

Protecting Your Assets When Employees Leave

By Tony Delligatti and Joëlle Khouzam

Your key employee just walked out the door with a list of clients that would make a Leprechaun envious, and a new employer is waiting for your employee with open arms. You are raging, and wanting to know what you can do to stop him. Hopefully, as the owner of a business you have protected yourself with a non-compete, non-solicitation and non-disclosure agreement (“non-competition agreement”).

Ohio has accepted a definition of “reasonableness” to determine whether non-competition agreements will be enforceable against former employees. “A non-compete clause will be found to be reasonable only where the employer can show by clear and convincing evidence that the restrictions imposed by the non-compete clause (1) are no greater than necessary for the protection of the employer’s legitimate business interests, (2) do not impose undue hardship on the employee, and (3) are not injurious to the public.”

Factors that a court considers in determining whether a non-competition clause is reasonable may include:

- “[t]he absence or presence of limitations as to time and space,
- whether the covenant seeks to eliminate competition which would be unfair to the employer or merely seeks to eliminate ordinary competition;
- whether the benefit to the employer is disproportional to the detriment to the employee; and,
- whether the employee’s talent which the employer seeks to suppress was actually developed during the period of employment.”

The above list is not inclusive but merely points out that it is imperative for a company to maintain good records and documentation on employees, such as the employee’s access to confidential information, the employee’s training from the company, the employee’s relationships with customers, and the employee’s job duties. All of these things will assist the company in obtaining relief against an employee for breaching his non-competition agreement with the company.

Every company, whether large or small, should ensure that key employees with access to confidential information and customer relationships execute an enforceable, reasonable non-competition agreement. If the employee has done so, the company has a much better chance of prevailing in any action brought against the employee in a court of law. Nonetheless, even if the employee has not executed a non-competition agreement, employers may still have a remedy against the employee under federal or state laws.

For more information regarding litigating and drafting non-competition agreements, please contact CPM attorneys Tony Delligatti or Joëlle Khouzam at (614)228-6135.