The Trend in Non-Competition Agreements
By Denice A. Gierach – January 2010

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There is an increasing amount of litigation between employers and former employees over non-compete agreements and other forms of restrictive covenants. Non-compete agreements and other restrictive covenants used to be used by employers for senior executives, but now are being used across the board. For certain companies, these may be something that has to be signed to be hired. In recent years, employers have dramatically increased their use of non-compete agreements to limit what a departing employee can do.

With unemployment being what it is today, there is also a change in attitude by judges, acknowledging that these agreements cannot be used to keep a person from finding any work. While a court may enforce a validly drawn non-compete agreement, this agreement must be limited in scope geographically and be reasonable in time so that the departing employee can have a chance of finding another job outside of the geographical area or anywhere after the expiration of a reasonable amount of time.

These agreements are usually drawn to protect confidential information or trade secrets, which are client lists, sales and marketing strategies, client preference and purchase histories, product formulas and the like. The protection of trade secrets in these agreements usually covers the whole time that the item is confidential. Once it becomes part of the public domain, it is generally no longer considered a trade secret.

There are usually also provisions that are non-solicitation agreements that prevent a departing employee from contacting former customers or employees of the former company. These provisions are designed to give the former employer some time to place another person in the job of the departing employee to firm up the relationship with the customer.

The duration in time that the restrictive covenant may cover has been in the purview of the courts. Some courts in Illinois have been very restrictive and have held that the restrictive covenant should not be longer than a six month period. Generally, a provision that is under two years will usually be upheld. However, in the case of these restrictive covenants being used in a severance agreement, where the payment of severance is substantial and paid over a longer term, the courts may uphold a longer period of time.

The rule of thumb in the art of drawing a restrictive covenant is that the restrictive covenant should be drawn in a narrow fashion to ensure that the employee can still find a job when the employee has left, should be limited in geographic scope to accommodate the geographic area that the employer covers and should include a reasonable time frame.

The rule of thumb should be if it is fair to both sides, it will probably be upheld.

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