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A PRACTICAL GUIDE TO RESTRICTIVE COVENANTS IN NEBRASKA

Restrictive covenants include confidentiality, non-competition, and non-solicitation obligations, and come in a wide variety of purposes and scopes. Questions on these restrictions arise at varied points — at the outset of an employment relationship; upon separation from employment when all are wondering what can and cannot be done; when a demand letter is received; when a lawsuit arises; and at various points in between these events.

Employers and employees routinely have questions regarding drafting, interpreting, and enforcing restrictive covenants under Nebraska law. This article sets forth seven commonly-asked questions and answers regarding restrictive covenant issues.

Question #1: *I would like to have my employee sign a non-compete agreement that prevents him from working for or starting a competitive business within 25 miles of our office. Can we do that?*

Answer: In most circumstances, this type of non-compete agreement against an employee with no ownership interest in the company would not be enforceable under Nebraska law. The cases in Nebraska analyzing restrictive covenants can be divided into two very clear groups: (1) cases involving employees; and (2) cases involving the sale of business, where an individual is selling a business or has an ownership interest in the business. In the sale of business context, a reasonable geographic restriction against competition, which is generally limited to the area where the company's customers are obtained and served, is enforceable if reasonable in time (generally 3 years or less, although longer restrictions have been enforced).

Such geographic restrictions, however, have been nearly uniformly rejected when applied to employees. Although there could conceivably be a scenario where a geographic restriction is the only way to protect a legitimate business interest of the employer (*i.e.*, confidential information, customer goodwill, etc.), we have not seen a Nebraska case expressly supporting this position.

Question #2: *If we can't do a geographic restriction, what is generally enforceable against a rank-and-file employee?*

Answer: Generally, employee restrictions can include a confidentiality and non-disclosure provision (limited to certain defined, non-public information), a reasonable customer non-solicitation provision, and a reasonable employee non-solicitation provision. The employee non-solicitation provision is discussed in Question No. 6.

When a client asks this question, they are usually asking about a customer non-solicitation. The often-expressed thought is: "Well, if we can't stop them from working for a competitor in the area, can we stop them from contacting and soliciting our customers? Perhaps our prospective customers?" As reasonable as such a solution sounds, this too must be further limited in order to be enforceable in Nebraska.

The well-accepted and litigated position of Nebraska courts is that a customer non-solicitation provision must be limited to those current customers with whom the employee actually had personal contact and did business while employed. Thus, the provision should not be drafted to simply apply to **all customers**, regardless of whether the employee had actual personal contact.

Additionally, it is best practice to limit the covered-customers to a certain timeframe of employment, such as: "all customers with whom Employee had personal contact and did business with *during* the last 18 (or 12) months of his/her employment with Company." The reason for doing this is because otherwise the restriction would apply to every customer relationship handled by the employee, regardless of whether those relationships have gone stale. If such time limitation is not included, the opposing party will almost certainly raise this point and argue the provision is unenforceable.

Question #3: *How long should the customer non-solicitation period be?*

Answer: Even if an employer limits the non-solicitation period to current customers with whom the employee had personal contact and did business with, the restriction will not be enforceable if it extends for an unreasonable period of time. The cases show a sliding scale of enforceability. Although it all depends upon the circumstances, the general rules of thumb are these:

- 12 months is usually enforceable.
- 18 months may be enforceable, depending upon the circumstances.
- 24 months is aggressive, and the employer runs the very real risk of the provision being held unenforceable, although such periods have been found enforceable.
- More than 24 months is most likely unenforceable, depending upon the circumstances.

Question #4: *Assuming what you say is true about what is generally enforceable against a rank-and-file employee in Nebraska, can't we just be aggressive and let the Court apply the agreement as far as it deems it enforceable?*

Answer: Taking an aggressive position on employee restrictive covenants is an option, but the employer must also be prepared for the practical effects of such position. The practical effect is that the entire restrictive covenant, and perhaps the entire agreement, may be deemed unenforceable by a Nebraska court. In some states other than Nebraska, when this happens, the court will reform or "blue pencil" the agreement to render it enforceable. Essentially a court evaluating a restrictive covenant with "terms X, Y, and Z" might say "terms Y and Z, as drafted, are unenforceable, but term X is enforceable so we will enforce only term X."

However, Nebraska courts will not reform or "blue pencil" an agreement; instead, either that provision or the entire agreement will fail. Thus, taking an aggressive approach may ultimately leave the employer with no protection. This can be particularly devastating when an employer has multiple employees with the same agreement. Word will spread quickly that there are no enforceable restrictions.

However, some employers may take an aggressive position with the goals of (1) feigning a strong belief regarding enforceability, even when they understand the risks; and (2) capitalizing on employee's misunderstanding of what is and is not enforceable. Employees may very well comply with an overly-aggressive, unenforceable restrictive covenant simply because they do not know it is unenforceable or they fear the former employer will attempt to enforce it, thereby drawing the employee into unwanted litigation. Still other employees take an aggressive position simply because an enforceable restriction does not provide them with what they deem is real or worthwhile protection.

In light of the above, employers should consider whether a less aggressive position will provide adequate protection.

Question #5: *What about employee non-solicitation or employee-raiding provisions?*

Answer: An employee non-solicitation or employee-raiding clause prevents an employee from attempting to hire away the employer's other employees. There is little to no case law in Nebraska regarding the enforceability of such provisions. In light of the absence of case law, employers should apply the same principles learned from the customer non-solicitation provisions: namely, apply it

only to current employees with whom the employee had personal contact and set a reasonable time limit on the provision (12 to 18 months).

Question #6: *The employee has been working with us for about 2 years, but we would like to revise our restrictive covenant and have the employee sign it. Any issues?*

Answer: Every contract must be supported by consideration in order for it to be binding. Consideration is generally some form of compensation or benefit, or it might be some promise to act or not to act. Nebraska case law is clear that commencement of employment, even if it is at-will employment, is sufficient consideration to support the execution of a restrictive covenant.

Although there is an argument to be made that continued at-will employment is also sufficient consideration to support the execution of a revised agreement, there is no case law directly answering that question. This poses some risk when executing a new agreement. Employers either accept this risk and rest on continued employment, or they negate the risk by providing some additional consideration for the execution of the agreement. This additional consideration usually comes in the form of a signing or other bonus, new terms of employment (i.e., a raise, new position, termination protection, etc.), or some other tangible benefit to the employee for signing. Providing additional consideration is a more conservative, risk-adverse approach.

Question #7: *Can't we just cover confidentiality in the employee handbook?*

Answer: Employers can certainly include a confidentiality policy in an employee handbook; however, the policy will not be contractual, and the employer will not be able to use it to seek damages or protect confidential information via a contractual claim. If an employer includes a confidentiality agreement as part of the employee handbook or in the handbook receipt form, the employer's efforts to avoid having its employee handbook treated as a contract may be undone.

In short, if you want an enforceable confidentiality agreement, make it separate from the employee handbook. If you simply want a policy that does not have contractual effect, you can include this in the employee handbook. Do not treat your employee handbook as conferring contractual obligations.

Please note that each situation is unique and impact the enforceability of a restrictive covenant agreement.[1] For additional information regarding restrictive covenants, please contact a member of Cline Williams' Labor and Employment Section:

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[1] The information in this article is being offered as an outline of general information on the subject to assist in the development and implementation of practices and policies. It is offered for educational and informational purposes only and is not intended as legal advice.