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Protective agreements: don't let the courts define things for you

Many companies require employees to sign restrictive or protective covenants as a condition of employment. Some of these agreements impose confidentiality obligations on employees, while others impose post-employment obligations, including non-competition, non-solicitation of clients and employees, and non-servicing of clients. These agreements provide peace of mind to companies so they can permit staffers to have unfettered access to confidential information without fearing that it will be used by departing employees for the benefit of a future employer.

However, many companies do not regularly update these agreements in response to changes in the business and legal environments. Even when such updates take place, they often mistakenly require only newly hired employees to sign the updated form. When this occurs, companies are left without complete protection and employee agreements that may not accurately reflect the current state of the law.

For instance, the New York Court of Appeals recently decided a case that defines "solicitation" of a client. In Bessemer Trust Company v. Branin, an executive sold his wealth management company, began working for the buyer of his business, and later resigned to join a competitor. Notably, the purchaser did not require the executive to sign any restrictive covenant agreement as part of the acquisition. However, under New York law, a seller still has certain implied non-solicitation obligations, since the purchaser of a business is considered to be buying the seller's good will and the seller's ongoing relationships with its clients.

In spite of these obligations, the New York court held that it was permissible for the executive to (1) answer a former client's questions about the competitor's business, (2) assist the competitor in creating a strategy to "pitch" the former client, and even (3) attend a meeting between the competitor and the former client.

The Bessemer case illustrates several important lessons for PR firms:

- Every PR firm should have a written protective covenant with employees who interact with clients, otherwise its ability to protect its client relationships will be severely limited.

- Companies should not leave it to courts to define the terms of their protective covenants or fill in missing or undefined provisions. They need to specifically define the term "solicitation" in their covenants to include the type of activity described in Bessemer.

- Companies should examine their existing covenants and make sure "client" is specifically defined as entities for whom the company renders services within the year of the employee's departure, as well as prospective clients to whom the company has made a formal presentation for PR services with the employee's assistance.

- Companies should also examine their existing covenants to ensure they prohibit a departing employee from not only "soliciting" clients, but also "servicing" clients. Without preventing the latter, a departing employee will find it easy to circumvent the rules.

With proper planning, PR firms can and should periodically update their existing confidentiality and protective covenants for all employees. These periodic updates often occur in Q4 in advance of annual salary and bonus awards. This approach allows PR firms to respond to business and legal changes and to make salary increases and bonus awards conditional to the acceptance of a new agreement. ■

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