

BLOGS

Archives;Hiring & Firing;Privacy & Information Security

Avoiding Restrictive Covenant Problems Simple Steps That Can Save You Heartache and Expense

In the past week, I have been involved in two situations in which an employer received a cease and desist letter from a potential competitor. The employers had hired employees away from the potential competitors and were then notified by the potential competitors that the employees were subject to various restrictive covenant obligations. The potential competitors letters made various demands regarding the restrictive covenants and restrictions to be placed on the employees activities.

As many of you know, restrictive covenants prevent employees from engaging in various types of actions both before **and** after they leave employment. Restrictive covenants include such things as:

- Non-competition restrictions which prevent an employee from working for a competitor;
- Non-solicitation of employee restrictions;
- Non-solicitation of customer restrictions;
- Confidentiality protections;
- Trade-secret protections; and
- Assignments of inventions.

While I could write at length about the legal issues surrounding restrictive covenants and their enforceability, there are some fundamental steps that employers can take to try to avoid restrictive covenant disputes altogether or, at the least, to have a leg up in dealing with a dispute. Taking these few extra steps in the hiring and termination process can go a long way to averting potential issues.

The Hiring Process

Lets start with the hiring process. Employers should always ask potential hires if they are subject to any type of restrictive covenant agreement. Why, you might ask? The advantages are two-fold. First, if you have this information on the front end, you can do an analysis and make an informed decision about whether the restrictive covenant is enforceable and whether you have any risks that you are willing to take on by hiring the employee. In addition, asking about restrictive covenants up front may help you defend an action brought by the competitor against your company. Minnesota allows competitors to sue new employers for tortious interference with a contract if the employer knowingly hires an employee subject to a restrictive covenant and the employer knew it was enforceable (after consultation with an attorney). If, however, the new hire told you that he/she is not subject to restrictive covenants, or if your attorney expressed an opinion that the restrictive covenant is not enforceable, you can more easily defend against this claim.



Remember too, that you want to document what you find out about the status of restrictive covenants from potential employees. The best way to do that is to make sure that your offer letter confirms the following:

- That the employee told you that he/she is not subject to any restrictive covenant;
- That the employee should not take any proprietary information from the prior employer; and
- That the employee should not take or utilize any confidential information from the prior employer and should return all of the prior employers property and data to that employer.

The Termination Process

Turning to the termination process, many employees who sign restrictive covenant agreements do not remember doing so or do not understand what the restrictive covenants mean. If you have employees subject to restrictive covenant agreements, it is a good idea to remind the employee about the restrictive covenants upon the end of employment. The best way to do this is through a short reminder letter that attaches a copy of the executed agreement and points out the specific restrictions that apply post-termination. At the very least, this puts the employee on notice that you take these issues seriously. In addition, it is more likely that employee will disclose the agreement to a new employer.

Finally, if you receive a cease and desist letter, remember that there are numerous ways in which you can address a potential dispute, including by trying to enter into an agreement with the potential competitor that meets the needs of both parties.