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Non-competes are sometimes nonenforceable

In people-intensive businesses with high levels of client interaction — like public relations — employees are often asked to sign a non-compete agreements, restrictive covenants that curtail their ability to compete with their former firms.

But PR firms should be aware that non-compete agreements may not be enforceable if the employee is an at-will employee and terminated without cause.

Employees in many states—even highly compensated employees—are considered to be "at will" which means they can be terminated for any reason (or no reason) so long as it is not unlawfully based on a protected classes such as age, sex, race, religion, marital status, or national origin.

Employers may be surprised to learn that enforcing non-compete agreements can present significant challenges when people are let go for reasons such as business downturns, staff reductions, client losses, office closures, or simply to maintain profitability.

Courts have increasingly seen the enforcement of non-compete agreements as unfair and beyond legitimate business needs.

These courts reason that it's disingenuous for companies to limit their employee's ability to service former clients or hire former co-workers if they decide the employee was unnecessary for its own business.

In fact, a growing body of statutes and case law requires that employers seeking to enforce restrictive covenants demonstrate a cause for terminating the employee.

For example, the recently enacted Massachusetts Noncompetition Agreement Act prohibits the enforcement of non-competes (entered into on or after October 1, 2018) against employees who have been terminated without cause.

Many courts, including in the District of Columbia, Illinois, Maryland, and Pennsylvania, will look at the reasons behind an employee's discharge. They may view non-compete agreements with heightened disfavor when the employer is the one ending the relationship, and refuse to enforce a non-compete when employees are terminated without cause.

New York state regularly refuses to enforce restrictive covenants against employeesterminated without cause. In December, the court in Davis v. Zeh refused to enforce a contractual provision prohibiting a terminated employee from working within 40 miles of the employer's clinic for a one-year period following the termination. The employer's only evidence supporting termination was a speculative allegation that the employee violated the company's employment handbook.

That reason could have demonstrated sufficient cause. However, the court refused to enforce the non-compete because the allegations were dubious and unsubstantiated.

It has always been good HR practice to maintain a robust performance management program with documentation of performance issues as well as sharing of feedback during reviews and immediately after performance issues arise.

These practices will serve PR firms looking to enforce restrictive covenants against departing at-will employees. Documentation of performance issues will help demonstrate that the termination was for legitimate performance reasons, and not arbitrary.

Another way for PR firms to maximize the enforceability of their restrictive covenants for all departing employees—including for those terminated without cause—is to use carefully- drawn separation agreements that provide severance benefits to departing employees.

The separation agreement should ask the employee to reaffirm the terms of the restrictive covenant and also ask the employee to agree to the restrictive covenant in consideration for receiving the severance benefit.

In sum, PR firms will face an uphill battle enforcing non-competes if they can't show the employee was terminated with cause.

PR firms can mitigate against this situation by maintaining good employee performance management systems and using carefully drawn severance agreements.

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