PROTECTING YOUR CUSTOMERS FROM FORMER EMPLOYEES

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In industries where customer lists are essential, employers often seek to prevent an employee from stealing clients through the use of legal covenants, namely non-competition and non-solicitation agreements. To protect your customers from former employees — and their new employers — using your content and information, you should review your employment agreements and your security policies to make sure that your valuable customer information is fully protected.

Post-Employment Restrictive Covenants

The restrictiveness of non-compete and non-solicitation agreements determines whether the contract will be enforceable in court. A non-compete agreement bars a former employee from competing against a former employer for a specified amount of time. For example, if the employee had worked in a pharmaceutical company, a non-compete agreement would prevent him or her from working in the pharmaceutical industry. These agreements are often restricted to a specific geographic area.

The non-solicitation agreement is a less restrictive contract and is narrowly aimed at preventing an employee from soliciting his or her former employer's clients. Unlike the non-compete agreement, the employee is allowed to immediately start work in the same industry and in the same geographic area.

Burke, Warren recently represented a company that was seeking to enforce a non-solicitation agreement against a former employee. The former employee left the company, started his own business and actively solicited clients from his former company. In court, Burke, Warren partners Aaron Stanton and John Kobus showed that the former employee breached his non-solicitation agreement and obtained a preliminary injunction that effectively shut down the former employee's new business.

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Courts generally view non-solicitation agreements more favorably, as they do not impose limitations on an employee's right to work. When balanced against the company's legitimate interests — to preserve and to protect its client base — non-compete agreements have been found to greatly restrict an employee's ability to seek other employment. Non-solicitation agreements, on the other hand, are generally viewed by the courts as imposing reasonable conditions as the employee is free to continue working in his or her area of expertise.

Regardless of whether you think you need (or currently use) a non-compete or non-solicitation agreement, several factors must be met under Illinois law for them to be enforceable.

The first factor is whether you have given your employees adequate consideration for the post-employment restrictions. In the case of *Fifield v. Premier Dealership Services*, the Illinois Appellate Court ruled that in order to enforce post-employment restrictions in employment agreements, an employer must employ that employee for at least two years or offer other adequate consideration to the employee, such as a signing bonus in exchange for the employee's agreement not to compete with the employer, post-employment. *Fifield v. Premier Dealership Services*, 2013 IL App (1st) 120327.

The employee in the *Fifield* case, who worked in the automobile insurance and finance industry, executed an employment agreement that precluded him from competing with the employer for two years after termination. This restriction, however, did not apply if the employee was terminated "without cause during the first year of employment." The employee resigned three months after executing the employment agreement and went to work for a competitor. The Illinois Appellate Court held that the non-compete restriction was invalid because it lacked "adequate consideration," stating that where the only consideration given to the employee is the promise of future at-will employment, "there must be at least two years or more of continued employment to constitute adequate consideration."

The *Fifield* decision presents two questions that all employers must address:

- How can an employer best ensure that non-competition provisions in employment agreements with new employees can and will be enforced?
- For current employees with non-compete agreements who have been employed for less than two years, what can the employer do to protect itself?

The answer to both of these questions is that the employer must offer the employee "adequate consideration" in exchange for the non-compete restriction. Although there is scant Illinois law on what constitutes "adequate consideration" for enforcement of a non-compete provision, it is clear that the consideration for the non-compete must be more than the salary and benefits that the employee will receive or currently receives for his or her employment. Therefore, after *Fifield*, an employer now must offer something in addition to regular salary and benefits — that is, something that the employee is not entitled to or would not normally receive simply for his or her employment. Courts outside of Illinois have held that additional adequate consideration includes: a signing bonus, stock options, a year-end bonus, managerial or other specialized training that could lead to career advancement, unconditional severance benefits at the end of employment, or a raise or promotion (for current employees).

Having determined what additional consideration will be offered, an employer must then determine what amount is adequate. Although there is no precise formula to ascertain what amount is adequate under the law, courts look at the amount of consideration on a case-by-case basis, based on the employee's salary, education, experience, and industry custom and practice. For example, courts have found that signing bonuses of $500.00 and $2,000.00 in consideration for a non-compete in an employment agreement were sufficient additional consideration to make non-compete restrictions enforceable.

In addition to consideration, in order to create an enforceable post-employment restriction, an employer must show that: (1) it has "a legitimate business interest" in need of protection by the non-compete, which includes a multi-faceted array of factors, including whether: (a) the employer has "near permanent customer relationships" and/or (b) the employee has access to the employer's confidential information; and (2) the restrictions are reasonable in geographic and temporal scope — for example, the employee cannot compete for one year and within five miles of employer. Likewise, the non-solicitation agreement should only apply to customers that the employee actually worked with and/or had contact with during the last year of employment. These requirements are very factually intensive and any non-solicitation or non-compete agreements should be narrowly and specifically tailored to the employer's specific business and industry.

Confidential Customer Information

One important factor in the above analysis as to whether an employer can enforce a post-employment non-compete or non-solicitation agreement is whether the employee had access to the employer's confidential information.

Many employers believe that the names, addresses, e-mails, and phone numbers of their customers are *per se* confidential. This is not correct. To be considered "confidential" under the law, the customer lists (1) must contain actual information that is not publicly available (*i.e.*, the list contains customers' buying patterns, preferences, or other market data) and (2) must be kept confidential (*i.e.*, access is limited and password protected). To protect your clients, you should:

- Make sure your client list contains comprehensive customer information, including buying history and customer characteristics, timing of the purchase and potential obsolescence of products or services, customer business needs and preferences, and cost sensitivity.
- Have employees sign a non-disclosure and non-solicitation agreement, with the above requirements met, prohibiting the use of information designated "Confidential" and solicitation of customers.
- Protect customer information by requiring passwords, limiting access to customers on a need to know basis, and restricting downloading of customer information onto personal devices.

The above are general steps. To discuss the right steps to best protect your company's customer information and determine what best fits your company's needs, feel free to contact Aaron Stanton at 312/840-7078 or astanton@burkelaw.com or John Kobus at 312/840-7093 or jkobus@burkelaw.com.