
WIER & ALLEN, P.A.

ATTORNEYS AT LAW

Richard R. Wier, Jr.*
Michele D. Allen*

*also admitted in PA

302.888.3222
Fax 302.888.3225
rwier@wierandallen.com
mallen@wierandallen.com



Selected by *U.S. News & World Report*, Sept. 2010 "first tier ranking" law firm in:
Labor Law - Management and Employment Law - Individuals

COVENANTS NOT TO COMPETE

PROTECTING YOUR PRACTICE – MAKING THE RIGHT DECISIONS WHEN DRAFTING RESTRICTIVE COVENANTS

By Richard R. Wier, Jr., Esq.
Michele D. Allen, Esq.

One of the biggest challenges for any employer when managing their practice is exactly that . . . managing their practice. It is a time consuming process and often cuts into hours that could be dedicated to managing the business, spending time with friends and family and enjoying the fruit of the hard work and countless hours dedicated to building a successful operation.

Like so many others in business, often the solution presents itself to expand and hire additional employees. It is often one of the best decisions a business owner can make if done correctly – but it comes with its own set of challenges and tough decisions.

As you open your business to someone else, the inevitable question arises – am I protected? Should I ask them to sign an employment agreement with a restrictive covenant?

What is a restrictive covenant?

A restrictive covenant is a contractual provision between an employer and his or her employee which prevents that individual from practicing in a specified geographic area for a given period of time if the employment is terminated. Restrictive covenants, such as covenants not to compete or solicit, are considered a protective and powerful mechanism used by employers to shield their customers/clients, information and referral sources from competition and misappropriation. The covenant also serves to protect the employer's investment in an employee (i.e., recruiting costs, moving expenses, opportunity costs) by encouraging the employee to remain with the business. Restrictive covenants can benefit employees as well. If an individual is employed by a business where all of the employee contracts contain covenants, none of the employees can compete directly with the business upon leaving.

How do you determine if you need a restrictive covenant?

Employers often ask whether or not they should have an employee, especially another colleague, sign employment agreements with restrictive covenants.

First you must evaluate the duties and responsibilities of the employee with the employer and determine that value. The employer must ask themselves how their business will be affected if the employee leaves. Will the employee have the knowledge of your clients that would allow them to solicit those individuals to another competitor? Will they be able to solicit other members of your staff? Will they have the capability to remove or copy valuable papers, software, marketing plans, billing records, customer lists, and other confidential information that would be harmful to you if used by a competitor? Can they leave to go work for a competitor and if so will that affect your business?

If by the employee's departure there is concern that the employee may affect your business in any of these ways, it would be a good idea to discuss with an attorney the creation and implementation of restrictive covenants to protect your business. There is nothing more troubling and potentially costly than investing time, money and resources into an employee to have them leave your business and go and work for a direct competitor taking your customers with them.

One Size Doesn't Fit All

A restrictive covenant is only as good as its ability to withstand the Court's scrutiny. Delaware courts will generally uphold restrictive covenants that contain reasonable limitations on the duration and geographic scope and are necessary to protect a legitimate interest of the moving party.

Delaware courts will generally uphold restrictive covenants that are between 1 to 3 years, as long as the duration of the restriction does not go beyond what is necessary to protect the employer's legitimate economic interests. Failure to satisfy these requirements has the potential to invalidate an otherwise reasonable agreement.

Bottom Line – Is my practice protected?

Restrictive covenants, or non-compete/non-solicitation agreements, are fact specific, requiring an in-depth review and drafting by an attorney.

Have additional questions or need guidance on drafting employment contracts? For employment law guidance you can reach Dick Wier or Michele Allen at 302-888-3222.

This newsletter does not provide specific legal advice or create an attorney-client relationship.