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Consider "Consideration" in Post Employment Restrictive Covenants

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It is a best practice for any direct-hire organization to ensure that its recruiters and sales staff have adequate restrictive covenants. Such restrictive covenants should take the form of non-compete covenants designed to protect the employer from a recruiter or salesperson leaving to work for a competitor, non-solicitation agreements designed to ensure that recruiters and salespeople, if they do leave, do not take clients or candidates to a new employer, and covenants designed to prohibit the use and disclosure outside the firm of a direct-hire company's confidential and proprietary business information.

Generally, such restrictive covenants will be enforced against employees provided they are reasonable, do not violate public policy, are part of a written employment agreement, and are supported by adequate consideration. In assessing the reasonableness standards, courts will typically consider the restrictive covenant's duration, geographical limits, scope of activities prohibited and the necessity of protecting the employer's legitimate business interests balanced against any undue hardships caused to the employee.

Under basic principles of contract law, "consideration" is a critical element of the enforceability of a restrictive covenant. In other words, because the employer is restricting the employee's ability to work in a limited way, the employer must provide the employee with something valuable for the employee giving up such rights. At the time of hire, the promise and terms of employment typically serve as adequate consideration for restrictive covenants, as well as other terms in an employment agreement.

What happens, however, when the employer desires to enhance its protections and requests that an existing employee enter into new restrictive covenants, or enter into them for the first time? The answer to that question depends on where the employer is located. Several states follow the majority rule that, as to existing employees, continued employment is not sufficient consideration to support the restrictive covenant; the underlying premise being that as the employee has the employment already, and the employer is doing no more than what the employer had already agreed to do at the time of the initial employment. In these states, in order for restrictive covenants entered into subsequent to the commencement of the employee's service to be enforceable, they must be supported by new or additional consideration, which can be in the form of a raise, a promotion or a change in employment status.

Other states, however, follow a rule that continued employment is enough to satisfy the consideration necessary for a current employee to enter into restrictive covenants. Those jurisdictions are of the view that if continued employment, or forbearance from discharge, is not sufficient consideration, then that would mean that employers would have to fire at-will employees and hire them back on the condition that the employees execute restrictive covenants, which is a position that some courts believe would lead to unnecessary "legal dramatics."

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Consider "Consideration" *continued ...*

The following provides a brief summary, with relevant case law, as to various states' positions on the consideration issue with post-employment restrictive covenants:

State: New Jersey Position: Continued employment sufficient consideration.

In *Hogan v. Bergen Brunswig Corp*., 153 N.J. Super. 37 (App. Div. 1977), the court held that the continued employment of a salesperson for a period of three years after signing of a post employment restrictive covenant was sufficient consideration to support the employee's restrictive covenant not to engage in post-employment solicitation of customers.

State: New York Position: Continued employment sufficient consideration.

In *Zellner v. Stephen D. Conrad, M.D., P.C.,* 183A.D.2d 250 (N.Y. App. Div. 1992), the court held that an ophthalmologist that opened a competing ophthalmology practice after signing a post-employment restrictive covenant not to compete violated the restrictive covenant because, in an at-will employment, an employer has the right to discharge an employee without cause, and without being subject to inquiry as to the employer's motives, and forbearance of that right by the employer is a legal detriment which can stand as consideration for a restrictive covenant.

State: Pennsylvania Position: Continued employment alone is not sufficient consideration.

In *Insulation Corp. of Am. v. Brobston*, 446 Pa. Super. 520 (Pa. Super. 1995), the articulated that "in order for a restrictive covenant entered into subsequent to the commencement of the employee's service to be [enforceable], it must be supported by new consideration, which can be in the form of a corresponding benefit or a beneficial change in employment status."

State: Connecticut Position: Continued employment sufficient consideration.

In *MacDermid Inc. v. Raymond Selle and Cookson Group PLC,* 535 F. Supp. 2d 308. (D. Conn. 2008), where the court held that where an employee signed a post-employment restrictive covenant when the employer made it clear to the employee that failure to sign would result in termination of employment, and later violated the restrictive covenant, continued employment was adequate consideration in the at-will employment relationship.

State: Delaware Position: Continued employment sufficient consideration.

In *Research & Trading Corp. v. Powell*, 468 A.2d 1301, (Del. Ch. 1983), the court held that where a salesperson employee signed a post-employment restrictive covenant in fear of losing his job, and without receiving any promotion, job reclassification, additional consideration, or benefits in exchange for signing of the covenant, mere continuation of the employment was sufficient consideration as the employee gains something, *i.e.* a job.

In summary, it is important that employers consult with competent counsel in the preparation of restrictive covenants to protect enforceability of such critical protections for the employer. A review of any existing covenants currently in place is also important to confirm that they will withstand judicial scrutiny. In asking existing employees to execute new post-employment restrictive covenants, the employer should also consult with counsel to prepare agreements that are reasonable in scope and address the consideration requirements of the applicable jurisdiction.

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