I SIGNED WHAT?

Understanding Your Obligations Under Common Employment Agreements

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2. Employers Use of Agreements.

3. Why Employees Get Sued and How to Avoid Litigation.


5. Questions and (Maybe) Answers
1. COMMON EMPLOYMENT AGREEMENTS

- Covenant not to Compete
- Nonsolicitation Agreement
- Trade Secret/Confidentiality/Nondisclosure Agreement
- Assignment of Inventions/IP Agreement
I. COVENANTS NOT TO COMPETE

Prevents employee from engaging in competitive activities for a certain time in a certain geographic area

- Historically one of the most common forms of restrictive covenant in employment agreements.
- Found in almost every industry, except where prohibited (doctors).
- Disfavored in many jurisdictions (California).
- Almost always coupled with other restrictive provisions.
I. COVENANTS NOT TO COMPETE

“For a period of one (1) year after my employment with the Company ends for any reason, I shall not accept employment with or render services for any other person or business entity or perform services on my own behalf if such services are in competition with the Company and within any territory where I rendered services for the Company during my employment.”
I. COVENANTS NOT TO COMPETE

• Common Limitations:
  • Duration (one year or less almost always enforced).
  • Geographic Area (less important in global economy).
  • Lack of legitimate business reason for restriction.
    • Trade secrets/confidential information/customer goodwill
    • Cannot prevent the use of general skill, knowledge, and training.

• Massachusetts and New York are similar in their enforcement of covenants not to compete.
  • Courts call them disfavored but will enforce if requirements met.

• Covenants not to Compete are Unenforceable under California law.
1. NONSOLICITATION AGREEMENTS

Restriction on solicitation of customers, employees and/or vendors for a certain time.

- Generally interpreted under same standard as covenant not to compete.
- But, more likely to be enforced due to more limited nature of restriction.
- California will enforce in limited situations.
1. NONSOLICITATION AGREEMENTS

“While providing services to the Company and for a period of one (1) year thereafter, I shall not engage in any of the following conduct: (a) solicit for employment by myself or others, any Company employee; (b) induce or attempt to induce any consultant, independent contractor, Supplier, vendor, independent sales representative, licensee or other third party to sever any relationship with the Company; (c) assist any person or entity in the solicitation of any of the Company's consultants, Suppliers, vendors, independent contractors, licensees, employees, or independent sales representatives; or (d) solicit or attempt to solicit, on my own behalf or on the behalf of any person or entity other than the Company, business from any Company Customer and Clients”
I. TRADE SECRETS

Nonpublic information that is valuable, in large part, because it is not widely known

- Protected by state and federal law even in the absence of an agreement.
- Agreements often define what is a trade secret as well as the handling of trade secret/confidential information.
- Can literally be anything from which the employer derives value and maintains some level of secrecy.
I. TRADE SECRETS

Defend Trade Secrets Act of 2016

- Get right into Federal Court.
- Allows for seizure of materials containing trade secrets.
- Acquisition of trade secret is actionable.
- Double damages
I. ASSIGNMENT OF INVENTIONS

Your work (and inventions and ideas) belong to the employer.

• Vary widely by employer.
• Enforceability varies by state.
• Where do you draw the line between what is yours and what is theirs?
• Effects can be felt years later.
“Throughout the period during which I provide services to the Company, I shall disclose to the Company all ideas, inventions and business plans I develop that relate directly or indirectly to the business of the Company including, without limitation, any and all documents, concepts, ideas, notes, compilations, work product and other materials that may be patentable or copyrightable. I agree that all of the work product, tangible or intangible, that results from my services to the Company (‘Work Product’) – including, without limitation, all patents, licenses, copyrights, tradenames, trademarks, service marks, concepts, strategies, methods of operation, and business plans developed or created by me in the course of providing services to the Company, either individually or in collaboration with others shall be deemed works-made-for-hire for the Company within the meaning of the copyright laws of the United States, and the Company shall be deemed to be the sole author thereof in all territories and for all purposes…”
I. ASSIGNMENT OF INVENTIONS

California:

- Rights determined by statute.
- Employee cannot be required to assign rights in invention developed on his/her time without using employers’ equipment, facilities, or trade secrets, unless:
  - Invention related to the employer’s business or anticipated research or development; or
  - Invention resulted from work performed by employee for employer.

Massachusetts:

- Utilizes reasonableness test based, in large part, on above factors.
II. EMPLOYERS USE OF AGREEMENTS

• Protect Trade Secrets.
• Protect Customer Relationships.
• Protect Investment in Employees.
• Stifle Competition.

What Else?
• Protection of Asset in Purchase of Company.
• Agreement Between Partners/Founders.
• Disclosure of Prior Agreements.
III. AVOIDING LITIGATION

Unjustified litigation happens because of the appearance of wrongdoing by the employee.

Working from Home:

- Emails to personal accounts.
- Use of thumb drives, Dropbox, or other file transfer mechanisms.

Solutions:

- Don’t work at home!
- Review and abide by policies for remote access.
- Written documentation of intent to work at home and permission received.
III. AVOIDING LITIGATION

Customer/Vendor Contact:

• Don’t do it if purpose of contact is at all related to previous work.
• Same goes for contact with current employees.
• Don’t say anything bad about your prior employer.

Communications with Prior Employer:

• Don’t volunteer information, but
• Be Honest.
• Don’t act like you have something to hide.
• Give notice of departure and abide by exit policies.
Communications with New Employer:
- Disclose any employment agreements if required as part of hiring process.
- Disclose prior to accepting employment if you believe there may be an issue.

Publicity:
- Shape all public statements about new work to differentiate between prior employment.
IV. ACHIEVING LONG-TERM GOALS

- Review employer policies and practices before accepting employment.
  - Online resources and request agreements in advance.
- What are your goals for five/ten years out?
  - How will these agreements impact your goals?
- Know the industry and the competitors.
- Know what you signed. Ask for copies of everything.
- Consult agreements before putting pen to paper on new ideas.