Restrictive Covenants:
What You Should Know As an Employer and an Employee

By: Lynn M. Brown, Esq.

Both employers and employees should know the basics about restrictive covenants, which often appear in employment contracts and are sometimes referred to as "covenants not to compete, or "non-competition" agreements. An example of a restrictive covenant is a contract provision that says, "for one year after the termination of the employee's employment, the employee may not be employed, directly or indirectly, by a company engaged in the same business as the employer, within 10 miles of the business of the employer."

While all employees owe certain duties of loyalty to their employers even in the absence of an agreement, restrictive covenants provide additional protection to employers who provide valuable training and know-how to employees that such employees are likely to use in any future employment, including for a competitor. Restrictive covenants enable an employer to keep a former employee "out of the market" for some specified period of time and in a specified location, allowing the employer a breathing period in which the employer does not have to face competition from the former employee and can instead devote its resources to continuing running the business and replacing the departed employee.

Often employers choose to combine a non-competition agreement with a non-solicitation and/or confidentiality provision, which, in addition to limiting the post-employment opportunities of the former employee, prevent the former employee from soliciting customers and/or employees of the former employer, and from using "confidential information" (usually defined in that provision), which the employee learned while in the employ of the former employer, either for the employee's own benefit and for the benefit of a new employer.

These agreements are most useful in highly competitive industries, where the departure of one or more employees can wreak havoc on the business of the former employer. An employer may rely upon the violation of a restrictive covenant as the basis for a breach of contract claim, as well as to support various business-tort claims against a former employee, including claims for unfair competition and tortious interference with prospective business relations.

Recognizing that restrictive covenants may be used by employers to prevent a former employee from earning a living, restrictive covenants are enforceable only to the extent that they are reasonable in scope and duration. If a restrictive covenant is challenged, which typically occurs when the former employer seeks to stop a former employee from starting his own competitive business or working for an established competitor, a restrictive covenant that is deemed too long or too broad is unlikely to be enforced as written. In connection with any such challenge, the restrictive covenant will be enforced, but only to the extent that an employer has a legitimate interest in its enforcement, including whether the employer is actually doing business in the location covered by the covenant, whether the length of the covenant is no more than necessary to protect the employer, and/or whether it is effectively depriving the former employee from

earning a living for an unreasonably long period. This is a fact-specific inquiry, and must be determined on a case-by-case basis. While, generally speaking, a restrictive covenant preventing an employee from engaging in a competitive business anywhere in the world for a ten year period is probably less likely to be enforced than a restrictive covenant preventing an employee from working for a year for any business within a 10-mile radius of the former employer, there may be particular circumstances in which a court may find the longer and broader restrictive covenant enforceable (for example, in the case of a high level employee working for an international corporation).

Even covenants deemed too broad or too long to be enforced as written may still be enforceable to some degree, as courts in New York and other jurisdictions have the power to reform a restrictive covenant to make it more reasonable, either by changing the scope or the duration of the non-compete. It also bears noting that an employee subject to a restrictive covenant may engage in "preparatory" acts before the non-compete expires, such as incorporating a new business or registering a trademark, as long as the employee is not actively competing with the former employee before the term of the restrictive covenant expires (including by making sales in competition with his former employer or collecting a salary from a competitor).

Carefully drafted agreements are enforceable, and warrant serious consideration both by employers who wish to protect themselves from competition from former employees and by employees who are asked to sign them. We have represented numerous employers and employees in connection with restrictive covenants, and can offer advice to employees with respect to their drafting and enforcement, and to employees who seek to challenge such a covenant. We can also offer advice with respect to acceptable "preparatory" activities that an employee may engage in without running afoul of a restrictive covenant.

About the Author

Lynn M. Brown is Of Counsel to Meyer, Suozzi, English & Klein, P.C. and is a part of the Litigation & Dispute Resolution and Education Law practice groups located in Garden City, New York. Ms. Brown has been involved in all aspects of state and federal litigation, with particular emphasis on complex commercial disputes, including contract disputes, partnership disputes, corporate break-ups, antitrust, fraud and securities law actions, construction law matters, defamation cases, landlord-tenant disputes, professional liability and malpractice claims, matters concerning the enforceability of restrictive covenants, and wrongful termination, unfair competition and other business torts. She has handled traditional litigation matters as well as arbitrations and mediations, and has argued on the trial and appellate levels.