

Non-Compete Issues for the New Year

Labor & Employment Law Update

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At the beginning of the year it is not uncommon for employees to jump ship. We often find our employer clients either dealing with employees who have left, or considering hiring employees who may be under non-compete agreements with their former employers.

Here are a few things to keep in mind:

If you are an employer who has an employee leave, make sure that his or her work station, laptop, or other electronic storage device is not “wiped” or put back in service until you are comfortable that the employee is not taking information or engaged in conduct that violates his or her non-compete. Obtain any physical copies of documents or information, thumb drives, etc. before the employee leaves. Have them affirm in writing that all information has been returned.

If you think the employee is engaged or about to engage in conduct that violates the non-compete, have your counsel send the employee and any prospective new employer a letter that encloses a copy of the restrictive covenant and puts them on notice that you are monitoring their conduct and that you stand ready to take any legally appropriate action.

Don't assume that the employee or the new employer will honor the non-compete. There are various reasons for this. The employee might think that non-competes are unenforceable – an erroneous but widespread misconception. Or, the employee might think that the employer does not really intend to enforce it. Some employees even forget they have agreements. In other cases, the employee does not tell the new employer that he has a non-compete.

If you are considering hiring someone, ask during the interview if they are under any kind of restrictive covenant, non-disclosure agreement, or other contract that would potentially be breached by their employment with your company. If you hire them, require them to sign a statement confirming that they have not been asked for, nor have they disclosed, any confidential or proprietary information. Experienced counsel will have forms of this type of agreement.

Finally, some employers roll out new restrictive covenant agreements at the beginning of a calendar year. If your company is considering doing this, please be aware that the law is developing and some states now require some type of consideration (besides the job or continued employment) to new or existing

employees in exchange for the non-compete. There are different ways to meet this requirement, so check with counsel experienced in this area of the law. Your non-compete agreements probably will need to be updated if they are more than a year old.

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