

Employers To Employees: “You Can’t Take That With You!”

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Restrictive covenants come in several forms such as confidentiality agreements, covenants not to compete (non-competition agreements), and non-solicitation agreements. Generally, these agreements are enforceable in New Jersey. However, the enforceability of these agreements varies depending upon the conduct that the employer wants to restrict and the manner in which they intend to restrict the conduct.

What are you, as the employer, trying to protect? This may be customers, trade secrets, confidential business information or certain client relationships. Generally, client relationships and current customers are subject to protection. However, covenants that attempt to simply stifle competition will not be enforceable. Trade secrets and proprietary business information such as customer lists, pricing information and trade secrets are protectable in New Jersey.

What is not protectable? Commonly known information such as client addresses or information that is in the public domain is not protectable. In addition, prospective customers are ordinarily not a protectable interest under New Jersey law.

When can you have an employee sign a restrictive covenant? The answer to this question is not necessarily straightforward. Employers may condition the hiring of an employee upon the execution of a restrictive covenant. Similarly, the conditioning of continued employment is permissible in New Jersey. This means that an employer can require that an employee sign a restrictive covenant in order to preserve employment with the company. Refusal to hire or continue to employ an employee based upon his or her refusal to execute a restrictive covenant is allowed in New Jersey.

When is a restrictive covenant enforceable? Non-competition agreements are enforceable provided that the terms are reasonable. New Jersey Courts will enforce a restrictive covenant so long as it is necessary to protect the legitimate interests of the employer, imposes no undue hardship on the employee and does not injure the public.

What constitute “Legitimate Interests” of the Employer? Legitimate interests of the employer include protection of trade secrets, confidential information and proprietary customer information. Courts often view covenants that attempt to restrict an employee from working in his or her trade to be unenforceable. Covenants that prevent an employee from using his or her skills learned during the course of employment are unenforceable. Finally, even if the restrictive covenant is otherwise enforceable, the Courts will not enforce it if it would reduce marketplace competition.

In addition to the factors set forth above, New Jersey Courts examine the overall reasonableness of a restrictive covenant. The narrower the restricted conduct the more likely it will be enforced. Generally, if the restriction is limited in scope, duration and geographic location, it will be enforced. Although it is a factually sensitive analysis, one to two years is frequently accepted as reasonable. Geographic limitations depend on the circumstances and the areas in which the employee performed his or her job.

Whether you are looking to have an employee execute a restrictive covenant or looking to enforce one, it is important to make sure that the restriction is reasonable. Although New Jersey is a blue pencil state, meaning that the Court may revise the terms of the covenant in order to make it more reasonable, the conduct you want to restrict may be revised by the Court rendering the restrictive covenant hollow. The best practice is to have the restrictive covenant prepared or at least reviewed by an attorney with experience in this area before having an employee sign the agreement. Otherwise, you risk an employee leaving his employment and taking confidential information or clients with him/her.