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"Non-Compete" Lawsuits Heat Up in Tight Job Market

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Over the past 10 to 15 years, many U.S. companies have introduced “non-compete” and "non-solicitation” obligations into the employment contracts of their key sales and technical-service employees. Employment contract “non-compete” provisions typically prohibit an employee from going to work for a direct competitor of the former employer for a period of one to two years. Usually, the non-compete restriction only applies if the former employee works for the competitor in the same geographical territory in which he worked for the former employer. In addition, the “non-solicitation” provision of an employment agreement usually prohibits the former employee from “soliciting” the former employer’s employees, customers, or suppliers on behalf of their new employer. The “non-solicitation” provisions of employment contracts are similarly imposed for one to two years post-employment.

Depending on a host of factors, including the length of time the former employee worked for the company and the reasons for the employee’s departure, companies have mostly attempted to enforce these types of “restrictive” employment terms when they discover a former employee quit to accept employment with a particularly aggressive competitor. When this development occurs, the company typically sues both the former employee (for breach of contract) and their new employer (for interference with the contract).

For the most part, these types of lawsuits are quickly settled if the employee and their new employer will agree to restrict the employee’s right to “solicit” (or call on) a list of specified customers or will agree the employee will restrict his business activities to a limited geographical area for a shorter time period than specified in the employment contract. For example, the employee won’t have any contact with the Smith Company for 9 months instead of a year or won’t make any sales calls in the Atlanta area for one year instead of two years. In other words, the parties to the dispute usually agree to a reasonable settlement of the lawsuit by obtaining a court-enforceable promise by the employee and their new employer that the employee will not solicit specific customers or customers in a specific geographical area for a shortened period of time.

However, the extremely tight job market the U.S. is experiencing has intensified the “poaching” of employees by competitors. The promise of hiring bonuses and substantial increases in compensation are pulling in even long-term, satisfied employees. At the same time, the new employer is looking at the former employer’s employment agreement to see whether there are legal deficiencies in the contract that will make the post-employment restrictions unenforceable. And the former employer is now concentrating on protecting their experienced sales and service personnel from being lured away by making it clear to employees and former

employees that they intend to enforce the post-employment contract obligations. This “battle” to keep employees from quitting their current job to join competitors (and then contacting their former colleagues to see if they are also interested in leaving the company) has caused U.S. companies to file more lawsuits to enforce post-employment non-compete and non-solicitation terms and to spend more time and money defending those contract terms. In addition, many companies have become reluctant to settle these lawsuits on practical terms because they fear competitors will continue to “poach” their employees one after the other if they don’t fight back when the first employee departs.

All of this means that companies often believe they need to prove to their competitors that they will take extreme action to prevent the *en masse* resignation of their most valuable employees. Defending the enforceability of the employment contract has become more important, in many instances, than examining the actual consequences of one former employee’s new job duties. So, these types of lawsuits are not only on the rise, but they are also getting more expensive to prosecute and defend because the stakes have been raised by a competitive job market.

This trend also comes at a time when the legislatures and courts of each state are developing different rules and tests for how post-employment restrictions will be enforced and for how long. Many state courts disfavor post-employment “non-compete” restrictions but are more willing to enforce reasonable “non-solicitation” restrictions. The emerging law is not always consistent or clear, making it especially difficult for companies operating in more than one state to arrive at a single employment agreement that all courts throughout the U.S. will consistently enforce.

In conclusion, the time for a company to examine the enforceability of its employment contract is before it sees the need to take legal action to enforce it. And just because a court in one state has agreed to enforce the contract terms against a former employee does not mean the court in another state will decide to enforce those post-employment terms in the same manner. Take the guesswork out of your employment strategy by talking with your attorney before you walk – voluntarily or involuntarily – into court.