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ASSOR BELL & PESKOE LLP

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ATTORNEYS AT LAW | 437 MADISON AVENUE | NEW YORK, NY 10022 | 212 907 7300 | WWW.GOLENBOCK.COM

# Mindful Use by Employers of Non-Compete Agreements

**To Our Clients and Friends:** **November 14, 2014**

*The New York Times* has featured two articles in the past several months about the increased use by employers of non-compete agreements for relatively low-to-moderate-level and low-to-moderately paid employees. ("Noncompete Clauses Increasingly Pop Up in Array of Jobs" and "When the Guy Making Your Sandwich Has a Noncompete Clause"). These employees have ranged from $8-an-hour sandwich makers at a national sandwich chain to camp counselors and to hair stylists.

The second of these articles characterizes the use of non-compete agreements in this manner as an "equality issue" – one of various "fundamentally unfair" means that ultimately prevent entry-level workers from having a better quality of life. Both articles underscore some practical legal considerations for companies to consider when deciding which of its employees should be bound by non-compete agreements and customer solicitation restrictions.

While employers may be using non-competes more frequently for lower level employees, that practice can work to their detriment when they attempt to enforce non-competes against employees who pose a real threat to them on leaving. Most judges are highly sensitive to the potential inequities that sidelining a former employee can create and to the potential for abuse of restrictive covenants and attendant overreaching by employers. These covenants are judicially disfavored because of their potential to severely restrict a person's livelihood and mobility. Courts will therefore carefully scrutinize a restrictive covenant to ensure it is not overly broad in scope or duration by applying a "reasonableness" test.

A restraint is reasonable only if it (i) is no greater than required for protecting an employer's legitimate interests, (ii) does not impose undue hardship on the employee, and (iii) is not injurious to the public. In applying this standard, courts weigh the need to protect the employer's legitimate business interests against the possible loss of the employee's ability to earn a living. Courts have held that legitimate interests include protection against misappropriation of the employer's trade secrets or confidential information and preventing the diversion of customer relationships that the former employee developed on the employer's dime. The more that a given restriction seems like overreaching by the employer rather than a narrowly-tailored mechanism for protecting a legitimate interest, the more likely it is that a court will strike the restriction down.

Requiring every employee who walks through the door to sign restrictive covenants – which appears to be the case in some of the examples highlighted in The New York Times articles – is one of the myriad factors that can cause a court to view an employer's practices skeptically. For instance, when one of the world's largest computer manufacturers hired a long-time senior manager from one of its equally esteemed competitors, the former employer went

on the attack by trying to enforce a 12-month non-compete agreement. In its lengthy recitation of the facts surrounding the dispute, the court noted that the plaintiff required over 1,700 employees to sign noncompetition agreements; more than 300 of its employees were required to sign a form noncompetition agreement identical to the one signed by the former employee; and, historically, the agreements were neither negotiated nor modified based upon the specific functions performed by an employee. These were some of the factors that ultimately led the court to conclude that the employer's non-competition program was not designed to protect a legitimate business interest but, rather, to stifle its employees from seeking and accepting job opportunities with competitors – in other words, a "retention device." The court did not stop there, however: it further explained that, even though it did not need to reach the issue of partial enforcement because IBM had not sought that remedy, the court would not have granted such relief because, based on a combination of factors that included the agreement's overbreadth, IBM had not shown a "good faith" effort to protect a legitimate business interest.

Employers should anticipate that any restrictive covenant that they impose on key employees will be carefully scrutinized by a court for "reasonableness" if the employee challenges enforcement after his or her departure. To increase the odds of prevailing in court when it counts, employers should limit their use of these restrictions to only those employees whose departure could truly compromise the employer's trade secrets or confidential information or result in the loss of customer relationships that the employee formed using the employer's resources.

In sum, the chances that a restrictive covenant will be enforced under New York's "reasonableness test" may be reduced if the employer does not tailor its restrictive covenant program to those employees who truly use and/or have access to its confidential information and trade secrets or who, because of the nature of their job responsibilities, may develop strong relationships with important clients that could later be diverted to a competitor. Further, although New York judges have discretion to narrow the scope of an overly broad restrictive covenant to make it enforceable, they may refuse to do so if they believe that the employer has not made an effort to limits its use of these restrictions to only those employees who can seriously be argued to present the types of risks against which restrictive covenants are intended to protect. Thus, by staying mindful of the fact that one size does not fit all when it comes to enforcing restrictive covenants, you will increase your odds of enforcing them when it really counts.

For more information on Trade Secrets & Restrictive Covenants, please contact:

**Preston Ricardo**: 212.907.7341
**Email:** pricardo@golenbock.com

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