ROGERS & HARDIN

Related Attorneys

- Daniel D. Zegura
- S. Gardner Culpepper, III

Related Practices

- Restrictive Covenants, Trade Secrets and Proprietary Information

SO THEY WANT YOU TO SIGN A NON-COMPETE (AND NOW!) – NEGOTIATION THOUGHTS FOR EXECUTIVES

08.21.2019

Successful business people are frequently presented with a new set of heavily lawyered restrictive covenants (e.g. non-compete and non-solicitation agreements) that they are urged to sign quickly, with little time to consult counsel. The pressure for haste can come from many sources. Perhaps the company / employer is being sold and locking the key employees (or founders) into non-competes is necessary before the deal can close (and the founders can be paid). Or maybe the employer is rolling out new stock grants or retention bonus plans, telling employees that, if the covenants are not signed soon, the opportunity to participate will vanish. The pressure and economic incentives to move fast can be intense.

Slow down and consult a lawyer. This is an important moment. In many states (including Georgia), restrictive covenants enjoy strong presumptions of enforceability if the drafter follows certain basic statutory guidelines. Some executives, with little or no negotiation, sign perfectly enforceable covenants that were drafted to greatly favor the employer. Employees sometimes tell themselves that they really do not have much choice but to sign the document (largely as drafted) and that, if the worst happens, they will hire a lawyer later to try to defeat the covenants. This is a bad strategy. The best way to guard against an unjust future outcome is to consult a lawyer on the front end to help negotiate a covenant before signing. Typically, employees have a much better chance to negotiate a balanced non-compete on the front end than they do to later invalidate an imbalanced non-compete that they freely signed.

There are many ways that an employee, through negotiation, might seek to soften the potential future impact of a proposed restrictive covenant regime. Negotiating, for example, to limit the geographic scope or duration of a non-compete or to define narrowly the other companies for which the employee cannot work if she separates employment is common.

There is, however, one sometimes overlooked area in which negotiation can be particularly fruitful. Many employees are surprised to learn that a non-compete is often enforceable for years after employment ends no matter the reasons for the separation. That is, even if the employee is terminated without cause or quits because she was demoted, the non-compete can often be enforced to sideline her for years.

Many executives succeed in negotiating some protections against these potentially harsh results. One possible mechanism is a "good cause / no good cause" and "good reason / no good reason" structure. For example, the employee might propose that if she quit for defined "good reasons" (e.g. she is demoted, her salary or benefits are cut, the employer files for bankruptcy, family illness or the employer exits the market segment in which she works) then the non-compete does not apply at all post-employment, or at least for some lesser period of time. On the other hand, if she does not have one of the agreed upon "good reasons" for leaving, then the non-compete applies in full. Similarly, she might propose that if the employer terminates her for "good cause" (defined, perhaps, as violation of the law or company ethics policies, failure to meet certain performance metrics, or loss of a licensure necessary to perform her job function), the non-compete will apply in full. But, if the termination is not for one of these defined "good causes," then the non-compete has no (or lesser) post-employment application.

Obtaining a more balanced covenant is not always possible as a matter of negotiating leverage or for other reasons. But, it is imperative that employees try. All the employer can do is say "no." And, once an employee signs the imbalanced covenant, the die has already been largely cast if the employment relationship later deteriorates.

Additional information on Rogers & Hardin's services is available at Restrictive Covenants, Trade Secrets & Proprietary Information.

Download PDF of Advisory