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What Every HR Professional Should Know About Non-compete Agreements

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In today's competitive business environment, the information you tell your employees and the specific skills they learn under your direction can be both your strongest asset and your greatest liability.

While sharing critical information such as client lists, formulas and financial data with certain employees may be integral to growth today, this could backfire tomorrow if these same individuals leave your company to take similar positions with your competitors. If your company is not protected, those same individuals can use the information you taught them to compete against you.

What your company considers a trade secret can determine the outcome of a multi-million dollar lawsuit, and with so much legal fog, it can be difficult to sort through what is most important for you, a human resources executive, to monitor and enforce. Thus, comprehension of contract options and their purposes is the first step to protecting your company's most valuable information.

The Changing Face of Non-compete Agreements

Non-compete, non-solicitation and confidentiality agreements are some basic tools used to safeguard your company from long-term damage. They can even dictate the terms of service for an ex-employee's future job, as the case study that follows demonstrates.

These contracts have significantly risen in popularity over the past few years. Many large companies try to enforce a mandatory signing policy for upper executive positions, and smaller businesses are increasingly following suit. Interestingly, the range of employees signing these contracts is also broadening. Middle management and even entry-level employees are now being asked to sign some type of confidentiality agreement, a precaution that was previously reserved only for top-level execs.

Non-compete and restrictive covenant agreements protect a company's trade secrets and intellectual property, such as technology innovations, client lists, formulas or other confidential information. These agreements can prohibit an employee from working for a competitor or in a certain industry within a specific amount of time and designated geographical boundary.

Non-solicitation agreements also protect other company employees as well as clients. The contracts ensure that an employee cannot solicit the company's clients and customers either for their own personal benefit or on behalf of a competitor once they leave the company. The agreement can also prohibit the employee from recruiting others to leave the company as well.

The legally binding portions of these documents must be understood in order to enforce these agreements. Comprehending necessary terms and regulations is a key step to avoiding potential future problems.

What Constitutes a Trade Secret?

Before filing a lawsuit, it must first be clear what constitutes a trade secret. In short, a trade secret can be defined as "anything with independent economic value derived from facts that are not widely known or easily obtained and that are the subject of reasonable efforts to maintain their confidentiality." A trade secret may differ from traditional "intellectual property," because while patents, trademarks and copyrights require public documentation for implementation and restrictive use of the information, trade secrets may not be made public.

Case Study: Inevitable Disclosure Says it All

Recently, I worked on a non-compete lawsuit filed by my client against its former district manager. The former manager had signed a non-compete agreement with the client stating that she would not accept a job with a competitor for two years and within 25 miles of her district after she left the company. After leaving the company, she was hired as the vice president of operations for one of the company's leading competitors in the same geographical area she had managed for my client.

Once in court, we proved that the employee's restrictive covenant was reasonable and enforceable which lead to my client's winning verdict. We proved the following issues that were critical for this verdict: first, for a court to rule in favor of the company filing the breach of contract, the court must find that the non-compete agreement is reasonable in its duration and geographical restrictions, which it did. Second, we proved that the company had confidential information worthy of protection and that the information was in jeopardy. (The provision in question must protect a legitimate interest of the employer and is not intended solely to aid the employer in preventing business competition.) We also established that the company had taken reasonable steps to protect its confidential information and trade secrets and that its former employee would inevitably use information from her previous position in her job with the competitor.

My client won this case without having to prove that its former employee had actually revealed any of its secrets or had malicious intent to exploit them. This legal concept is known as the Inevitable Disclosure Doctrine, which states that if there is an adequate basis for the court to infer that the duties and responsibilities required to perform the new position with a competitor will "inevitably cause the individual to reveal the former employer's trade secrets even in the absence of ill-will or improper motive," then the former employee has breached his or her contract.

Taking This Information into Your Workplace

Every state and company has a different policy for employee privacy terms and agreements, and it is imperative that each employee is aware of the provisions under which he or she works. It is the human resource professional's duty to keep the information on terms of employment and confidentiality policies fresh in an employee's memory. Inevitably, some employees will leave your company and join a competitor. It is then that the skills and lessons learned can be put into an action plan where your company's protection is the priority.

Enforcement of the Agreements: Simple Steps to Avoid the Lawsuit

Although constant reminder of these signed agreements need not be necessary for compliant and content employees, it is imperative that there be a tactical employee exit strategy that can be enforced instead of an ad-lib reaction. At all exit interviews, it is imperative that non-compete and restrictive covenant agreements be reintroduced to their original signer. Head-hunting agencies, as well as strategic recruiters, may not be aware that a specific employee might be subject to geographic and/or temporal restraints. It is the human resource professional's job to remind exiting employees of their final responsibilities to the firm and to emphasize the possible equitable and legal ramifications of breach of contract. With proper knowledge and awareness, the legal fog over all these agreements can be properly lifted.

Author

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