

Labor and Employment 2018 Symposium

Is Your Noncompete Agreement Enforceable?

Dorsey Speakers

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1. PowerPoint Presentation prepared by Dorsey & Whitney LLP

ahead of the curve

Workplace law trends for today and beyond.
Come up to speed to stay ahead.

Is Your Noncompete Agreement Enforceable?

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Agenda

- **Trends**
 - Choice of Law
 - Judicial Modification
 - Non-Solicitation Covenants
 - Breach of Fiduciary Duty Claims
- **Tips**
- **Questions**



More Restrictions in More Jurisdictions

- **Nationally, the trend is towards limiting or eliminating non-compete agreements.**
 - Alabama (2015), Hawaii (2015), Illinois (2016), Nevada (2017), New Mexico (2015), Oregon (2016), and Utah (2016) have passed legislation restricting or otherwise limiting the enforceability of non-compete agreements.
 - Idaho, Massachusetts, Missouri, Maryland, Michigan, New Jersey and Washington introduced but not passed legislation restricting or otherwise limiting the enforceability of noncompete agreements.



Choice of Law Provisions Won't Save You

- **More jurisdictions are making it harder to apply the law of a jurisdiction other than where the employee works and lives.**
 - **Cal. Labor Code § 925.**
 - California law prohibiting choice of law outside California for California employees.
 - ***Osborne v. Brown & Saenger, Inc.*, 2017 ND 288.**
 - Forum-selection unenforceable where it violated North Dakota's public policy against noncompete agreements and the State had an interest in protecting that public policy from evasion.



Judicial Modification Won't Save You

- Even jurisdictions that allow judicial modification or the “blue pencil” rule are becoming more reluctant to save overly burdensome noncompetes.
 - *Engineering, Inc. v. Mercury Partners, 90 BI, Inc.*, 378 Ill. App. 3d 437, 456 (1st Dist. 2007).
 - Court concerned about encouraging overly broad covenants;
 - Chilling effect caused by employees who do not realize overly broad covenant is unenforceable.
 - *Aqualife Inc. v. Leibzon*, 2016 N.Y. Misc. LEXIS 6 (N.Y. Sup. Ct. Jan. 5, 2016), citing *Brown & Brown Inc. v. Johnson*, 25 N.Y.3d 364 (2015).
 - Court found unequal bargaining power in creation of noncompete and refused to blue pencil it.



Even Employee Non-Solicitation Covenants Are Being Scrutinized

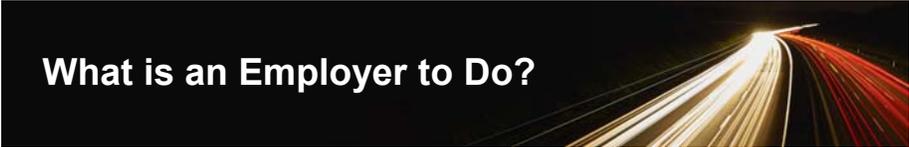
- While employee non-solicitation covenants are often the least controversial, even these provisions are being scrutinized.
 - *The Manitowoc Company, Inc. v. John M. Lanning*, 2018 WI 6, 2018 WL472928 (Jan. 19, 2018).
 - Court rejected as overly broad an employee non-solicitation provision that prohibited soliciting any Manitowoc Company employee to terminate his or her employment for any reason, or soliciting any Manitowoc Company employee to take any position with any competitor, supplier, or customer of Manitowoc Company.





But Don't Forget About Breach of Fiduciary Duty Claims

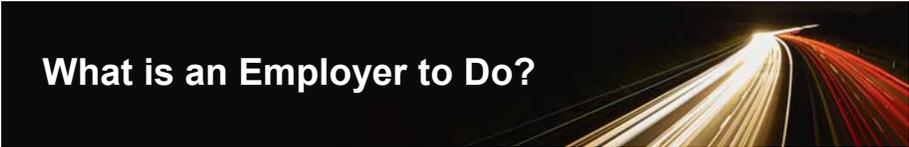
- Even where restrictive covenants have failed, employers may be able to bring breach of fiduciary duty claims for customer solicitation that occurs before the employee leaves.
 - *Wells Fargo Ins. Servs. USA, Inc. v. Tyndell*, 2016 U.S. Dist. LEXIS 172346 (E.D. Wash. Dec. 12, 2016) (granting preliminary injunction).
 - Employees' alleged solicitation of customers while still employed, along with customers' moving business within two weeks of employees' departure, led court to find likelihood of success on the merits.



What is an Employer to Do?

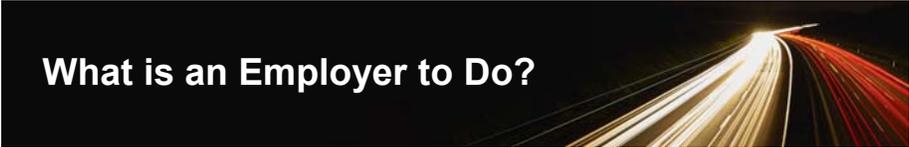
- Avoid stock “off the shelf” non-compete agreements.
 - Courts want to see agreements that are narrowly tailored to the particular business risks facing the employer.
- One size does not fit all.
 - Consider having different non-competes for different employees.
 - A non-solicitation agreement might be more appropriate for a salesperson while a non-compete might be necessary for someone with deep knowledge of the company's technical secrets.





What is an Employer to Do?

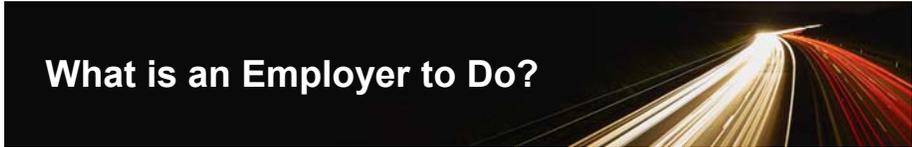
- **Avoid non-compete agreements for low level employees.**
 - Courts hate it when you try to keep an employee with no ability to harm your company from finding a new job.
- **Don't selectively enforce your non-compete agreements.**
 - If you gave one employee a pass it indicates that you don't have a compelling interest in enforcement against another...
 - ...except where circumstances have changed, e.g. you have closed an office or exited an industry.



What is an Employer to Do?

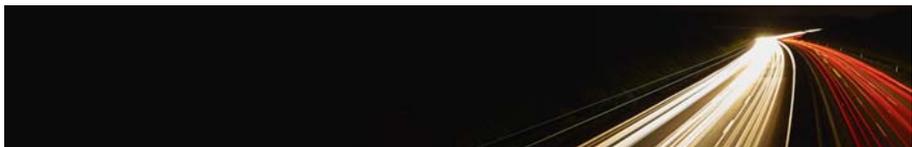
- **Courts are generally more willing to enforce non-solicitation provisions ...**
 - They are less likely to keep employees from finding a new job and are often easier to justify, especially for salespeople.
- **... but they are harder to police.**
 - It is much easier to discover and prove that a former employee has gone to a competitor than solicited a customer.
 - Non-solicitation lawsuits can make your customers into witnesses, which they generally hate.





What is an Employer to Do?

- **Consider where to file your case.**
 - State vs. federal
 - Court's prior history of granting/denying injunctive relief
- **Consider removal, but do so only with caution.**
 - Better the devil you know than the devil you don't?



Questions?