DEAR HRK

Should we utilize restrictive covenants at hire and/or termination?

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First things first. What exactly is a restrictive covenant?
A restrictive covenant is a condition or provision that quite literally restricts, limits, or prevents the action of someone. In the context of employment relationships, common types of restrictive covenants include:

- **Confidentiality agreements** - Used to prevent current and former employees from disclosing or using proprietary information of their former employer.
- **Non-solicitation agreements** – Used to prohibit a former employee from soliciting its former employer's current, prior or prospective customers for a specific period of time.
- **Non-disclosure agreement-** This agreement is used to prevent parties from disclosing confidential information that has been shared in the course of business.
- **Non-competition agreements** – Provision used to prohibit a former employee from competing against their former employer within a particular geographic area for a defined period of time. *These are generally considered the most restrictive.*

Why do employers use restrictive covenants?
Simply stated, most employers utilize restrictive covenants to protect their business. During the course of employment, workers may have access to proprietary or confidential information. Propriety information can be obvious things like financial records or trademark secrets. However, it can also be as unassuming as a list of contact emails or phone numbers. By using restrictive covenants, an employer may be able to reasonably protect their business interests.

When are restrictive covenants typically used?

We commonly see employers requesting their new hires to sign confidentiality agreements during the onboarding process. Keep in mind that a confidentiality *agreement* is a legal document, whereas a confidentiality policy is a broad statement (and not an agreement) typically found in a handbook. Employers may also require the signing of a non-compete or non-solicitation agreement upon hire, depending upon the nature of work. At separation, a severance agreement may include various provisions such as non-disclosures. The usage of restrictive covenants varies greatly depending on the employer type, industry, and geographic location, amongst other factors.

So, what's the catch?

The nitty gritty details of these documents can be complex. For starters, a growing number of states have passed laws limiting an employer's use of such agreements. The variation of the laws is widespread as well; some states simply limit the use in particular circumstances, while others are seeking to ban them altogether. Restricting the use of non-compete agreements, in particular, has become a legal trend in recent years in an effort to protect low-wage earners in retail and restaurant industries. Examples of recent legislation include:

- Massachusetts passed **MA Noncompetition Act in 2018**
- Washington DC Bans Non-Competes, effective October 2022- see our **e-Alert**
- Rhode Island Prohibits Non-Competes for Certain Employees- see our **e-Alert**
- Colorado renders most Non-Competes void unless the employee is "highly compensated" and must be no broader than reasonably necessary in **HB 22-1317**
- California has some of the most aggressive laws, specifically California Business and Professions Code section 16600 which states "every contract by which anyone is restrained from engaging in a lawful profession, trade, or business of any kind is to that extent void."
- California **SB 331** prohibits non-disclosure provisions that prohibit the disclosure of information about unlawful acts in the workplace, specifically regarding unlawful harassment

The momentum has extended to the federal level as an Executive Order was issued in 2021 directing the Federal Trade Commission (FTC) "to curtail the unfair use of noncompete clauses and other clauses or agreements that may unfairly limit worker mobility." The agency has not yet formally addressed the issue.

What should employers do if they currently have these documents in circulation?

First, it may be helpful to step back and understand why these agreements were implemented in the first place. Do all new hires need to sign a confidentiality agreement if they do not have access to proprietary information? Perhaps not. It may be helpful to reevaluate the need for widespread forms, as a targeted audience could be more strategic and appropriate.

Secondly, once a determination is made of whether the restrictive covenant is necessary- it is strongly recommended to have an employment attorney review applicability and enforceability.

This step cannot be understated as the regulatory landscape is changing rapidly. These documents should be stored separately (and electronically!) from the employee handbook, as the handbook is not an employment contract/agreement. Be mindful of your remote employees and/or employees that have relocated within the course of employment, as this could impact prior restrictive covenants as well.

And lastly, be sure to perform the same exercise for your exit documentation! Severance agreements typically include restrictive covenants, and it is essential for employers to perform their due diligence *each and every* time they intend to deliver a severance agreement. Keep in mind your remote workers may have different rights than those at your company's primary location. Keep in mind that the enforceability of any given document may be different depending on the employee's work location.

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