Some of What You Should Know About Employee Non-Compete Agreements

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If you're in the high-tech industry, you already know that Austin is one of the hottest marketplaces for technology companies, big and small, from industry leaders to startups. Between 2001 and 2013, Austin's technology industry grew by 41.4%. The city currently leads the nation in startup activity, and is home to more than 4,700 hi-tech companies. As of a year ago, the Austin Technology Council predicted that 11,754 new tech jobs would appear within five years.

With new growth comes new opportunity. But with this growth also comes competition, including competition for the best employees, who frequently receive numerous unsolicited job offers each month.

Many Austin employers realize that to guard their profits, they must guard their talent. Hence the rise of the non-compete agreement—an employment contract that limits the employee's ability to go work for a competitor. If you work in the tech industry, chances are high that you've either signed a non-compete agreement, or will be asked to sign one in the future.

Here is some of what you need to know about these agreements:

In Texas (unlike in states like California and Oklahoma), well-drafted non-compete agreements tend to be enforceable. Texas courts apply certain tests when determining whether a particular non-compete agreement is enforceable.

First, any employee's promise not to compete must be "ancillary to or part of an otherwise enforceable agreement." Simply put, this means an employer must, in exchange for the employee's promise not to compete, provide some type of new "consideration" (compensation) to the employee that is designed to enforce the employee's return promise not to compete. The consideration can take the form of more money, stock options, specialized training, or providing the employee with confidential and proprietary information. This additional consideration does not have to be received by the employee at the time the documents are signed.

Second, the agreement not to compete must be reasonable and cannot be overbroad. This means that the agreement must not impose a greater restraint on the employee than is actually necessary to protect the employer's goodwill or business interest. Generally, restrictions on an employee's ability to compete must be limited (a) by geographic area (to a specific identifiable area) and/or by customer base in certain circumstances, (b) by a specific period of time (it can't be indefinite), and (c) in scope of prohibited activities. Because non-competes must not be broader than necessary to protect the employer's interests, what might be reasonable for one company could be overly protective when imposed by another.

When negotiating and drafting non-compete agreements, vigilance is required on both sides of the employer-employee equation to ensure the agreement is properly tailored and reasonable. On the one hand, if an employer attempts to enforce what turns out to be an overly broad agreement, it might lose out on recovering damages that may have otherwise been available with a more narrowly drafted agreement in a lawsuit against a departed employee. But on the other hand, an employee who haphazardly signs a non-compete agreement might arguably, by virtue of the employer's initial inclusion of certain stipulations in the agreement, waive a future defense that the agreement was overbroad and unenforceable.

And then there's "TUTSA," the Texas Uniform Trade Secrets Act:

An employee who is contemplating a new opportunity must consider more than simply whether he or she is governed by a non-compete agreement. Under the Texas Uniform Trade Secrets Act (TUTSA), a former employer can also bring an action against an ex-employee if it appears the employee has taken trade secrets belonging to the former employer. And if the employee brings a trade secret to a new employer and the new employer should have known the trade secret was acquired by improper means, then the new employer may be liable for damages under TUTSA, as well.

These cases can become complex, in part because what constitutes a "trade secret" is frequently subject to dispute. A trade secret is more than just a special formula, but it does not include every piece of information gained during the employment relationship, and the trade secret status of certain information may be inadvertently waived by the employer in a number of ways, including by public disclosure. Due to the complexity of these cases, rather than taking the risk of exposure and litigating a case to the bitter end, some new employers will simply terminate a recent hire at the first sign of real trouble.

The Rodeo:

Finally, lawsuits brought in the wake of an employee's departure frequently progress on a very fast track. The employer can show up at a courthouse with little or no notice to the employee and obtain a temporary restraining order ("TRO") that prohibits the employee from violating the non-compete and/or taking trade secrets. Within fourteen days, the court must hold an evidentiary temporary injunction hearing (a mini bench trial) to determine whether the court should put a longer temporary injunction in place. If ordered, the temporary injunction will prevent the employee from engaging in certain behavior until a full trial on the merits can be had, which could take up to a year or more. The first few weeks leading up to a temporary injunction hearing are often intense and invasive, and in the modern internet era frequently involve requests to image personal and work computers and cell phones, followed by the parties sifting through and identifying documents or communications containing potentially confidential or proprietary information.

But the landscape is not all bleak. With the help of good counsel and strategic planning, employees can and should feel able to seize new employment opportunities, and employers can and should feel confident in continuing to hire and recruit top talent. While the level of acrimony associated with these types of business separations often resembles that seen in bitterly contested divorces, these are party and case specific, and generally can be handled an "easy way" or a "hard way," with many variations in between. All parties should proceed with their eyes wide open and diligently protect their interests, including by getting advice from well-qualified counsel, knowing that proper planning can make a contemplated transition more successful and less stressful.

[THIS DOES NOT CONSTITUTE LEGAL ADVICE. PLEASE HIRE AN ATTORNEY.]

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