compete covenant and to tailor the geographic scope to that area that is reasonable under the circumstances); Carrigan v. Arthur J. Gallagher Risk Mgmt. Servs., Inc., 870 F. Supp. 2d 542, 551 (M.D. Tenn. 2012) (noting a reasonable geographic scope is one that considers the nature of the business, the manner in which the business has been conducted, and its territorial extent).

[9] See, e.g., Carvel Corp. v. Eisenberg, 692 F. Supp. 182, 186 (S.D.N.Y. 1988) (upholding a restrictive covenant that contained a two-mile geographic limitation as "reasonably related to Carvel's interest in protecting its know-how and to its ability to install another franchise in the same territory").

[10] See generally Lantech.com v. Yarbrough, 247 F. App'x 769 (6th Cir. 2007) (enforcing, under Kentucky law, a broad non-compete agreement in any area where the company did business, which was nationally and in some foreign countries).

[11] See Del. Elevator, Inc. v. Williams, No. CIV.A. 5596-VCL, 2011 WL 1005181, at *8 (Del. Ch. Mar. 16, 2011) ("When evaluating the reasonableness of a restrictive covenant, a court must consider how the temporal and geographic restrictions operate together. . . . All else equal, a longer restrictive covenant will be more reasonable if geographically tempered, and a restrictive covenant covering a broader area will be more reasonable if temporally tailored.").

[12] See Farr Assocs., Inc. v. Baskin, 530 S.E.2d 878, 882 (N.C. Ct. App. 2000) ("To prove that a geographic restriction in a non-compete provision is reasonable, an employer must first show where its customers are located and that the geographic scope of the covenant is necessary to maintain those customer relationships.").

[13] See, e.g., NanoMech, Inc. v. Suresh, 777 F.3d 1020, 1024 (8th Cir. 2015) (holding that a non-compete was unenforceable, under Arkansas law, because it lacked a geographic restriction and failed to define what activities the former employee was prohibited from performing for NanoMech's competitors).

and established business, and (2) the employee's ability to earn a living.[14] Courts will endeavor to keep restraints no greater than necessary to protect the employers' legitimate interests.

An employer's most protectable interests are its current customers and its confidential information / trade secrets. Courts are more likely to enforce restrictions directed towards a company's current set of customers – those with which the company has an ongoing relationship – than the public at large.[15] Similarly, former employees who had access to high-level and valuable confidential information or practices will have more difficulty moving directly to competitors that can utilize that knowledge to the former employer's detriment.[16] Courts are particularly wary of letting employees use confidential trade information to syphon off their former employer's customers.[17]

The courts are also mindful of employees' interests, specifically their ability to earn income in their chosen field of work. More narrowly tailored definitions of restricted activities are more likely to be enforceable than vague, boilerplate language that seeks to include, for example, "any business activity in which the Company is engaged."[18] Limiting the non-competition provision to activities and work the employee actually performed for the employer will typically assuage a court's concern about hardships imposed on the employee.[19] Similarly, restrictions should be limited to those activities that the employer actually conducted and the market areas in which the employer actually engaged.

Whenever possible, employees should encourage employers to identify and list specific competitors and clients subject to the covenant not to compete, leaving the rest free from the provision's reach. This approach may satisfy both the employer's concern about protecting its business interests, and give the employee valuable certainty for his/her job search efforts.

4. Public Policy and Other Reasonableness Factors

Courts will occasionally cite to public policy as a separate reason not to enforce non-competition provisions, though they use this factor less than the grounds of unreasonable

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[14] See generally Procter & Gamble Co. v. Stoneham, 747 N.E.2d 268 (Ohio Ct. App. 2000).

[15] See Century Bus. Servs., Inc. v. Urban, 900 N.E.2d 1048, 1058 (Ohio Ct. App. 2008).

[16] See, e.g., Avery Dennison Corp. v. Kitsonas, 118 F. Supp. 2d 848, 853 (S.D. Ohio 2000).

[17] See American Express Fin. Advisors, Inc. v. Scott, 955 F. Supp. 688, 693 (N.D. Tex. 1996) (granting employer's preliminary injunction to enforce a non-compete provision in order to prevent the former employee from soliciting the employer's clients for the former employee's own competing venture).

[18] See Keener v. Convergys Corp., 205 F. Supp. 2d 1374, 1380-82 (S.D. Ga. 2002), aff'd in relevant part, rev'd in part, 342 F.3d 1264 (11th Cir. 2003) (finding similar language to be "overbroad").

[19] Bybee v. Isaac, 178 P.3d 616, 622 (Idaho 2008) ("It is true that in the employment context, non-compete covenants should expressly limit the scope of activities the employee is prohibited from performing."); Dearborn v. Everett J. Prescott, Inc., 486 F. Supp. 2d 802, 808 (S.D. Ind. 2007) (noting the general requirement for geographic or customer limits tied to the former employee's own activities in a non-compete agreement).

duration, geographic scope, or breadth of restricted activities.[20] Such concerns most often come into play when enforcement of a provision would result in the withholding of important services to the public. For example, a court would be reluctant to enforce an agreement prohibiting a medical specialist from practicing in a particular region where there are too few practitioners serving that region already and the residents' medical needs will not be met.[21]

Whether the employee resigned his employment or was terminated can also factor into the courts' enforcement decisions. Although in most jurisdictions an employer's termination of the employee will not void a non-competition provision *per se*, the courts tend to be more sympathetic to employees facing such restrictions through no fault of their own.[22] A few limited states, including New York, hold that the non-competition agreement is unenforceable as a matter of law when the employee is involuntary terminated.[23]

B. Consideration

Jurisdictions differ on what constitutes sufficient consideration to support a non-competition agreement. There is little dispute that an initial offer of employment can constitute sufficient consideration to bind an employee to a restrictive covenant if entered into at the beginning of the employment relationship.[24] More controversial are the provisions entered in the midst of employment, and the courts are split as to whether "continued" employment can constitute consideration. Courts in the majority of jurisdictions hold that continued employment is sufficient.[25] Exceptions include Minnesota, North Carolina, Pennsylvania, Texas, Washington, and West Virginia.[26] Illinois requires two years of employment after entering into the non-competition provision before the provision can be enforced.[27] Employers will often tie

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[20] See Olander v. Compass Bank, 363 F.3d 560 (5th Cir. 2004) (analyzing whether a non-compete provision was valid in light of the public policy requirements expressed by the Texas Supreme Court's interpretation of Texas law).

[21] See, e.g., The Cmty. Hosp. Grp., Inc. v. More, 869 A.2d 884, 898-900 (N.J. 2005); Valley Med. Specialists v. Barver, 982 P.2d 1277, 1285 (Ariz. 1999).

[22] Murfreesboro Med. Clinic, P.A. v. Udom, 166 S.W.3d 674, 686 (Tenn. 2005) (acknowledging that the non-compete provision would inflict undue hardship on the former employee because, among other factors, the employer did not terminate the employee for cause).

[23] See Arakelian v. Omnicare, Inc., 735 F. Supp. 2d 22, 41 (S.D.N.Y. 2010).

[24] See, e.g., Conway v. C.R. Bard, Inc., --- F. Supp. 3d ---, 2015 WL 627928, at *3 (D. Minn. Feb. 12, 2015).

[25] See Access Organics, Inc. v. Hernandez, 175 P.3d 899, 904 (Mont. 2008).

[26] See, e.g., Pulse Techs., Inc. v. Notaro, 67 A.3d 778, 782 (Pa. 2013); Alex Sheshunoff Mgmt. Servs., L.P. v. Johnson, 209 S.W.3d 644, 651 (Tex. 2006); Labriola v. Pollard Grp., Inc., 100 P.3d 791, 794 (Wash. 2004); Reynolds & Renolds Co. v. Tart, 955 F. Supp. 547, 553 (W.D.N.C. 1997); Nat'l Recruiters, Inc. v. Cashman, 323 N.W.2d 736, 740 (Minn. 1982); PEMCO Corp. v. Rose, 257 S.E.2d 885, 889 (W.Va. 1979).

[27] See Fifield v. Premier Dealer Servs., Inc., 993 N.E.2d 938, 943 (Ill. Ct. App. 2013).

additional compensation, such as stock options, to these mid-employment non-competition agreements to help ward off any consideration arguments down the road.

C. Judicial Modification

When a court determines that a portion of the non-competition provision is unenforceable, it can take a few different approaches to address the issue. The first, followed by a majority of states, is "reasonable modification," in which the court revises the offending language of the provision, narrowing it so that it conforms to reasonableness standards.[28] A court may also refuse to perform such partial modifications and just throw out the entire covenant, if it determines that the employer was purposefully overreaching or did not in good faith negotiate the language to protect its legitimate business interests.[29] Thus, an employer risks losing any protections if it drafts an overly broad non-competition provision; it cannot simply shoot for the moon and expect the court to save it through reasonable modification.

Some states follow the "blue-pencil doctrine," which allows a court to strike offending language from overbroad provisions, but enforce the remaining language.[30] For example, a blue-pencil court may strike one or two counties from a long list of regions included in an employee's non-competition provision. Courts following the blue pencil doctrine include Arizona, Indiana, Louisiana, Maryland, Montana, North Carolina, and Rhode Island.[31]

In the few "red-pencil states," courts will find an entire non-competition provision to be unenforceable if any portion of it is overbroad.[32] These states include Arkansas, Nebraska, South Carolina, and Virginia.[33]

D. Non-Solicitation Provisions

Similar, though less litigated than non-competition provisions, non-solicitation clauses provide than an employee, after separation, will not solicit the employer's clients or customers.[34] The same principles discussed above for non-competition provisions generally apply to non-

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[28] See, e.g., Basicomputer Corp. v. Scott, 791 F. Supp. 1280, 1289 n.3 (N.D. Ohio 1991).

[29] See, e.g., Freiburger v. J-U-B Engs., Inc., 111 P.3d 1000, 107 (Idaho 2005).

[30] See Star Direct, Inc. v. Dal Pra, 767 N.W.2d 898, 915 (Wis. 2009).

[31] See, e.g., Beverage Sys. of the Carolinas, LLC v. Associated Beverage Repair, LLC, 762 S.E.2d. 316, 321 (N.C. Ct. App. 2014); Tradesman Int'l v. Black, 724 F.3d 1004, 1018 (7th Cir. 2013) (noting that Indiana enforces the "blue pencil doctrine"); Valley Med. Specialists v. Farber, 982 P.2d 1277, 1286 (Ariz. 1999).

[32] See, e.g., NanoMech, Inc. v. Suresh, 777 F.3d 1020, 1025 (8th Cir. 2015) (holding that, under Arkansas law, a court cannot narrow a noncompete agreement if it is overbroad).

[33] See Lanmark Tech., Inc. v. Canales, 454 F.Supp.2d 524 (E.D. Va. 2006); Vlasin v. Len Johnson & Co., 455 N.W.2d 772, 774 (Neb. 1990).

[34] See, e.g., Whelan Sec. Co. v. Kennebrew, 379 S.W.3d 835, 842 (Mo. 2012).

solicitation provisions.[35] Courts typically view non-solicitation clauses more favorably, since they are usually specifically targeted towards existing customers or contracts and courts consider these to be fundamental business interests warranting protection. In addition, these provisions allow the former employee to work in his/her chosen profession and so present less of a restraint of trade.[36] Employers who seek broader non-solicitation clauses, such as those prohibiting contact with undefined "prospective" customers, are at greater risk of inviting court interference.[37] Notably, non-solicitation clauses do not place restrictions on the customers themselves. Customers are free to leave the employer, and can usually do business with the former employee so long as the employee did not actively solicit the contact.

Non-solicitation clauses also often apply to prohibit the solicitation of a company's employees. Employers may try to include language preventing departing employees from "encouraging" or "assisting" other company employees in separating from the company.[38] Employees subject to these provisions must take care not to run afoul of these restrictions, especially when fielding calls from former co-workers who want the employee's advice because they are also considering leaving the company. For sake of clarification, the parties can agree that the employee may respond to former co-worker requests for referrals and recommendations, so long as the employee does not initiate the contact with or request by the former co-worker.

E. Non-Disclosure Provisions

Non-disclosure and confidentiality agreements seek to prevent a departing employee from sharing or using confidential information gained about the former employer during the course of the employment.[39] Such agreements are not necessarily limited to "trade secrets" which are often protected under state statute.[40]

Employers will often try to define confidential information as broadly as possible, and such language can lead to contentious disputes later on. Courts will look unfavorably upon

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[35] Id. (discussing non-solicitation clauses in the context of their geographic scope, duration, and relationship to prospective customers).

[36] See Henderson v. U.S. Bank, N.A., 615 F. Supp. 2d 804, 812-13 (E.D. Wis. 2009) (noting that a non-solicitation provision, which technically applied to the employer's affiliated companies, was "irrelevant" because the former employer is only prohibited from soliciting those customers for whom he directly performed services or with whom he had direct business contact).

[37] See Whelan, 379 S.W.3d at 842 (finding that the provisions of a non-solicitation clause that prevented a former employer from soliciting any prospective customer from the last 12 months, throughout the nation, to be unreasonably broad).

[38] See, e.g., Cirulis v. UNUM Corp., 321 F.3d 1010, 1012 n.1 (10th Cir. 2003).

[39] See Central Monitoring Serv., Inc. v. Zakinski, 553 N.W.2d 513, 516 n.7 (S.D. 1996).

[40] Approximately 47 states have adopted the Uniform Trade Secrets Act, which codifies and harmonizes standards and remedies regarding misappropriation of trade secrets. For example, see Indiana's version of the act at IND. CODE § 24-2-3-1 et seq.

overly broad and ambiguous clauses.[41] Employees should demand exceptions for information they had knowledge of prior to working for the employer or developed independently of their employment. This may be addressed by allowing the employee to add a list of such inventions, trade-secrets, etc., as an attachment to the non-disclosure agreement. Employees should also seek language excepting publicly available information from the definition of confidential information.[42]

Employees may seek to reduce their potential liability from such agreements by negotiating language that limits their obligations to one of exercising reasonable care or other acceptable standards, as opposed to strict contractual liability for any inadvertent disclosure. Employees may also propose that the confidential information be limited to "marked" documents and records, placing the burden on the employer to clearly delineate any information it wants treated as confidential during the course of employment.

Time periods are often included in non-disclosure provisions, but courts impose less scrutiny on them than they do for non-competition provisions.[43] Five years is a commonly acceptable length.[44]

F. Temporary Restraining Orders and Preliminary Injunctions

Temporary restraining order (TROs) and preliminary injunctions are the primary tools used by employers to enforce restrictive covenants. Many practitioners are familiar with the four elements used by courts when determining whether to grant a TRO or preliminary injunction: 1) the likelihood of irreparable harm with no adequate remedy at law; 2) the balance of harm favors the movant; 3) the likelihood of success on the merits of the case; and 4) whether the public interest favors the granting of the injunction.[45]

Employers draft restrictive covenants with these requirements in mind. Anticipating the above-mentioned elements, they will often try to slip language into the contracts stating that if the employee engages in prohibited conduct the employee acknowledges that the employer will suffer "irreparable harm." With or without such statements, courts will independently determine

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[41] Gen. Assur. of Am., Inc. v. Overby-Seawell Co., 893 F. Supp. 2d 761, 773 (E.D. Va. 2012) (noting that, under Georgia law, a non-disclosure provision was unlimited in time and therefore was overbroad), aff'd, 533 F. App'x 200 (4th Cir. 2013).

[42] Harvey Barnett, Inc. v. Shidler, 143 F. Supp. 2d 1247, 1254-55 (D. Colo. 2001) (finding that a non-disclosure and confidentiality agreement was not enforceable because it, in part, encompassed information that was available in the public domain).

[43] Bodemer v. Swanel Beverage, Inc., 884 F. Supp. 2d 717, 736 (N.D. Ind. 2012) (noting that confidentiality agreements are analyzed under a more lenient standard than non-compete agreements).

[44] See Foster-Miller, Inc. v. Babcock & Wilcox Canada, 210 F.3d 1 (1st Cir. 2000) (finding a confidentiality agreement of five years to be enforceable); Imaginative Research Assocs., Inc. v. Ramirez, 718 F. Supp. 2d 236 (D. Conn. 2010) (same).

[45] See, e.g., Johnson & Johnson Vision Care, Inc. v. 1–800 Contacts, Inc., 299 F.3d 1242, 1246–47 (11th Cir. 2002).

irreparable harm by assessing whether the damages stemming from the employees' activities will be difficult calculate.[46] In the restrictive covenant context, employers argue in favor of TROs by emphasizing the permanent loss of goodwill and lost opportunities from stolen clients.[47] To counter this argument, employees should try to isolate for the court the specific customers and contracts that have transferred from the employer and calculate the dollar amount of those losses. The more effective the employee is able to break down the employer's damages, the less likely the court will find that the employer was immeasurably harmed.

Employees may also counter an employer's arguments by showing that the employee will suffer a greater hardship if the covenant is enforced, thereby addressing the second element of the TRO test. The balance of hardships is highly fact specific, but employees should focus on their loss of income and ability to support themselves and their families if they cannot continue to work in their chosen profession.[48] The presence of a looming TRO may easily cause potential employers to shy away from these employees as candidates or withdraw previously extended job offers. In addition, forcing employees to sit on the sidelines while litigation plays out will only cause their networks and job-market connections to grow stale and make their increasing period of unemployment look suspicious to employers.

The likelihood of success on the merits and public interest elements should be argued with a view towards the reasonableness principles discussed in the preceding section.[49] Employee representatives should evaluate employer threats of litigation over restrictive covenants with this analysis in mind. In deciding how seriously to take the employer's threats, the employee's counsel should question whether the employer is willing to risk the court issuing an unfavorable opinion about its covenant language. A negative finding in one individual's case could inure to the benefit of many other employees, to the employer's great detriment.

When facing a potential TRO, employees must determine whether they will be providing their own defense or if they will have outside support. If the employees have managed to obtain new employment, they should find out whether the new company will pay to defend against the TRO request, and if so, whose attorneys will be used. Of course, the best result is often a party-negotiated resolution prior to any motions being filed. There may be a simple solution – reducing the time limitation from one year to six months might be acceptable to both parties. Employers may be primarily concerned about particular products, customers, divisions or market segments, especially if they know what new job the employee has lined up. Employees can offer to modify their restrictive covenants to identify these specific areas of sensitivity, and formally

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[46] See The Cmty. Hosp. Grp., Inc., 869 A.2d 884, 890 (N.J. 2005) (noting that the lower court underwent an independent analysis of whether there was irreparable harm despite language in the agreement which stated that in the event of a breach by the former employee, the employer would suffer irreparable harm).

[47] See, e.g., Unisource Worldwide, Inc. v. Valenti, 196 F. Supp. 2d 269, 280 (E.D.N.Y. 2002).

[48] See, e.g., DS Parent, Inc. v. Teich, No. 5:13-CV-1489 LEK/DEP, 2014 WL 546358, at *12 (N.D.N.Y. Feb. 10, 2014).

[49] See, e.g., Valley Med. Specialists v. Farber, 982 P.2d 1277, 1283 (Ariz. 1999) (noting that analysis of whether to enforce a restrictive covenant is a question of reasonableness, which is a fact-intensive inquiry that weighs on the totality of the circumstances).

agree to stay away from them in return for a release of the remaining portions of the restrictive covenant.

II. DISPUTED DOCUMENTS

With or without the presence of a non-disclosure or confidentiality agreement, once an employment relationship ends, employers often become extremely sensitive with respect to company documents and property. Employers fear that employees will use the documents to (1) steal business or (2) place the employer in a bad light, including as support for subsequent legal claims. While it can be natural for departing employees to take their work records with them, or simply not bother to return the files they have in their possession, employees do face several bases of liability when they intentionally or inadvertently retain company records.

Breach of contract is obviously a concern when an employee has signed a confidentiality agreement, as discussed above.[50] Such provisions may be challenged on reasonableness grounds, especially where confidential information is defined too broadly or ambiguously. By and large, however, courts will not allow employees to retain company records (hard copy and electronic), as they are viewed as employer property.[51] This includes documents created by the departing employees themselves while they were employed by the company.

If the documents are kept in an effort to support a later whistleblower claim or prevent criminal activity, a court may rule the confidentiality agreement unenforceable on public policy grounds.[52] Government agencies are becoming increasingly vocal about their reliance on information from company employee whistleblowers, as exemplified by the SEC regulation prohibiting enforcement of confidentiality agreements if such agreements would prevent employees from bringing information to the attention of the SEC.[53] An employee's argument for non-enforcement in these instances would have to show both a well defined public policy and that the policy outweighs the interest of the employer in enforcing the agreement and protecting its confidential information.[54]

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[50] See, e.g., Jones v. Hamilton, 53 So. 3d 134, 141-42 (Ala. Civ. App. 2010) (reversing summary judgment on breach of contract claim related to the confidentiality agreement where former employee removed a box of financial records and contracts from the company).

[51] See generally Raven Indus., Inc. v. Lee, 783 N.W.2d 844 (S.D. 2010).

[52] See, e.g., United States v. Cancer Treatment Ctrs. of Am., 350 F. Supp. 2d 765, 773 (N.D. Ill. 2004) (holding that a confidentiality agreement was unenforceable compared against the False Claims Act's strong policy of protecting whistleblowers who report fraud against the government).

[53] See 17 C.F.R. § 240.21F-17(a) (2011).

[54] Cf. Woods v. Boeing Co., No. 2:11-CV-02855-RMG, 2013 WL 5332620, at *2 (D.S.C. Sept. 23, 2013) (finding that the employer was entitled to summary judgment on breach of the confidentiality agreement even in light of the former employee's use of the documents in making a whistleblower complaint to the Federal Aviation Administration because the former employee's "vast and indiscriminate appropriation" of the employer's documents did not fall into the public policy exception).

Employees who retain documents also face liability for breach of fiduciary duty. An employee has a duty not to use or communicate information confidentially provided to her by the employer, or acquired by her during the course of or on account of her employment, unless the information is a matter of general knowledge.[55] As with breach of contract claims, employees may avoid liability for breach of fiduciary duty if they can prove their dissemination of confidential information was done to protect significant public interest outweighing the employer's own private interests.

Criminal liability is also a concern for employees who take employer documents and records. Though prosecutors appear hesitant to pursue criminal charges against genuine whistleblowers, employees should be aware of the exposure. The Computer Fraud and Abuse Act (CFAA) provides for criminal prosecution and civil action for "hacking" – *i.e.*, the unauthorized access of computers used in interstate commerce.[56] The Circuits are split as to whether the CFAA applies to employees who, knowing they are about to leave the company, use their computer access to obtain information for use after separation.[57]

Employees who use company documents as evidence to support whistleblower claims or activities, employment discrimination claims, or other action against the employer may prompt an employer to assert breach of contract or fiduciary duty claims. In response to such a tactic, employees may assert their own retaliation claims. To prevail, the employee will have to show the employer brought the suit in bad faith and that there is a causal connection between the employer's claim and the employee's protected activity.[58] As a practical matter, employers may be reluctant to pursue these sorts of actions against employees who share information with government agencies, for fear of drawing attention from and angering the government regulators and public.

III. OTHER KEY EMPLOYMENT AGREEMENT TERMS

Employees beginning new jobs enter a sort of "honeymoon" period and may not necessarily be closely scrutinizing the terms of their employment agreements. They may have difficulty focusing on how they would prefer events to unfold at the eventual time of separation. Below are some important terms appearing in employment agreements that should be on employees' radar screens.

A. Severance Protections

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[55] Mabrey v. SandStream, Inc., 124 S.W.3d 302, 316 (Tex. App. 2003).

[56] 18 U.S.C. § 1030 et seq.

[57] Compare LVRC Holdings LLC v. Brekka, 581 F.3d 1127, 1132-35 (9th Cir. 2009) (holding that employee's lawful access to employer's computer, irrespective of the employee's use of the information therein, did not breach that CFAA), with Int'l Airport Ctrs., LLC v. Citirin, 440 F.3d 418, 420-21 (7th Cir. 2006) (holding that an employee's access to computer information with the intent to harm their employer violates the CFAA).

[58] See generally Nesselrotte v. Allegheny Energy, Inc., No. CIV.A. 06-01390, 2007 WL 3147038 (W.D. Pa. Oct. 25, 2007).

Employees in the position to negotiate an employment agreement prior to the start of employment should be sure to insist upon a severance clause. The key provision within many such clauses is the definition of "cause," where the severance payments are triggered upon termination so long as the termination occurs "without cause" or "not for cause."[59] There is great variation in how contracts may define cause, and employees will obviously want to fight for as narrow a definition as possible. Employee-friendly definitions may be limited to events such as felony convictions or willful damage to company assets.[60] Employers prefer definitions containing lower standards with more subjective terms, such as "inadequate job performance" or "actions against the best interests of the company."[61]

Employees with especially strong bargaining positions can push for "good reason" clauses, which allow them to resign and still receive severance under certain circumstances.[62] Examples include material changes in control, forced relocation, and material reductions in duties or pay. Both "for cause" and "good reason" provisions can also include notice-to-cure terms, typically between 30 and 90 days.[63]

B. Bonuses

The parties can also agree beforehand regarding the treatment of bonus payments upon termination or resignation. An employer can create the means to avoid paying bonuses after an employee leaves the company by including language that (1) leaves it within the employer's discretion to pay the bonus or (2) requires the employee to be employed on a date certain in order to have "earned" the bonus. Accordingly, employees should seek to structure bonuses so they are calculated and earned based on concrete benchmarks (sales figures, stock price, etc.), thereby removing discretion from the employer. They should also resist date of employment requirements, or at least include provisions for a pro-rata allocation of the bonus if they are terminated before the payment date. As for severance payments, the parties may also tie "without case" termination or "good reason" resignation to the bonus payments.[64] Note that most states have wage and hour laws requiring payment of bonuses after they are "earned."[65] While most states will permit bonus forfeiture if the employment agreement contains a "payment only if employed on X date" requirement, some states prohibit such contractual forfeitures under

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[59] See, e.g., Design Indus., Inc. v. Cassano, 776 N.E.2d 398, 399-400 (Ind. Ct. App. 2002).

[60] See, e.g., Chic By H.I.S., Inc. v. Luehrs, No. 98 CIV.5431 JFK, 2000 WL 217482, at *1 (S.D.N.Y. Feb. 22, 2000).

[61] See, e.g., Hale v. Stoughton Hosp. Ass'n, Inc., 376 N.W.2d 89, 93 (Wis. Ct. App. 1985).

[62] Jorgensen v. United Commc'ns Grp. Ltd. P'ship, No. 8:10-CV-00429-AW, 2011 WL 3821533, at *2 (D. Md. Aug. 25, 2011) (identifying a "good reason" clause attached to a non-compete provision).

[63] See Mullenix v. Sysco Spokane, Inc., No. CV-13-305-LRS, 2014 WL 3587581, at *1 (E.D. Wash. July 21, 2014) (30 day notice-to-cure term).

[64] See, e.g., Conti v. Tyco Elecs. Corp.,, No. H037607, 2012 WL 4789445, at *2 (Cal. Ct. App. Oct. 9, 2012 (invalidating bonus if employee is terminated for cause or voluntarily terminates).

[65] See, e.g., Cal. Lab. Code § 204 et seq.

certain conditions.[66] Employees should familiarize themselves with local wage and hour rules to be sure the bonus provision language does not allow the employer to side-step such regulations, as the degree of discretion in awarding the bonus is often determinative.

C. Clawback Provisions

Clawback provisions provide that an employee must return compensation to the employer following certain events including, but not limited to:

- The employee's resignation
- Missed profit projections
- Accounting restatements or accounting restatements
- Detrimental activity

Clawback provisions are also often tied to restrictive covenants and so subject to the same issues discussed earlier. Employees should try to narrow the scope of the clawback-triggering language as much as possible. The type of compensation subject to clawback can include salary, bonus, and equity.[67] Note that wage laws in some states restrict the employer's ability to recover amounts already paid to an employee, adding a layer of difficulty in enforcing these clawback provisions.

D. Mandatory Arbitration

Thanks to some recent employer-friendly Supreme Court decisions,[68] employers are becoming increasingly aggressive in drafting restrictive mandatory arbitration provisions into their employment contracts. These provisions are almost universally adverse to employees. Among other disadvantages, arbitrations preclude employees from arguing before a jury, are almost impossible to appeal and carry higher upfront costs and filing fees. Arbitration procedures also tend to limit the parties' ability to take discovery, often to employers' advantage by preventing employees from acquiring the necessary information to support their employment claims.

Employees should expect employers to respond to the Supreme Court's vigorous enforcement of employer-friendly arbitration agreements by drafting increasingly one-sided arbitration provisions. Employees must be on the lookout for new and aggressive attempts to curtail their litigation rights. Possibilities include shortened statutes of limitations, pre-selected arbitrators, or other employer-favorable selection procedures, extensive pre-arbitration grievance

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[66] See, e.g., 820 Ill. Comp. Stat. 115 / 2 (2008) (identifying "earned bonus" as part of "final compensation" due to separated employees).

[67] See, e.g., Int'l Bus. Machines Corp. v. Simonson, 988 N.Y.S.2d 523 (N.Y. Sup. Ct. 2014) (bonus); Square D Co. v. C.I.R., 121 T.C. 168, 186 (2003) (salary).

[68] See generally Am. Express Co. v. Italian Colors Rest., 133 S. Ct. 2304 (2013); AT&T Mobility LLC v. Concepcion, 131 S. Ct. 1740 (2011); Hall St. Assocs., LLC v. Mattel, Inc., 552 U.S. 576 (2008).

procedure exhaustion requirements, unfair witness and claim disclosure requirements, and increased arbitration costs to employees.

While striking any mandatory arbitration would usually be ideal, employees do not always have such leverage when negotiating employment agreements. They may, however, be able to push for the exclusion of certain clauses – e.g., limiting arbitration to any disputes arising under the employment contract but not for claims under statutorily conferred rights such as discrimination claims. Other terms that may be negotiable include the following:

- Who Pays for the Arbitration;
- Location;
- Choice of Law;
- Arbitration Proceedings (number of depositions, availability of summary judgment, etc.);
- Number of Arbitrators;
- Time for Filing Claims and Commencement of Hearings;
- Rules of Evidence;
- Mandatory Pre-Arbitration Mediation; and
- Fee-shifting

IV. SEPARATION AGREEMENTS

Once the employment relationship has come to an end, a new round of negotiation begins. If severance hasn't been discussed prior to this point, it will be now. An employee's bargaining leverage rises and falls depending on the merits of any contractual, discrimination, or other claims she can assert based on her employment experience or termination. The employee may also have leverage based on the possibility of generating bad publicity for the employer, either through litigation or public relations. Employees are advised, however, not to overestimate their ability to create such publicity or the employers' fear of them doing so. Moreover, the employees may be just as vulnerable to bad publicity as the employer, if not more so. Employees may also be able to secure favorable terms if the employer needs their cooperation in transitioning replacements or assistance in defending against other claims or regulatory actions about which the employees have knowledge.

Regardless of the amount of leverage an employee can assert, she should be on guard for certain terms commonly included in employer-drafted separation agreements.

A. Release of Claims

By entering into a separation agreement, the employer is, primarily, paying the employee for a release of claims. The employer wants the comfort of knowing that the employee will not bring costly and resource-draining litigation against the company after leaving. Accordingly, employers invariably ask for a broad release of any and all potential claims the employee could bring against the employer.[69] Before signing any separation agreement, employees should be sure they submit and are reimbursed for any expenses owed to them, lest they get swallowed up by the release provision.

Employees should also be sure the release is limited to the relevant parties. Employers often define the released parties to include the employer, its affiliates, subsidiaries, parents, predecessors, successors, assigns, owners, officers, attorneys, agents, etc.[70] The more tangentially related entities can be problematic, especially when they are defined to include past and future companies and individuals whom the employee cannot ascertain at the time she executes the release. Employees can remedy the issue by insisting the release be limited to issues "arising out of their employment or separation." With this restriction in place, employees can at least be sure that they have not forfeited potential claims having no real connection to the employer/employee relationship.

A prospective release of claims arising from unanticipated future events is generally unenforceable,[71] but many employers will nonetheless attempt to use broad enough language to encompass such claims. Employees should insist on removing such provisions. If, for example, the employer retaliates against the employee after execution of the separation agreement by defaming him or tortiously interfering with his next job, the employee must maintain his right to bring a retaliation claim for those actions.

Employees should be aware of certain statutory provisions commonly affecting release language. The Older Workers Benefit Protection Act (OWBPA) places several requirements on parties wishing to release claims under the Age Discrimination in Employment Act (ADEA).[72] Under the OWBPA, waivers of ADEA rights must be "knowing and voluntary," meaning the release must specifically mention the waiver of ADEA rights.[73] Also, employers must advise employees to consult attorneys, provide a waivable 21 day consideration period from the date of the final separation offer (or 45 days for group terminations) and provide a non-waivable 7 day

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[69] See, e.g., Bickings v. Bethlehem Lukens Plate, 82 F. Supp. 2d 402, 404 (E.D. Pa. 2000).

[70] See, e.g., Andersen v. Dartmouth Hitchcock Med. Ctr., No. 13-CV-477-JD, 2015 WL 847447, at *4 (D.N.H. Feb. 26, 2015) (releasing the company and its "parents, subsidiaries, divisions, affiliates, successors, and assigns, and current and former officers, directors, employees, and agents").

[71] See, e.g., Alexander v. Gardner-Denver Co., 415 U.S. 36, 51-52 (1974) ("[A]n employee's rights under Title VII are not susceptible of prospective waiver.").

E.E.O.C. v. Allstate Ins. Co., 778 F.3d 444, 450 (3d Cir. 2015), as amended on reh'g in part (Mar. 26, 2015)

[72] See 29 U.S.C. § 621 et seq.

[73] See Oubre v. Entergy Operations, Inc., 522 U.S. 422, 427 (1988); see also 29 U.S.C. § 626(f) (citing the eight requirements for a waiver to be "knowing and voluntary").

revocation period after signing the release for employees over 40 years old.[74] For discrimination claims in general, employees cannot release their rights to file with the EEOC or equivalent state agency, though they can waive their rights to seek damages.[75] With respect to the SEC's Whistleblower Program, the agency has recently taken an aggressive stance against requirements that employees sign confidentiality or release agreements that prevent the employees from reporting securities violations.[76] Employees should resist any effort to include such provisions in their separation agreements.

Employees are also well-advised to push for any release provision to be mutual, such that the employer releases any and all of its own claims against the employee. These can be especially important after heated negotiations, where employers often take to accusing the employees of improper or even illegal conduct. Employers may resist providing employees with a mutual release and will typically seek exceptions for claims arising from facts discovered after the employee's departure, such as embezzlement. If appropriate, employees should seek an employer's representation that it is aware of no basis for any such claims.

B. Non-Disparagement Provisions

Non-disparagement provisions offer value to both employers and employees.[77] Employees gain assurance that their pool of potential new employers will not be tainted by a former supervisor set on spreading rumors or bad-mouthing them. Employers usually propose non-disparagement language in their first drafts of separation agreements, but they typically construct them to protect the employer only. Nonetheless, employers are often, though not always, amenable to revisions making the non-disparagement language mutual. They will only go so far, however, and usually will not allow the employer's non-disparagement obligations to extend to the entire company workforce. Instead, employers will seek to qualify the provision so that it applies only to certain named individuals or high level executives. This usually represents a fair compromise, though employers will sometimes try to take it a step further by narrowing their obligation to only "instruct" those individuals to refrain from disparaging the employee.[78] Employees have good cause to question the efficacy of such a formulation.

C. Referrals

Employers frequently resist open-ended referral requests from separating employees. Employers fear inviting defamation, retaliation, or other claims based on an employee blaming

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[74] § 626(f).

[75] See, e.g., Anzueto v. Wash. Metro. Area Transit Auth., 357 F. Supp. 2d 27, 29 (D.D.C. 2004).

[76] See SEC Order Instituting Cease-and-Desist Proceedings Pursuant to Section 21C of the Securities Exchange Act of 1934, Making Findings, and Imposing a Cease-and-Desist Order (April 1, 2015), available at http://www.sec.gov/litigation/admin/2015/34-74619.pdf.

[77] See Cooper Tire & Rubber Co. v. Farese, 423 F.3d 446, 457 (5th Cir. 2005) (noting the ubiquity of non-disparagement clauses and the value it can have to both parties when an employment relationship is terminated).

[78] See, e.g., Drapkin v. Mafco Consol. Grp., Inc., 818 F. Supp. 2d 678, 683 (S.D.N.Y. 2011).

the company's unenthusiastic referrals/recommendations for their failures to secure new employment. Other times, the relationship has simply soured enough that employers are not interested in doing the employees any favors. Employees can convince more agreeable employers to consent to a pre-written letter of recommendation attached as an exhibit to the separation agreement, which has the advantage of allowing the parties to come to terms on mutually acceptable referral language. In most cases, the employees will be able to draft this letter themselves, although they should be careful to keep the language within reason in order to convince the employer to actually agree to it. To accomplish this and avoid unnecessary haggling, employees can incorporate the employers' own words from positive performance reviews.

As an added step, employees can demand that an employer's response to inquiries be consistent with that pre-written letter. More resistant employers will reject any requests for a recommendation and insist the company answer any inquiries with a "name, rank and serial number" response – meaning they will only provide inquirers with the former employees' title, dates of employment, and possibly pay.[79] If this is the case, employees should at least require employers to tell inquirers that their formulaic response represents company policy, so that potential employers are not led to believe the lack of a substantive response reflects upon the employee's performance or other negative aspects of the employment relationship.

D. Return of Property

Employers will often make separation payments contingent on the employees returning all company property and documents.[80] Employees are rarely entitled to retain company badges, cell phones, computers, or other tangible items. With respect to documents, employers are often satisfied with an employee representation that it has returned and/or destroyed all company documents in its possession or control, including those stored electronically.

E. Prohibition Against Reapplication

Many separation agreements contain clauses prohibiting the employee from reapplying to the employer in the future. Problems arise when the term "employer" is defined too broadly and encompasses affiliates, subsidiaries, parents, etc. for the past, present and future. Employees should be sure to limit these sections so they do not apply to companies who happen to be later acquired or merged with the employer after the employee starts working for them. In addition, the clause should only apply to instances in which the employee "knowingly" reapplies to the employer.

[79] See, e.g., Matthews v. Wis. Energy Corp., No. 05-C-537, 2005 WL 1924189, at *1 (E.D. Wis. Aug. 10, 2005).

[80] See St. Louis Produce Mkt. v. Hughes, 735 F.3d 829, 832 (8th Cir. 2013) (finding that former employee's failure to return all company property – mainly the battery, power cord, and hard drive of his laptop – established that the employee failed to fulfill a condition precedent to receive severance payments).

F. Cooperation in Future Proceedings

Employers often seek to include cooperation provisions in separation agreements, which require employees to provide assistance with respect to either future litigation or regulatory investigations about which the employee has relevant knowledge. Employees can agree to such commitments, but should insist that any requests and corresponding demands on time be "reasonable," so as to not interfere with subsequent employment. In addition, employers should reimburse employees for travel and other expenses an employee incurs as a result of providing the assistance, and if possible, a per diem.

G. Characterization of Separation Payments

If employees have asserted claims that led in part to the separation agreement, settlement payments can be divided between the resolution of wage claims (*e.g.*, back pay, front pay, missing commissions) and non-wage claims (*e.g.*, emotional distress). Though employees must pay income taxes on both categories of payments, employer withholdings are only applied to the payments for wage claims. Consequently, for monies attributed to non-wage claims, the employer and employee save approximately 7.65% on FICA and payroll taxes. The parties should not too aggressively allocate payments for non-wage claims, however, because the IRS requires that settlement payments reasonably reflect the claims actually asserted and resolved.

Also of note, payments attributed for employees' attorneys' fees are technically treated as income, but the American Jobs Creation Act of 2004 allows employees to take an "above-the-line" deduction for fees and costs incurred in connection with the settlement of claims for unlawful discrimination, which is defined to include discrimination, retaliation and whistleblower claims.[81]

Separation agreements should indicate that the employer will issue a W-2 form for the employee's wage claim payments and 1099 forms for the payments for non-wage and attorneys' fees payments.

H. Liquidated Damages

Liquidated damages provisions penalize employees for breaching the separation agreement by forcing them to pay back a specified portion of the settlement/severance amounts.[82] The broadest provisions are worded such that employees must return 100% of their compensation due to *any* breach of *any* terms of the agreement. This creates too much risk for the employee, especially with respect to the more insignificant provisions of the agreement.[83]

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[81] See 26 U.S.C. § 62(a)(20) (2004).

[82] See Del. Bay Surgical Servs., P.C. v. Swier, 900 A.2d 646, 650 (Del. 2006) (discussing liquidated damages and noting the difference the difference between a liquidated damages provision and a penalty, which is void against public policy).

[83] Courts may find that an unreasonable liquidated damages provision constitutes a "penalty," is therefore void, and unenforceable. See, e.g., Med+Plus Neck & Back Pain Ctr., S.C. v. Noffsinger, 726 N.E.2d 687, 693 (Ill. Ct. App. 2000) (finding the liquidated damages provision was unenforceable because it was a penalty and bore no relation to the employer's loss).

For example, many separation agreements require the employee to notify the employer's counsel within a defined number of days if they receive a subpoena related to the agreement itself. This of course may happen years down the road, when the employee is no longer in regular communications with her own counsel, and when she no longer recalls the various terms of the agreement. The employee should not be asked to forfeit her entire severance amount – money which she may no longer have – just for being a day or two late in notifying the employer about the subpoena.

Accordingly, an employee should seek to revise any liquidated damages language so that the provision is only triggered after a court determines the employee to have "materially" breached the agreement. In addition, many employers are willing to compromise and will agree to a lowered liquidated damages amount of between 25% and 50% of the employee's settlement proceeds, or a specific amount (*e.g.*, $10,000) per breach. In general, employers simply want comfort that employees have "skin in the game" and are properly incentivized to take the terms of the agreement seriously.