

An ounce of prevention: Employer-employee agreements

Your company has worked hard to stay competitive in the oil and gas industry—developing a robust customer list, inventing cutting-edge industry techniques and strategizing to ensure successful reactions to rapidly-changing market conditions. Jane is a valued member of your organization, an important leader in your sales group and a part of your strategic planning team. One day, Jane walks into your office and asks for a few minutes of your time. Jane informs you that she is pursuing other opportunities and gives her two weeks' notice.

You thank Jane for her efforts on behalf of the company and wish her well, but after she leaves you begin to feel panicked. You've trusted Jane with your customers and with confidential company information. What happens if she goes to work with a competitor? If she then calls your customers and asks them to move their business to her new employer? If she discloses confidential information, allowing her new employer to steal your competitive advantage?

Advance planning increases business protection and employer control

Now imagine that in response to Jane's resignation you thank her and wish her well, and then remind her of her post-employment obligations as contained in the non-compete and confidentiality agreement she signed when she began working at the company. Jane may respond that she's moving forward with the agreement in mind and tell you about her exciting new opportunity in a different field.

If instead Jane expresses her intent to violate the agreement or gives a non-committal response, you are prepared. You immediately develop a course of action to protect your company, by engaging with Jane and/or her new employer and enforcing your rights under the agreement.

Having an agreement like Jane's in place requires advance planning. In Pennsylvania, restrictive covenants such as noncompetition and non-solicitation agreements are enforceable if they are (1) part of an employment relationship between the parties and supported by adequate consideration; (2) reasonably necessary to protect the business interests of the company; and (3) reasonably limited in duration and geographic scope.

Although confidentiality agreements are frequently included as part of employer-employee agreements, they are not technically considered restrictive covenants. As a result, Pennsylvania courts have held that companies may require employees to enter into confidentiality agreements without consideration and without regard for the reasonableness of the agreement's geographic scope or duration.

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No universal approach

Restrictive covenant agreements offer companies a valuable tool to protect their business interests, but there is no one-size-fits-all approach regarding the specific restrictions an agreement will contain. The most common types of provisions in employer-employee agreements are non-competition, non-solicitation and non-disclosure or confidentiality provisions.

As a general matter, non-competition provisions place restrictions on the type and location of an employee's future work and future employers, for a specified period of time. Non-solicitation provisions prevent employees from contacting or doing business with entities such as customers or suppliers for a specified period of time. Nondisclosure or confidentiality provisions restrict employees from using or disclosing confidential business information such as customer lists, financial data, trade secrets and business processes or methods—essentially any business information that is not publicly available and provides a company with a competitive advantage. Although Pennsylvania and federal law provide certain protections to trade secrets, confidentiality provisions can protect information a business considers to be confidential that does not necessarily qualify as a trade secret.

Companies may want to use different agreements for different types of employees. For example, a company may choose to have all employees sign a basic confidentiality agreement, but utilize an additional agreement containing restrictive covenants for key employees who have contact with customers and suppliers, access to financial data and strategic planning or access to proprietary industrial and scientific information. Restrictive covenant agreements are not just for employees who have an employment contract for a particular term, but are equally available for at-will employees.

Restrictions must be reasonable and relate to protectable business interests

Pennsylvania courts will not uphold a restrictive covenant agreement to prevent a former employee from competing simply for a company's economic advantage. Employers should approach restrictive covenant agreements by examining what protectable business interests are at stake and what type of agreement is reasonable to protect those interests. Some examples of protectable business interests in Pennsylvania are trade secrets, confidential information and customer goodwill.

A restrictive covenant agreement must also be reasonably limited in geographic scope and duration. Although a court will make its decision based upon the facts of each particular case, Pennsylvania courts have upheld non-competition agreements that are closely tied to the geographic area of the employee's duties and the company's customers. Non-solicitation provisions are typically given more geographic latitude, because non-solicitation agreements only prevent an individual from engaging in business with specific customers and entities. As to duration, Pennsylvania courts have generally upheld restrictive covenants with a post-employment term of one year to two years as reasonable and depending on the particular circumstances may uphold a longer post-employment term.

Although they are frequently a part of employer-employee agreements that contain restrictive covenants, non-disclosure or confidentiality agreements are not themselves technically considered "restrictive covenants" in Pennsylvania. Rather, they are agreements that protect the property rights of a company in its business information. Therefore they are not limited by the reasonableness criteria (geographic scope and duration) that apply to non-competition or non-solicitation provisions.

Employee must receive consideration for entering into restrictive covenant agreement

Courts in Pennsylvania will also refuse to enforce a restrictive covenant agreement containing non-competition and non-solicitation provisions if the employee did not receive adequate consideration in exchange for signing the agreement. Pennsylvania considers entering into a restrictive covenant as part of the commencement of employment (i.e., as a condition of hiring) to be adequate consideration.

Unlike some other states, Pennsylvania does not view continued employment alone as sufficient consideration. Therefore, companies who wish to enter into restrictive covenants with existing employees must provide those employees with additional consideration. The adequacy of that consideration is evaluated based upon the specific facts of a particular case, but is usually composed of some combination of a raise, promotion and/or bonus.

No consideration required for confidentiality agreements

Non-disclosure or confidentiality agreements are not restrictive covenants, and new or existing employees need not be provided with consideration in exchange for signing such agreements. Companies can require employees to sign confidentiality agreements at any time during the employment relationship. In fact, in 2016 the Commonwealth Court of Pennsylvania ruled that one company's existing employees who

were terminated after refusing to sign a confidentiality agreement were ineligible to receive unemployment compensation benefits.

In *Greenray Indus. v. Unemployment Comp. Bd. of Review*, a company informed its employees that continued refusal to sign a confidentiality agreement would result in termination of their employment. The Commonwealth Court held that the employees' refusal to sign amounted to a refusal to accept an offer of continued employment, equivalent to a resignation, and denied them unemployment compensation on the basis the employees had voluntarily left work without cause "of a necessitous and compelling nature."

The future applicability of the *Greenray* ruling will depend on the particular facts and circumstances of each individual case. However, companies should strongly consider using confidentiality agreements to emphasize to employees (1) what information a company considers as confidential business information and (2) that the company explicitly expects all employees to maintain the confidentiality of that information.

Best practices

If they do not have one already in place, companies should consider requiring existing employees to sign a confidentiality and non-disclosure agreement. Such an agreement can then be integrated into a new employee on-boarding process so that all employees are covered, with the goal of maintaining the confidentiality of a company's confidential business information.

Companies should also consider whether non-competition and/or non-solicitation restrictive covenants are appropriate for new or existing employees, particularly key employees. Any employer-employee restrictive covenant should be tailored to the particulars of your company's business, and consideration is easiest to establish at the time new employees are hired. Prospective employees should be notified during the hiring process if a noncompetition or non-solicitation agreement will be required as a condition of employment. Restrictive covenants may not prevent employee departures, but when employees like Jane depart such agreements can help protect a company's customer relationships, confidential information and trade secrets.

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