

# Employment Law Update



by  
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*“Many financial sector employers require those who have significant client contact to sign non-solicitation agreements.”*

## Protecting Your Most Valuable Asset

Significant time, money, and resources often goes into developing client relationships, so it is only natural that businesses take appropriate steps to protect these intangible assets. Many financial sector employers require those who have significant client contact to sign non-solicitation agreements.

However, executing and enforcing that agreement are two different matters. Customer non-solicitation agreements, like traditional non-competes, are considered restraints on trade, and most courts will enforce them only if they are “reasonable.”

In considering reasonableness, Courts will traditionally 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. Following is practical guidance to increase the likelihood that an agreement is enforced.

### Be Clear About What You Are Trying to Protect

The most widely recognized protectable interest is a business’s goodwill with its customers. Most jurisdictions recognize that a company has an interest in protecting its client relationships against departing employees. This is particularly true where the employee had personal contact with clients.

Courts have also recognized that companies have a right to protect their confidential information by prohibiting former employees from soliciting clients. Courts may restrict a former employee from soliciting customers even if that employee had no direct contact, if the employee gained significant knowledge of those customers during his employment. But note that the information must be of such confidential nature that it would give the former employee an unfair competitive advantage. This rule excludes general knowledge or skills acquired during employment or information that is publicly available.

### Set a Reasonable Time Period

Non-solicitation agreements must have a reasonable time limit. This is often

interpreted to be the period needed for the company to rebuild its customer relationships. The determination is fact specific and case specific.

In some instances, a period of several months is reasonable. If the selling or servicing of the relationship is complex, a longer period may be justified.

Courts in Delaware generally presumed that restrictions of two years or less are reasonable. Longer periods may be necessary if the former employee had access to confidential information.

### Avoid the “I Didn’t Solicit Them; They Called Me” Defense

A common defense invoked by former employees is that they did not “solicit” the customer. Where the term “solicit” is not defined, courts typically defer to the dictionary definition, and will take into account public policy considerations.

Employers can avoid this uncertainty by specifying that a former employee may not accept business from the employer’s customers. Many jurisdictions will enforce such language.

### Consider a Liquidated Damages Provision

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

In order for a liquidated damages provision to be enforceable, it must be a reasonable estimate of the loss likely to be suffered, yet relate to an injury incapable of accurate estimate. Estimates might include the payments made by the solicited customer to the former employer during a certain time frame.

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