NOTHING LASTS FOREVER . . . NON-COMPETE AGREEMENTS INCLUDED

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Successful companies make significant investments in their employees in the form training, relationships, sharing confidential or proprietary information and other resources. If all goes well, a company's employees can become valuable assets. As such, an employer should protect the value of its "employee" assets, just as it protects the value of its other tangible and intangible assets. One of the ways that a company can protect the value of its employee assets is by entering into non-compete agreements.

What is a Non-Compete Agreement?

Non-compete agreements are usually located in stand-alone agreements or incorporated into a primary governing contract, such as an employment agreement or independent contractor agreement.

Non-compete agreements can restrict different types of activities, such as those involving unfair competition, solicitations, confidential information and trade secrets:

Non-Compete Agreement	Restricts an employee from engaging in certain unfair competitive activities with a former employer.
Non-Solicitation Agreement	Restricts an employee from soliciting customers and/or employees of a former employer.
Confidentiality Agreement	Restricts an employee from disclosing trade secrets and/or confidential information of a former employer. (Also known as Non-Disclosure Agreement)

These restrictions are often referred to as "restrictive covenants" and are usually in effect during employment and remain in effect for a limited period of time after termination of employment. The restrictions can be applied separately, or in combination with each other.

For the sake of simplicity, references in this blog post to "non-compete agreements" are intended to refer to all the different types of restrictions.

Non-compete agreements are governed by state law, usually as interpreted by the courts, and sometimes as codified by statute. In the absence of a non-compete agreement, some states impose limited restrictions on employees, but entering into non-compete agreements generally provides employers much greater protection.

Most states view non-compete agreements as a restraint on trade and will only enforce them under limited circumstances. State law governing non-compete agreements varies widely among the states. It is not uncommon for two similar neighboring states to have vastly different laws governing non-compete agreements. This presents a myriad of challenges for companies that have employees located in multiple states.

Non-Compete Agreements in Missouri

Healthcare Servs. of the Ozarks, Inc. v. Copeland, 198 S.W.3d 604 (Mo. 2006). In Missouri, non-compete agreements are governed by statute in R.S.Mo. § 416.031 and R.S.Mo. § 431.202, as well as court decisions.

Generally, non-compete agreements are enforceable in Missouri if they are

- (i) reasonable in both duration and geographic scope, and
- (ii) reasonably necessary to protect an employer's legitimate business interests.

While the above requirements seem straightforward, there is much nuance to be considered, and courts take many other factors into account when determining whether a non-compete agreement is enforceable. Therefore, it is recommended that employers seek the advice of experienced legal counsel to avoid the many pitfalls which can cause a non-compete agreement to be deemed unenforceable.

Changes that Affect Non-Compete Agreements

One of the lesser-considered pitfalls is how the effectiveness and enforceability of a non-compete agreement can change over time, whether due to a change in circumstances or governing law. Consider the following examples:

Change in Geographic Scope

A non-compete agreement that restricts an employee from competing with the employer within St. Louis County would be mostly ineffective if the employee was subsequently transferred to work exclusively in St. Charles County.

Change in Job Duties

A non-compete agreement for an employee working in the role of a sales representative that restricts an employee from working for a competitor as a sales representative would not be particularly effective if the employee is subsequently promoted to be the vice-president of operations (i.e., a non-sales role) and then is hired in that same role for a competitor.

Change in Employer's Line of Work

A non-compete agreement that restricts an employee from competing with its "business," which is defined in the agreement as selling cleaning supplies, would not be particularly effective if the employer subsequently expands into primarily selling office supplies, and the employee later leaves the company to work for an office supply competitor.

Change in Ownership

A non-compete agreement that is initially enforceable by an employer, is not necessarily enforceable if the employer is acquired by or merges with another company.

Change in Technology

A confidentiality agreement that was drafted before electronic documents became ubiquitous and requires an employee to return all physical documents at the end of employment may not adequately require electronic documents to be returned. Similarly, a non-solicitation agreement drafted prior to the popularity of social media may not fully contemplate how employees can use social media to solicit an employer's customers or employees.

Change in Governing Law

The law of non-compete agreements is constantly evolving, in some states more than others. A new statute or pivotal state court decision can have an enormous impact on existing non-compete agreements. Sometimes, new statutes only apply to agreements executed after the dates that such

statutes go into effect, but occasionally statutes can affect both existing and new agreements.

Guidance for Non-Compete Agreements

A well-drafted non-compete agreement will be flexible to accommodate the many potential changes in circumstances and governing law, but even the best-drafted agreement cannot protect against every scenario. Employers often do not realize the weaknesses in their non-compete agreements until after a valuable employee leaves the company to compete with the employer, when it is generally too late to do anything about it.

Even though non-compete agreements protect the value of crucial assets, it is not uncommon for them to be neglected after an employee is initially hired. Sometimes employers never even follow through to make sure that their employees sign non-compete agreements, or the agreements are signed, but later lost. More occur over time that challenge the effectiveness and enforceability of the agreements.

With the assistance of experienced legal counsel, employers should periodically review their existing non-compete agreements, as well as their standard (template) forms of new non-compete agreements, to ensure that their agreements are effective and enforceable.