



DELAWARE

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covenants not to compete

Protecting your most valuable asset

by Scott A. Holt

Significant time, money, and resources often go into developing client relationships, so it is only natural that businesses take steps to protect those intangible assets. Many employers require employees who have significant contact with clients to sign nonsolicitation agreements. However, executing and enforcing nonsolicitation agreements are two different matters. Like traditional noncompetes, nonsolicitation agreements are considered restraints on trade, and most courts will enforce them only if they are "reasonable."

In considering reasonableness, courts will typically assess three factors: (1) the employer's interest in protecting its business, (2) the employee's right to earn a living, and (3) the public's interest in competitive markets. This article provides practical guidance to increase the likelihood that your nonsolicitation agreements will be enforced.

Be clear about what you're trying to protect

The most widely recognized protectable interest is a business's goodwill with its customers. Most courts recognize that a company has an interest in protecting its relationships with clients from departing employees, especially if the employee had personal contact with clients.

Courts also have recognized that employers have a right to protect their confidential information by prohibiting former employees from soliciting clients. If an employee gained significant knowledge of a company's customers during his employment, courts may restrict him from soliciting customers, even if he had no direct contact with them. However, note that the information must be so confidential that it would give a former employee an *unfair* competitive advantage. The rule excludes general

knowledge or skills acquired during employment and information that is publicly available.

Set a reasonable time period

Nonsolicitation agreements must have a reasonable time limit. "Reasonable" is often interpreted as the period needed for the company to rebuild its relationships with customers. The determination is fact and case-specific. In some instances, a period of several months is reasonable. If the services being provided or the business relationship are complex, a longer period may be justified.

Delaware courts generally presume that restrictions of two years or less are reasonable. Longer periods may be necessary if an employee had access to confidential information.

Avoid the 'she called me' defense

Former employees commonly claim that they did not "solicit" a customer. If the term "solicit" is not defined, courts typically defer to the dictionary definition, and they will take public-policy considerations into account. You can avoid uncertainty by specifying that former employees may not accept business from your customers. Many courts will enforce such language.

Consider a liquidated damages provision

Finally, consider including a liquidated damages provision in your nonsolicitation agreements. It is usually easier to sue for money than to obtain injunctive relief from a court, and the potential for significant damages may make an employee think twice about poaching clients.

The requirements for a valid liquidated damages provision are a bit contradictory. First, the damages agreed to must be a reasonable estimate of the loss likely to be suffered in the event of breach. Second, liquidated damages provisions are only permitted where it is difficult or impossible to accurately value the loss. In making your valuation, consider a variety of factors, including the cost of developing client relationships with similar depth and complexity, as well as the revenue paid to the former employee by the solicited customer.

Bottom line

Keep in mind that nonsolicitation agreements are not a cure-all. They generally should be limited to high-level employees who have direct contact with or knowledge of your customers, clients, vendors, or other business relationships that are susceptible to interference. If you believe that your business could benefit from implementing nonsolicitation agreements, it is best to consult a lawyer. This is not a situation in which you can find high-quality forms online.

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