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Limiting competitive damage from your former employees

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The Record

Q: Can I have my employees agree not to work for a competitor if they leave my company?

Yes, in New Jersey, employers can enforce contractual agreements that reasonably prohibit employees from engaging in competitive activities with their former employer following termination of the employment.

In fact, such agreements, known as "restrictive covenants," can be very useful to employers seeking to reasonably prevent employees from many post-employment activities, including revealing confidential information or trade secrets, prohibiting direct competition, and/or prohibiting former employees from soliciting the clients and employees of the employer.

To be enforceable in New Jersey, restrictive covenants must be "reasonable" under the circumstances. To successfully overcome a challenge to a restrictive covenant, an employer must establish: (1) the covenant protects a legitimate interest of the employer; (2) the covenant imposes no undue hardship on the employee; and (3) the covenant is not injurious to the public interest.

Application of these criteria is not always straightforward. For example, a restraint against competition may be invalid if the employer's sole interest is to prevent competition. On the other hand, courts have found employers have a legitimate interest in protecting confidential information and the employer's ongoing relationships with their clients.

Similarly, while the personal inconvenience and financial hardship of an employee may not be enough to invalidate a restrictive covenant, in weighing the hardship a restrictive covenant will impose, courts will consider the ability of the employee to find other employment based on his or her skill level and expertise.

A court considering the enforceability of a restrictive covenant is not limited to fully enforcing or rejecting the agreement, however. Courts in New Jersey have the discretion to review restrictive covenants in their entirety and to decide to enforce only those provisions they find to be reasonable. Thus, when these agreements are drafted, each provision should be carefully considered by the employer and its counsel with an eye toward achieving a balance between protecting a legitimate interest of the employer and becoming overly oppressive to the employee

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