

# CONSIDERATIONS AND ALTERNATIVES FOR NON-COMPETE LITIGATION

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# INTRODUCTION

- Recently, the amount of non-compete litigation has increased while litigation generally has decreased in recent years. Why?
  - Increased employee mobility
  - Decreased employee loyalty
  - Technological developments

# THRESHOLD CONSIDERATIONS REGARDING ENFORCEMENT VIA LITIGATION

- Expense
- Potential counterclaims by ex-employee
- Potential claims by current employer of ex-employee
- Competitive costs -- deployment of resources to lawsuit vs. marketplace

# ENFORCEMENT CONSIDERATIONS

- Is the non-compete permissible under applicable state law?
- Does adequate consideration, if required, support the non-compete?
- Is the non-compete narrowly tailored for the specific ex-employee's particular prior employment?
  - Is every employee asked to sign the same non-compete – or only employees whose departure could present a genuine competitive threat?
  - How restrictive is the non-compete – is the restriction appropriate to guard against the departed employee's interactions with clients, potential clients, and access to confidential information or trade secrets?
  - Is the non-compete designed to protect skills and knowledge acquired during employment with you, or pre-existing knowledge?
  - Are the restrictions established by the non-compete reasonable in time and geography?

# ESTABLISHING A VIOLATION

- Can you establish that the ex-employee copied or downloaded competitive information while working?
- Can you establish that the ex-employee is currently utilizing your resources?
- Can you evidence that the ex-employee was forming or working for a competitive business while working for you?
- Have employees been advised that emails and voice mails are company property which are monitored?
- Has the company taken steps to treat the information involved in the lawsuit as confidential, or is the information generally discussed or disseminated rather than maintained confidentially?

# LITIGATION RISKS

- Litigation is expensive and time-consuming.
- Non-compete litigation ordinarily is fast-paced and immediate.
- Attorneys' fees – ordinarily, the prevailing party in non-compete litigation recovers its' attorneys' fees pursuant to state law – what does your particular state law say about enforcement costs and prevailing party attorneys' fees?
- Will the lawsuit be filed in a “blue pencil” state, such that you obtain some, but perhaps not all, of the relief sought?

# LITIGATION AS LAST RESORT: PRE-SUIT RISK ASSESSMENT

- Questions to consider even if enforcement of the non-compete appears to be “rock solid:”
  - Does the ex-employee actually present a genuine competitive threat currently?
  - Are your clients truly “trade secrets?”
  - Will the lawsuit protect what *actually* matters *currently*?
  - Will the lawsuit necessarily involve your customers? If so, is it worth it?
  - Will the lawsuit necessarily involve your executive and employee time? If so, is it worth it?
  - What is the risk of an adversary ruling on other employees bound by a similar non-compete?

# EXPLORING OPPORTUNITIES FOR RESOLUTION OTHER THAN LITIGATION

- Cease and desist letter
- Notify current employer and ask it to respect the non-compete
- Negotiate a lesser geographic limitation or shorter time period with ex-employee
- Negotiate a job reassignment with the ex-employee's current employer



Questions?