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Noncompete Agreements and The Great Resignation

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"The Great Resignation" is upon us. For months, pundits have predicted that millions would leave their jobs as the pandemic subsides, and those predictions have proven prescient. According to *The Wall Street Journal*, the percentage of people leaving their jobs is higher now than it has been in a generation,[1] and Microsoft's Work Trend Index reports that more than 40% of the workforce intends to leave their employer this year.[2]

Some of these employees will be subject to noncompete/nonsolicitation agreements and may possess confidential trade secrets, so their departures may raise difficult questions for prospective and former employers. Will hiring this person subject my company to litigation? Should I enforce the restrictive covenants for this departing employee? If I do not enforce the covenants now, will that impact my ability to enforce those restrictions with future employees that may leave for competitors?

There is no "right" answer to these questions, but several considerations can help an organization process these difficult decisions.

What must an employer prove to obtain injunctive relief?

Enforcing a restrictive covenant through injunctive relief has been described as a "drastic" and "extraordinary" remedy, and courts caution that such remedy "should not be routinely granted."[3] Fairly, courts are reluctant to deprive individuals of the ability to work and make productive use of the skills and knowledge they have gained in their careers.

In *Winter v. NRDC, Inc.*, the Supreme Court explained that a "plaintiff seeking a preliminary injunction must establish that (1) he is likely to succeed on the merits, (2) that he is likely to suffer irreparable harm in the absence of preliminary relief, (3) that the balance of equities tips in his favor, and (4) that an injunction is in the public interest."[4] A failure to meet one or more of these requirements can be fatal to a request for injunctive relief, and each one of these factors requires a fact-specific analysis.

Each of these elements is open to attack, so obtaining injunctive relief requires thorough preparation for former employers and provides employees and prospective employers with meaningful protections.

Reasonableness is king

When considering enforcement of noncompete agreements, courts must balance the need to protect the employer's legitimate business interests with the employee's need to have a livelihood.[5] Any balancing of those

competing interests must be reasonable. A common standard used to evaluate the enforceability of such covenants is that a covenant that is reasonable in time and geographic scope shall be enforced to the extent necessary (1) to prevent an employee's solicitation or disclosure of trade secrets, (2) to prevent an employee's release of confidential information regarding the employer's customers, or (3) in those cases where the employee's services to the employer are deemed special or unique.

Each of these considerations have subparts to be considered. Does the employee know "trade secrets" as that phrase is understood or other confidential information? What time and geographic restrictions are reasonable for the context of that employee? If an employee can telecommute for the job, what geographic restrictions can be imposed? Again, "reasonableness" is king and is unique to the facts of that specific employer-employee relationship.

The applicable law matters greatly

States vary significantly when it comes to enforcing noncompete provisions, as states weigh the benefits of employee mobility with the need to fairly protect a company's legitimate economic interests and investments in their employees.

Increasingly, jurisdictions are restricting or banning employers from enforcing noncompete agreements. Earlier this year, for example, the District of Columbia passed a law that prohibited employers from enforcing noncompetes even during the time that the employee was working for the employer.[6] Other jurisdictions have also recently enacted laws to restrict, or further restrict, the use of noncompete agreements, particularly among low-wage workers.

When the noncompete agreement was executed could also be determinative of its enforceability, as the applicable standard for enforcing the noncompete agreement can vary depending on when it was executed. By way of example, Illinois has one law for noncompete agreements entered into prior to January 1, 2022, and a second law will apply to noncompete agreements entered into after that date if, as expected, Governor Pritzker signs the bill to amend the Illinois Freedom to Work Act, 820 ILCS § 90/1, *et seq.* Other jurisdictions, such as Washington, have laws that apply retroactively to limit the enforceability of noncompete agreements.[7] Oregon enacted changes to its noncompete law as recently as this summer to further limit the enforceability of noncompetes.[8]

Moreover, having a choice-of-law provision in the noncompete agreement does not necessarily end the analysis about the applicable law. Because of the public policy concerns involved in enforcing noncompete provisions, courts may undertake a choice-of-law analysis to ensure that the chosen law has sufficient contact with the dispute, and whether application of the chosen law would result in an outcome that is contrary to a fundamental policy of the state, which has a materially greater interest in the dispute than the chosen state.[9]

What are the risks of waiving a noncompete provision?

Selectively enforcing noncompete agreements, or giving mixed signals about whether a noncompete agreement will be enforced, could invite employees to argue that employers have waived the restrictive covenants. Waiver is the intentional relinquishment of a known right, and former employees may argue that the employer waived the noncompete provision, either by the employer's words or actions.

For example, if employees had previously left a company, and the former employer did not enforce the noncompete agreements for those employees, an employee may argue that the employer has waived the right to enforce the provision. Well-reasoned opinions have mostly rejected the argument, particularly when the agreement has an integration clause, but potential waiver arguments should be considered if declining to enforce a noncompete agreement.[10]

Recommendations

While each employment arrangement is different, we have some basic recommendations to assist employers with evaluating noncompete agreements. First, analyze your noncompete agreements and templates and determine whether they still make sense after changes to how employees work after the pandemic. For example, given the rise of telecommuting for work, is it reasonable to expand the geographic restriction on future employment? Second, spend time learning recent changes to the applicable laws that may impact your organization's noncompete agreements. For example, a newly enacted law in Washington provides that a noncompete that seeks to force a Washington-based employee to adjudicate the noncompete in any jurisdiction other than Washington is void and unenforceable.[11] In Oregon, recent changes limit noncompetes to a 12-month period, and employees must meet certain salary limits to be bound.[12] With recent legislation in numerous states that bar or limit the use of restrictive covenants, it is important to know the strength of your noncompete agreements. Third, if you selectively enforce noncompete agreements, prepare a written record about why that decision was reached to memorialize the unique circumstances for not enforcing the agreement in that circumstance. Fourth, if you are restricted by new laws from enforcing noncompete agreements, consider whether restrictions on the use of trade secrets would provide your organization with similar safeguards. Employers in states that have restricted the use of noncompete provisions have used other legal options to protect confidential and proprietary information from dissemination.

Finally, if you have any questions, or want to discuss these issues further, please feel free to contact the authors who will connect you to the appropriate member of Troutman Peppers' Labor and Employment practice as necessary.

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[1] *See* https://www.wsj.com/articles/forget-going-back-to-the-officepeople-are-just-quitting-instead-11623576602.

[2] *See* https://www.microsoft.com/en-us/worklab/work-trend-index.

[3] *IBM Corp. v. Johnson*, 629 F. Supp. 2d 321, 329 (S.D.N.Y. 2009).

[4] *Winter v. NRDC, Inc.*, 555 U.S. 7, 20 (2008). Other jurisdictions offer alternative avenues for obtaining a preliminary injunction. *See, e.g., IBM Corp. v. Johnson*, 629 F. Supp. 2d 321, 334 (S.D.N.Y. 2009).

[5] Additionally, there are myriad of procedural requirements promulgated by various jurisdictions that also impact the enforceability of a noncompetition agreement, *e.g.,* whether the noncompetition was entered into at the

appropriate time, such as to make the noncompetition agreement enforceable, was separate consideration necessary to support the non-competition agreement, whether there is a salary-basis for the bound employee that is implicated and/or satisfied, etc. These preliminary procedural issues may affect the enforceability of the non-competition agreement even before getting to the substance of the agreement.

[6] Ban on Non-Compete Agreements Amendment Act of 2020, D.C. Law 23-209.

[7] Wash. Rev. Code Ann. § 49.62.100. Washington requires that an employer must disclose the terms of the noncompete in writing to a prospective employee "no later than the time of the acceptance of the offer of employment," or if the noncompete is entered into after the commencement of employment, it must be supported by "independent consideration for the covenant." RCW 49.62.020.

[8] *See* ORS 653.295.

[9] *Estee Lauder Cos. v. Batra*, 430 F. Supp. 2d 158, 170 (S.D.N.Y. 2006).

[10] *HR Staffing Consultants, LLC v. Butts*, No. 2:15-3155, 2015 U.S. Dist. LEXIS 71220, at *40 (D.N.J. May 29, 2015); *but see Surgidev Corp. v. Eye Tech., Inc.*, 648 F. Supp. 661, 698 (D. Minn. 1986).

[11] RCW 49.62.050.

[12] ORS 653.295.

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