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Management Alert

Five Easy Tips for Improving Your Company's Non-Compete and Confidentiality Agreements and Related Practices Now

By Robert B. Milligan

As January quickly passed by and new projects increase by the day, there is still a golden opportunity to capitalize on some low-hanging fruit to immediately improve your company's practices and add immediate value to your company. The opportunity lies in improving your company's restrictive covenant and confidentiality agreements and confidentiality policies. Below are five tips that you can employ immediately to improve your company's agreements/policies and practices.

First, make sure your company is using confidentiality agreements and confidentiality policies with your employees. You may be surprised to learn how many companies do not ask their employees to sign such agreements. When those companies later seek to explore their options against employees who have joined competitors, their options are significantly narrowed. Also, your company should not rely solely on employee handbook policies or other similar policies. While your company may not use non-compete or non-solicitation covenants with your workforce, at a minimum, companies should use non-disclosure agreements with their employees. There is really no excuse not to ask employees to sign such agreements.

Additionally, companies should consider using the maximum legally permissible restrictive covenants in their jurisdictions, including non-competes and non-solicitation of customers and employees as applicable, with their workforces; otherwise, companies are leaving a competitive advantage at the table. While some companies may elect not to use non-compete agreements because such covenants are viewed as not supportive of their company "culture," companies should carefully survey what their competitors are doing and determine whether they are putting themselves at a disadvantage in the talent market.

Second, spend some time with the business leaders in departments that create your company's confidential information to make sure that your company's non-disclosure agreement provides sufficient descriptions of the information that each department considers high value confidential information. Oftentimes, companies give little thought to the categories of information described in the non-disclosure agreement or have no description of the information whatsoever. While your company should not provide the secret information in the agreement, your company should at least describe the category of information in which it belongs and some specifics so that the category is easily identifiable by employees. The value in describing the information in more detail is that the employee then understands what the company deems confidential, and it also provides the company a better chance in the courtroom to hold a former employee accountable if he or she misappropriates such information.

Third, review your company's restrictive covenant and confidentiality agreements to make sure that they do not unnecessarily limit the company's rights. In one recent case, an employer lost its trade secret suit because its non-disclosure agreement defined confidential information as only that information which had been marked confidential. The court found that the trade secret claim failed because the information in dispute had not been marked confidential. The trade secret claim may have proceeded if the contract had not unnecessarily restricted the term "confidential" information to only signify information labeled confidential. While labeling information as confidential indicates that such information may be subject to reasonable secrecy measures to support a classification as a trade secret, it is typically not dispositive as to whether contract and trade secret claims can be pursued for the theft of company information.

Additionally, companies operating in states that permit non-compete and non-solicitation agreements should consider using such agreements with their employees in those states even if those companies' corporate headquarters are in jurisdictions where non-competes are typically void in the employment context, such as California. Simply put, just because your company is headquartered in California does not mean that you should not ask your employees in Florida to sign non-compete and non-solicitation agreements governed by Florida law. Additionally, some companies have been successful in using forum selection and choice of law provisions to bind employees who work in jurisdictions where restrictive covenants are limited to non-competes and non-solicitation covenants in the company's home forum, particularly where such employees are provided access to trade secrets and maintain well-established relationships with company clients. A company should also consider whether to use a prevailing party provision for attorney's fees and costs for actions brought on or related to the agreement.

Fourth, take into account some recent developments in state non-compete law to make sure that your company's agreement is compliant. For example, Oregon has limited the duration of employee non-competes to two years effective January 1, 2016. Hawai'i has banned the use of non-compete and non-solicit agreements with technology works effective July 1, 2015. Alabama has made it easier to enforce non-compete agreements with a revised statute that became effective January 1, 2016. Also, in Alabama, non-competes of one year will now be presumed to be enforceable. Additionally, Illinois and Pennsylvania have special requirements for the roll-out of non-compete agreements with existing employees, including providing consideration apart from continued employment alone, to enforce such agreements. The Wisconsin Supreme Court recently has found that continued employment was adequate consideration for non-compete agreements entered into after the inception of employment. There are also active movements in Utah and Washington to restrict the use of non-compete agreements.

Fifth, critically examine which employees and third parties your company asks to sign restrictive covenant and confidentiality agreements and be mindful of third-party scrutiny. Regulators, legislators, and employee groups are scrutinizing the use of restrictive covenant agreements. While some employers may not be using such agreements enough, particularly with the right people (i.e., executives, engineers, R&D personnel, sales representatives, among others), other companies may be accused of overreaching in asking all employees to sign non-compete agreements. While the janitor does not necessarily need to sign a non-compete, he or she probably should sign a non-disclosure agreement in certain instances. Also, your company should perform an audit or ensure one has been performed to see if your company has signed agreements with key employees, particularly high level executives and employees who may be flight risks.

Companies should think critically about who they *are* asking to sign such agreements and who they *should* be asking to sign such agreements (e.g., appropriate restrictive covenants and non-disclosure agreements with vendors and contractors). We have found that while some companies may have solid agreements with employees, the same high value information may be provided to contractors and vendors without similar protections, which erodes the confidentiality protections placed on the information. Government agencies such as the NLRB, SEC, and EEOC are actively scrutinizing employer confidentiality restrictions, so companies should be mindful to provide examples of confidential information instead of broad undefined labels, to not prohibit disclosure of information protected by Section 7 of the National Labor Relations Act (such as concerted activity involving discussions of conditions of employment or wages), and to not prohibit participation in government investigations or including similar provisions which impede the ability of employees to act as whistleblowers.

As many have already broke their New Year's resolutions as we move into February, there is still an opportunity for you to add value to your organization by addressing these critical issues and providing useful recommendations to your organization. Don't wait. Act today and reach for this low-hanging fruit.

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