Australia – Protecting Your Company's Customers and Confidential Information

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August 31, 2011

In a thriving economy, companies may not be as worried about losing a little business here and there because they are likely picking it up elsewhere. That is not the case in today's business climate as companies are fighting and scratching to hold onto every customer they can. In an effort to protect valuable goodwill and assets, many employers insist that confidentiality and restraint of trade clauses are contained in their employees' contracts of employment. In general, these employment contracts are used to restrict employees from competing with the employer after their employment comes to an end.

The interests of the employer which a restraint on trade seeks to protect is known as its protectable interests. As specific needs have arisen, restraint clauses have acquired other names with particular purposes. For instance, non-solicitation clauses prohibit former employees from soliciting former clients/customers; non-poaching clauses prohibit former employees from hiring away (or "raiding" or "poaching") the employer's current employees; and non-compete clauses prohibit former employees from working in a competitive business to that of the former employer. Whether these various agreements are separate contracts or separate provisions in one agreement, the purpose is usually the same - to prevent unfair competition from former employees.

In Australia, there are two categories of enforceable and protectable interests - goodwill, including customer and staff relationships; and confidential information. Courts in Australia will generally enforce restraint of trade clauses so long as they are reasonable to protect the employer's legitimate business interest. One way that employers can demonstrate the reasonableness of the restraint is to limit the enforcement of the restraint to a specific geographic area and duration that relates to the employer's business. While the reasonableness of a restraint likely will be examined on a case-by-case basis, a clause that restricts an employee from competing against its former employer for an unlimited time anywhere within the country is almost always unreasonable.

With respect to confidential information, Australian law distinguishes between trade secrets of a business and the general knowledge/skills gained by an employee during employment, or "know-how." While a true "trade secret" is afforded protection under the law and must never be disclosed by an employee, the only method for protecting employee "know-how" is through the use of an express confidentiality provision in an

employment contract. For maximum protection, employers should refrain from trying to differentiate between trade secrets and "know-how," and instead should exhaustively define the protectable, "confidential" information within the terms of the employment contract.

In the event that an employer fails to include a restraint clause in the employee's contract, Australian law provides other mechanisms to protect a company's confidential information. One such mechanism is the employee's implied duty of good faith and fidelity. This duty applies during while an employee is working for the company and requires the employee to not at in a manner detrimental to the interests of the employer. For example, an employee may breach the duty of good faith and fidelity by copying customer lists for use after employment ends.

Another mechanism an Australian employer might use to protect confidential information in lieu of a valid restraint clause is the equitable duty of confidence. To enforce this obligation, the employer must demonstrate the following elements: (1) the confidential information is specifically identifiable; (2) the confidential information has the quality of confidence about it and is not common/public knowledge; (3) the confidential information was imparted in circumstances giving rise to the duty of confidence; and (4) there is misuse or threatened misuse of the confidential information without the former employer's consent. It is important for employers to note that while the duty of confidence certainly is a useful method for protecting information, it is by no means inclusive. Rather, it generally relates to the misuse of trade secrets or highly confidential information. Accordingly, the best method for protecting a company's confidential information is to err on the side of caution and include an enforceable confidentiality provision in each contract of employment.