Two Sides: The Employer, The Employee, and The Non-Compete

One Side. An Employee accepted a position with a new employer and handed a resignation notice to Employee's (now) former employer. The transition was a huge success. Within days, Employee implemented a strategy that will likely send profit margins through the roof and delivered a sizeable book of business. To support the boom times, the new Employer hired dozens of the employee's former co-workers. Two weeks pass by, and, the hope and promise of new beginnings came to a screeching halt as a courier hand delivered a letter, starting with the words: "CEASE AND DESIST – VIOLATION OF NON-COMPETE AGREEMENT."

The Other Side. An Employer received a resignation notice from a (now) former Employee. Within days, clients stopped taking Employer's calls, more employees resigned, and profit projections took a nose-dive. Confusion quickly turned to clarity: Employee's profile surfaced on the website of Employer's direct competitor. Employer pulled Employee's HR file and confirmed Employee signed a Non-Compete. Eager to stop the bleeding, Employer immediately dispatched a cease-and-desist letter.

What Happens in a Toss-Up? The answer depends on a number of things. Principal among them will be whether the Employer or Employee observed the best practices explained below to minimize their risks and maximize their legal rights.

Employer Best Practices

For an employer, a properly drafted and implemented Non-Compete can be a legal castle, protecting valuable assets—such as goodwill and relationships with clients and employees—from a departing employee's competitive action. When drafted or implemented incorrectly, however, a Non-Compete can result in a coin toss of "heads—employee wins, tails—employer loses" situation. Observing the best practices below will help ensure your Non-Competes are stone fortresses, rather than castles made of sand.

The first step for an employer begins long before an employee ever leaves the company. Employers must spend the time, effort, and resources necessary *on the front end* to ensure that their Non-Competes are drafted to comply with the particular state laws that govern their employees. Only California, North Dakota, and Oklahoma fully prohibit the use of Non-Competes. The vast majority of states support Non-Competes, but their respective laws are by no means universal. Instead, each state has its own particular requirements and limitations that determine whether an employer can enforce a Non-Compete against a departing employee.

Next comes on-boarding. Generally, a Non-Compete is signed at the start of an employment relationship. Successful organizations employ on-boarding processes that ensure: (i) new employees sign their Non-Competes; and (ii) a fully-executed versions of all signed Non-Competes are maintained in the organization's records. If a Non-Compete incorporates exhibits, it is important that all exhibits are signed and maintained in the organization's files. If Docu-Sign or an equivalent e-sign application is used to execute the Non-Compete, the company should retain all electronic records that evidence the employee's receipt, e-signature, and delivery of the Non-Compete. The final on-boarding step seems basic, but cannot be overlooked. Employers must review the entirety of the Non-Compete after its signed. A clever employee may have taken the opportunity in review to cross out or modify terms in to the Non-Compete. Employers have

lost cases—before they even began—after discovering an employee changed a Non-Compete's terms years earlier at its execution.

After on-boarding, an employer should implement routine Non-Compete compliance procedures. Compliance does not end when an employee signs a Non-Compete, even if it has been carefully tailored to comply with relevant state regulations. Non-Compete law, even within a given state, changes frequently due to legislative action or judicial interpretation. Employers should therefore conduct periodic (every one to two years) reviews with legal counsel to ensure Non-Competes remain compliant with developments in applicable law or need to be amended. There is no guarantee that the Non-Compete a valuable employee signed ten years ago remains enforceable today.

Off-boarding may be the next step and is just as critical as on-boarding. Exit interviews are important times to remind employees that they are contractually bound by restrictive covenants. Depending on the circumstances, providing a hard-copy of an employee's Non-Compete during the exit interview may be advisable. Moreover, best practices include requiring that employees sign acknowledgments confirming they have returned all property of the employer and have no confidential information in their possession. Upon termination, employers should immediately cut off an employee's access to the organization's email system and network to thwart a rogue employee's ability to take confidential information on their way out the door to a competitor. In suspicious situations, employers should also work with their IT department or an outside consultant to forensically image company-owned electronic devices a departing employee used. More times than not, departing employees who have plans to hit the ground running with a competitor in violation of a Non-Compete will email, download, or transfer confidential and proprietary electronic information (such as client lists or financial data) to personal accounts or storage devices. If these employees are caught early or in the act, employers can limit damage and begin litigation from a position of strength.

Consistency in applying these steps is key. Employers should not enter contracts they do not intend to consistently adhere to or enforce. The rationale for this proposition is both practical and legal. Practically, consistent enforcement practices establish a workplace precedent that discourages employees from disregarding their Non-Compete obligations because they know there will be consequences. Legally, failing to consistently enforce Non-Competes when they are violated or taking a case-by-case approach could constitute waiver—the knowing relinquishment of a legal right—which can operate as a bar to an employer's ability to enforce a Non-Compete.

A final note for employers: in some states, a court can reform (i.e., re-write) an unenforceable Non-Compete to fix terms that are legally out of bounds. Law differs on whether reformation can happen early in a lawsuit (as part of temporary or preliminary injunctive relief) or at the end (only after trial). Though helpful, reformation is not usually a total fix. In states like Texas, an employer can seek judicial reformation to make an unenforceable Non-Compete enforceable, but to do so, the employer must be willing to relinquish any monetary damages incurred before reformation. Other states do not allow reformation at all. In these states, an employer loses all contractual protection against competition or solicitation if their Non-Compete does not hold up in court. The resulting harm can be exponential: word travels fast, and existing employees will be on notice that their Non-Competes can be ignored.

Employees Best Practices

Switching jobs is never an easy decision. Doing so after entering a Non-Compete takes things to another level. Employees with Non-Competes can minimize risk and liability through proper planning before—and strategic actions during—a departure.

Just like a prudent employer, a prudent employee's first step begins long before the employment relationship ends, but when it begins. An employee should anticipate that a Non-Compete might be buried in that stack of first-day paperwork. Any proposed employment agreement must be taken seriously: employees must thoroughly read and understand the terms before signing. If the agreement contains a Non-Compete provision or provision defining an employer's confidential information, an employee must take time to evaluate whether the employee does—or can—agree to the terms. Retaining experienced counsel to assist in evaluating these provisions and, if necessary, negotiating alternatives, can prevent trouble down the road and clarify the employee and employer's expectations from the beginning. An ounce of prevention can be worth a pound (or much, much more) of cure.

Experienced counsel becomes even more critical when an employee contemplates a career shift while under an existing Non-Compete. An employee with a Non-Compete should engage legal counsel before resigning. Developing an informed strategy before departure is far better than developing one on the go after receiving a cease-and-desist letter. A reasonable investment in retaining an experienced lawyer to conduct a preliminary review of a Non-Compete on the front-end of a departure will pay off in numerous ways. For example, not all Non-Competes are created equal. By engaging legal counsel early in the process, employees can arm themselves with vital information, including whether: (i) the Non-Compete is enforceable under applicable law; (ii) taking a particular job would violate the terms of the Non-Compete; or (ii) a thoughtful resignation approach could open doors to negotiate a way out of an enforceable Non-Compete.

One of the fastest ways for employees to find themselves in a Non-Compete lawsuit is by keeping or taking information that their former employer considers to be proprietary, confidential, or trade secret. To a seasoned Non-Compete litigator or judge, cases involving Non-Competes tend to begin in similar fashion: a departing employee emails customer lists, financial data, or employee-specific data (such as salary, benefits, and contact information) from their work email account to a personal email account to access after an anticipated departure. Employers often consider this type of information the key differentiator between their organization and that of their competitors. In some situations, taking this kind of information may constitute theft. Accordingly, teaming up with a competitor in violation of a Non-Compete while armed with this type of information is a sure-fire way to get hit with a lawsuit seeking a temporary restraining order and injunction. Once this type of conduct is revealed to a judge, legitimate arguments attacking the enforceability of a Non-Compete are often overshadowed and an employee is left at the court's mercy. When contemplating a job change or resigning, take steps to avoid this unbalanced litigation scenario: don't email yourself or otherwise take, transfer, or download an employer's confidential and proprietary information on the way out the door. If you believe the information is yours and not the employer's, you should still proceed cautiously. A well-versed attorney can help you take steps in ensure the information remains safe while you prove your case.

Finally, taking an upfront and forthright approach with both a new and old employer during a career change—especially one involving a Non-Compete—can minimize risk and expenses and save a lot of headaches and sleepless nights. Presumably, employers that require Non-Competes do so with the intent to enforce them if needed. This, however, is not always the way things develop. Employers routinely modify Non-Competes through negotiations with employees or simply choose not to enforce them in light of any number of reasons, including the time and expense associated with litigation or even the risk of defeat in litigation. As with many situations,

you will never know if you don't ask. By informing your employer of your plans in a forthright manner, you create an opportunity to seek a mutually acceptable business solution or open negotiations about modifying the restrictions. While some employers will not budge, the upside of handling your business decision in a forthright, professional manner is too great to pass up. Similarly, you should be forthright with your new prospective employer about the existence of a Non-Compete. Otherwise, the surprise receipt of a cease-and-desist letter or suit by your new or prospective employer could result in losing an employment offer or termination after employment. Deciding how to open this conversation with a current prospective or future employer also warrants discussion with counsel. As discussed above, a comprehensive understanding of your Non-Compete—especially its enforceability—will equip you to have an informed, transparent dialogue with all parties.

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