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M. CAROLINA AVELLANEDA is a partner in the Litigation and Employment Groups. Ms. Avellaneda focuses her business litigation practice on employment law, international business disputes and tourism/hospitality law. She counsels senior executives on all aspects of their operations, including business negotiations, risk assessment, crafting of strategies for avoiding litigation, development of personnel policies and procedures, and enforcement of non-competition agreements. Ms. Avellaneda provides preventive training, investigation and management of discrimination and harassment claims. She represents clients before state and federal courts, agencies and tribunals.

Ms. Avellaneda was born in Argentina and is fluent in Spanish. She is an officer of the Travel, Tourism, and Hospitality Committee of the International Bar Association, and a member of the Massachusetts Association of Hispanic Attorneys, and the Boston Bar Association. Ms. Avellaneda is an active member of the Massachusetts Staffing Association and the New England Latin American Business Council. She is a graduate of the Massachusetts Commission Against Discrimination's certified programs on harassment and discrimination prevention training.

Prior to joining Gadsby Hannah LLP, Ms. Avellaneda was a law clerk for the Superior Court of Massachusetts, where she worked closely with judges on both civil and criminal matters.

Ms. Avellaneda is admitted to practice in the State of New York and the United States District Court for the District of Massachusetts. She holds a J.D. from Boston University School of Law and a B.A. from Wellesley College.

ARE YOU MAKING YOUR EMPLOYMENT CONTRACTS WORK FOR YOU?

In the mid-1800's retail magnate Marshall Field opined that "Goodwill is the one and only asset that competition cannot undersell or destroy." Evidently, the business world has changed drastically. An efficient, inexpensive, and effective tool to protect your company's interests from the potentially devastating actions of former employees or business owners is a carefully drafted contract that includes reasonable non-disclosure, non-solicitation and non-competition provisions as well as a non-disparagement provision.

A company's need to protect its business by limiting a former employee's new employment opportunities conflicts with an individual's freedom of movement in the economy. Thus, courts will only enforce restrictive covenants that protect legitimate business interests and are narrowly drafted to prevent unfair competition. What then are the considerations in drafting an employment agreement? What are your legitimate business interests? What steps should a company take following departure of an employee to maximize the likelihood that restrictive covenants will be enforced?

STEP ONE: DEFINE YOUR BUSINESS INTERESTS

Because courts will only restrict unfair competition, contract provisions that provide a blanket prohibition against all competition are not enforceable. In order to assure that the restrictive covenants in your agreements are enforceable, you must start by defining the legitimate business interests for your company. Under Massachusetts law, for example, legitimate business interests include goodwill, trade secrets and confidential information. Under some state's laws, you may even have a protectible business interest where you provide your employees with extraordinary or highly specialized training.

Equally important is defining the scope of the business from which you will seek to ban your former employee. A covenant that aims to protect you from all possible competitive activity will have no value because it will prove unenforceable.[1] You should

[1] Although some states, such as Massachusetts, are blue pencil states, you should be weary of drafting an agreement that intentionally leaves the Court with the responsibility of carving out a reasonable non-competition provision.

analyze an employee's responsibilities to determine the field and activities in which the employee is actually engaged and clearly define this area within the agreement. The goal should be a non-competition provision which seeks to protect you from probable threats (i.e. targets your product, you sales area, your clients and how your competitors will compete) and whose duration and geographic scope is tailored to the position, experience and value of the former employee. Keep in mind that in the context of the sale of a business a broader restrictive covenant is more likely to be upheld.

Undefined and ambiguous phrases in restrictive agreements such as "territories" or "activities" are often interpreted against the employer, or worse, are found unenforceable. A staffing company, for example, should not state broadly that the ex-employee may not compete in the "business of the company," but more specifically should say the ex-employee may not compete in, for example, "the placement of temporary or permanent professionals in the finance and accounting field." Clarity will not only avoid unenforceability but will also satisfy a court that the former employee understood the limitations in the agreement.

STEP TWO: ADDRESS ALL QUESTIONABLE CONDUCT

Competition is not the only conduct that you should protect against. An employee who disparages your company, discloses confidential information, or solicits key business contacts or employees can be just as destructive. Thus, restrictive covenants that target this conduct are equally important.

An effective non-disclosure provision contains a thorough definition of the type of confidential information to which an employee is exposed and includes an acknowledgement that disclosure of this information would be so harmful that money damages would be insufficient. A non-solicitation provision should define the clients, key business contacts and internal employees from which the former employee must stay-away and should clearly delineate the duration of this provision. Clauses providing for reimbursement of training cost and prohibiting disparagement provide the company with additional protection. Finally, for added value to your business, you should consider expressly making the agreement assignable by the company.

STEP THREE: PROTECT YOUR AGREEMENTS

Restrictive covenants should be included in all employee contracts, not just those of sales people. Your company's controller, head of human resources and information technology director have as much if not more ability to wreak havoc on your business than a star salesperson. To be enforceable the agreement must be supported by consideration. In some states, such as Massachusetts, continued employment of an at-will employee will provide sufficient consideration. An agreement executed at the inception of the employment relationship is also commonly found to have sufficient consideration. Even after drafting a solid employment agreement, companies are still at risk if they don't ensure that the agreements are actually signed, safeguarded and kept current. The original agreement should be kept in a secure place with the individual's original employment file. Any subsequent agreements signed by the employee should expressly acknowledge the existence of pre-existing agreements and should address their viability. Material changes in an employee's position should be accompanied by execution of a new agreement.

In seeking to enforce a non-disclosure agreement, you will have to demonstrate that the company truly treated its business data as "confidential." This means your confidential information should actually be protected. Simple protections include issuing passwords to protect databases, limiting administrative passwords, maintaining locked offices after hours, and limiting the ability of individuals to print information from their desktops or at least tracking significant print jobs.

STEP FOUR: POLICE YOUR AGREEMENTS

Execution of the restrictive agreement does not guarantee that it will serve to protect the business. Vigilance is crucial not only in protecting a company's assets but also in the ultimate enforcement of the agreement. A departing employee should be reminded of his/her obligations to the company and should be given a copy of applicable agreements. Upon hearing that an employee will be joining a competitor, you should immediately check for any unusual conduct, including unusual e-mail traffic and print jobs, and take action. A company should prevent the perception, either in-house or within the industry, that it is unwilling to enforce its restrictive agreements. Where an

ex-employee is found to be competing, soliciting employees or clients or disclosing information, the company's movement should be swift.

DO UNTO OTHERS….

The best position for the company to be in when it attempts to enforce its restrictive covenants is for it to have respected its competitors' agreements. Having your new employees sign an acknowledgement that they are not bound by any agreement that restricts their ability to work for you is one way to demonstrate that you are acting in good faith. The company should also have an institutional memory regarding the positions taken in any lawsuits in which it has been involved. Courts will be particularly suspicious of a company that changes position depending on its interests in a lawsuit and may choose to deny injunctive relief under egregious circumstances.

William Knudson, Jr., early Chairman of the Ford Motor Company, is credited with saying "In business, the competition will bite you if you keep running, if you stand still, they will swallow you." The hope is that with an enforceable restrictive covenant in place, a company that keeps running will not even get bit.

Beyond Borders

International Employment

Issues for the Global Hospitality Industry

M. Carolina Avellaneda
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WHY EMPLOYMENT?

We are not the only ones talking about these issues. During their 2006 Conference, The International Society of Hospitality Consultants identified the Top Ten Global Issues and Challenges in the Hospitality Industry for 2006. The number one issue was:

"CHANGING LABOR CONDITIONS"

Overview

When do International Employment Issues Arise?

- ✓ Multinational operations
- ✓ U.S. workers working in non-U.S. offices
- ✓ U.S. based parent opens or closes non-U.S. office
- ✓ Cross border M&A or acquisitions
- ✓ Non-U.S. subsidiaries

Overview

What are the International Employment Issues?

- ✓ Recruitment and Retention
- ✓ Hiring and Termination
- ✓ Compensation and Benefits
- ✓ Employment Agreements

Overview

What are the International Employment Issues (cont.)?

- ✓ HR Policies: Sexual Harassment
- ✓ Ex-Pat Agreements
- ✓ Emergency Response
- ✓ Data Protection and Privacy Issues

OVERWHELMED?

Start with some basic considerations

Before You Cross the Border

Study local culture/statutes regarding:

- ✓ Existence of at will-employment
- ✓ Required employer related contributions
- ✓ Mandatory/customary vacations
- ✓ Statutory notice periods
- ✓ Statutory insurance/sick pay
- ✓ Required year end bonus
- ✓ Protection of company data

Before you Cross the Border

Study local culture/statutes regarding: (cont.)

- ✓ Union issues
- ✓ Statutory minimum hours and vacation time
- ✓ Structuring a competitive compensation/benefits package
- ✓ Residency/work visa issues
- ✓ Who should employ the employee?
- ✓ Should you hire locally or export?

Before you Cross the Border

At-will Employment

- ✓ "At-will" doctrine is unique to the United States
- ✓ Most South American countries recognize a "right to work"
- ✓ EU – "at-will" employment is prohibited

Before you Cross the Border

At-will Employment- EU

FRANCE

- ✓ In general there will be a signed employment contract that specifically sets out the parties' obligations
- ✓ Indefinite term contracts are the norm
- ✓ Fixed term employment: highly regulated, can only be used temporarily

Before you Cross the Border

At-will Employment- (cont.)

- ✓ Can only terminate legally for just cause (not fulfilling the requirements set out in the contract) or for economic reasons
- ✓ Difficult to terminate for cause (termination must be justifiable and fulfill required notice period)

UNITED KINGDOM

- ✓ Disciplinary hearing needed prior to dismissal
- ✓ Minimum notice period of one week per year of service with a minimum of 12 weeks

Before you Cross the Border

At-will Employment- South America

- ✓ Constitution of virtually all South American nations state that labor law are deemed to be of the highest social interest.
- ✓ Workers cannot lawfully waive/contract out of minimum standards in Labor Codes.
- ✓ Employment relationships are contractual in nature and presumed to be of indefinite duration.
- ✓ Laws seeks to protect and promote the stability and continuity of employment contracts.
- ✓ Must prove just cause to terminate an individual employment contract.

Before you Cross the Border

Structuring Ex-Pat Compensation

- ✓ Offer letters often not enforceable abroad
- ✓ Domestic packages may not be enforceable abroad
- ✓ One size benefits do not fit all
- ✓ Determining salary rate: home based, host country, net-to net, higher of host or home, etc.
- ✓ Double taxation issues
- ✓ Home leave
- ✓ Local or U.S. benefits
- ✓ Housing allowance

Before you Cross the Border

Non-Competition Agreements- Worth it?

- ✓ Virtually every jurisdiction which permits them has a judicial presumption against their enforcement.
- ✓ Intensely reluctant to modify and interpreted against the drafter (employer), no blue pencil.
- ✓ Narrowly construed.

Before you Cross the Border

Non-Competition Agreements

Improve the chances you will have an enforceable agreement by:

- ✓Using a familiar national format
- ✓Respecting national language
- ✓Offering consideration
- ✓Stating your interest as employer
- ✓Applying contracts consistently
- ✓Executing effectively
- ✓Remedies – injunctive relief/liquidated damages

Before you Cross the Border

Sexual Harassment

Be aware – as a U.S. entity doing business abroad, U.S. sexual harassment law applies to you.

Before you Cross the Border

Sexual Harassment

- ✓ No longer unique to the United States
- ✓ E.U. Sexual Harassment Directive
- ✓ By October of 2005 member states must have enacted legislation.
- ✓ Chile implements sexual harassment statute
- ✓ In Israel sexual harassment both a tort and a crime

CONCLUSION

Crossing the border is never easy:

GET LOCAL COUNSEL EARLY!

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