HOW DO YOU PREVENT A FORMER EMPLOYEE NOW WORKING FOR A COMPETITOR FROM RECRUITING YOUR CURRENT EMPLOYEES?

Most roofing companies are concerned about former employees luring away customers and leaving employment with confidential information. To address this concern, many companies have their employees execute employment agreements containing provisions commonly referred to as restrictive covenants. The most common restrictive covenants are noncompete provisions and nonsolicitation-of-customers provisions.

A carefully drafted and enforceable noncompete provision prohibits an employee from going to work for a competitor for purposes of providing specific services for a specified period of time and within a specific geographic boundary. The nonsolicitation-of-customers provision prohibits an employee from contacting certain customers of his or her former employer for a specified period of time following employment without any reference to a geographic boundary within which the restriction applies. These restrictive covenants can go a long way toward protecting your interests; however, you won’t have any interests to protect if you lack employees to keep you in business. So how do you prevent your former employees from recruiting your current work force to go to work for their new employers? The answer is to include a nonrecruitment provision in your employment agreements.

A nonrecruitment provision prohibits an employee, for a set period, from soliciting certain individuals to leave their current employer and work with the employee. Although traditional restrictive covenants, such as noncompete and a nonsolicitation provisions, are subject to strict scrutiny by the courts that are asked to determine their enforceability because the

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covenants are considered to be in partial restraint of trade, a covenant against solicitation or recruitment of employees has historically been scrutinized less strictly. Courts generally only consider whether the nonrecruitment provision, when taken as a whole, is reasonable. Some courts, however, apply the same rules to nonrecruitment provisions as are applied to nonsolicitation and noncompetition provisions. These states subject nonrecruitment provisions to the same level of strict scrutiny that is applied to noncompete and nonsolicitation provisions.

Those states that treat the nonrecruitment provision differently from the traditional restrictive covenants will enforce a nonrecruitment provision if its scope is reasonable in relation to time and it seeks to advance legitimate business interests. These states, therefore, still require at a minimum that the nonrecruitment provision have a time limitation. The absence of an explicit time limitation in these states renders the agreement invalid. Courts in these states have found agreements prohibiting recruitment of employees for periods of one to two years to be reasonable. There is no requirement in these states that the nonrecruitment provision contain a territorial limitation.

Some states go a step further and only prohibit recruitment of employees for purposes of going to work for a competitor while allowing recruitment of employees for businesses unrelated to that of the employer. These states also do not require that the nonrecruitment provision contain a territorial limitation. In states that treat nonrecruitment provisions differently from noncompete and nonsolicitation provisions, an enforceable nonrecruitment provision may read as follows:

For two years after leaving the Company, the Employee will not, directly or indirectly, attempt in any manner to cause or otherwise encourage any employee of the Company to leave the employ of such corporation [to go to work for a competitor of the Company].

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Those states that apply the same rules to nonrecruitment provisions as are applied to noncompete and nonsolicitation agreements generally apply the following criteria: Is the restraint, from the standpoint of the employer, reasonable in the sense that it is no greater than is necessary to protect the employer in some legitimate business interest? From the standpoint of the employee, is the restraint reasonable in the sense that it is not unduly harsh and oppressive in curtailing his or her legitimate efforts to earn a livelihood? Is the restrain reasonable from the standpoint of a sound public policy? In making these determinations, courts generally use a three-part test of duration, territorial coverage and scope of activity restricted. The absence of a geographic boundary for the nonrecruitment restriction in these states likely will result in the provision being held unenforceable. In these states, an enforceable nonrecruitment provision may read as follows:

For two years after leaving the Company, the Employee will not, directly or indirectly, attempt in any manner to cause or otherwise encourage any employee of the Company to leave the employ of such corporation to go to work for a competitor of the Company when the competitor’s principal office is located within the 50 mile radius of the Company’s office located at 1234 Smith Lane, Atlanta, Georgia 30303.

Regardless of whether your company is concerned enough about its legitimate business interests that it has its employees with access to customers and confidential information execute an employment agreement containing restrictive covenants, you should be concerned that your former employees could potentially try to raid your workforce, and you should take measures to prevent that from happening. By adding a nonrecruitment provision to your employment agreements, you can address this concern because, without an enforceable nonrecruitment provision, the law generally permits recruitment of your current employees by competitors and former employees as long as it is done fairly and legally.

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