

### Should You Hire That Great Applicant with the Non-Compete?

We often receive calls from employers advising that they want to hire a new employee (from a competitor of course) who is the best thing since sliced bread but he has this non-compete agreement. The first question is usually: "that's not enforceable, right?" The seemingly useless lawyer answer of "it depends" is just the starting point. The more practical issue is will your company get sued if you do hire this person, and will you have to spend valuable time and money in determining if the non-compete is enforceable or not.

Contrary to the belief of some, non-competition agreements can be enforceable, although they are restricted in a few states such as California, North Dakota, and Oklahoma. In other states such as New Jersey and Pennsylvania, the general rule is that enforceability requires a showing that the agreement is (1) necessary to protect the employer's legitimate interests, such as to protect confidential information or client relationships; (2) will not cause an "undue hardship" on the employee; and (3) does not cause any public harm. These are very fact sensitive factors and judges will differ on their application, with some judges enforcing these agreements. So, there is significant risk in moving forward with the hire. These risks include the following:

- Tortious Interference with Contract Claim. In a lawsuit for tortious interference with contract, the prior employer will argue that the new employer knew of the agreement but still hired the employee anyway, thereby causing interference (or once it became aware of the agreement, it continued to employ the employee).
- Legal Fees. Who's Paying? Even if not sued, is the new employer paying the legal fees for the employee when he is sued?
- Conflicts of Interest. If both the employee and new employer are sued, they may each need their own independent lawyer based on potential conflicts of interest between the two. This, in turn, will increase the legal fees, as well as potential tension or distrust between the two.
- Vicarious Liability of New Employer. Vicarious liability or "respondeat superior" is a doctrine that holds that an employer is liable for the wrongful acts of its employees committed within the scope of their employment. Consequently, if the new employer proceeds with the hire and it turns out that new employee has also been using confidential information for the benefit of his new employer-even without new employer's knowledge-the new employer can be liable for this as well.
- Chaos of a Quick Injunction Hearing. Lawsuits involving breach of a non-competition agreement usually start with the former employer seeking a hearing (akin to a mini-trial) in which it asks for injunctive relief, such as a prohibition on the employee working for the new employer until the matter is resolved through the court. This, in turn, requires a need for the new employer to engage counsel, obtain witnesses and prepare them,

gather documents, and engage in potential forensic analysis of electronic data, all in a very short time period.

Given these risks with hiring an applicant with a non-compete, employers should first engage in the following actions:

- Consult with counsel who can advise not just on the enforceability of the non-competition agreement, but also on the jurisdiction at issue to see if there is a tendency to enforce or not enforce in that specific jurisdiction.
- Seek to determine if a lawsuit is really likely or not, or is it just a bluff. Has the former employer sued other former employees in similar circumstances? Or has there been a pattern of similarly situated employees leaving with no legal action at all?
- Ask if the employee was terminated or not. Some courts, such as those in New Jersey, will consider the fact that the employer initiated the termination as a factor in not enforcing the non-compete. (Of course, you will want to know the reasons for the termination as they may implicate other issues on whether to hire or not).
- Seek to determine if a waiver of the restrictions is possible from the former employer, or whether some compromise is feasible. Sometimes the former employer is really just concerned with solicitation of clients and an agreement in that regard can be reached.
- Have the employee sign a written agreement representing that he has not taken any of his prior employer's confidential information and will not use any such information in the course of his duties with the new employer.
- Finally, have an exit strategy if you do hire and are then sued. Will you engage counsel for the new employee? Will you continue to litigate if the case cannot be resolved early? Or will there come a point where you decide to part ways with the new employee?

Hiring an employee with a non-competition agreement carries significant risks, both legally and practically. Do not fall into the trap of automatically thinking the agreement is not enforceable. Tread carefully and consider your options based on the guidance above.

If you have any questions regarding non-competition or related agreements, please contact [Douglas Diaz, Esquire](#), or any other member of Archer's [Trade Secret Protection and Non-Compete Group](#) in Haddonfield, NJ at (856) 795-2121 or Philadelphia, PA at (215) 963-3300 or Hackensack, NJ at (201) 342-6000.

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