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Did You Sign a Non-Compete Agreement?

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These days, more and more companies are requiring their employees to sign restrictive covenant agreements. These are agreements that are designed to protect a business's legitimate interests and assets from being misappropriated or improperly utilized by a former employee. Such agreements often contain non-competition provisions, which may provide that an employee is prohibited from working with a competitor of the employer or starting a competitive business during employment and for a period after his or her employment ends.

New York resident individuals who have signed non-compete agreements and are transitioning between employers or starting a new business venture must analyze the extent of the applicable non-compete restrictions and whether such restrictions may be enforceable under New York law. In addition, the prospective employers or business partners of such individuals must be equally diligent regarding those non-compete restrictions.

New York courts have noted that there are powerful public policies weighing against depriving people of their ability to earn a living, but have also held that non-competition agreements are enforceable so long as they meet an overriding limitation of reasonableness. For a non-compete restriction to be deemed reasonable under New York law, it must meet each of the following three conditions:

1. The restriction is no greater than is required for the protection of the legitimate interest of the employer;

2. The restriction does not impose undue hardship on the employee; and

3. The restriction is not injurious to the public.

In addition to the above items, former employers seeking to enforce a non-compete agreement will need to evidence that the employee was given consideration, i.e., something of value, in exchange for agreeing to the non-compete restriction. Examples of consideration include new employment, a promotion, garden leave payments, a raise or any form of bonus compensation. Continuing employment ("sign this or you're fired") is also valid form of consideration for at-will employees. The value of consideration given to the employee will influence any determination of the reasonableness of the non-compete restriction.

In that regard, an additional critical issue is the skill set of the employee. New York courts will generally uphold a non-compete restriction against a former employee whose services are "unique or extraordinary". To meet that standard, it would need to be shown that the services are irreplaceable or that the loss of services would cause irreparable injury to the employer.

Geography, duration and scope are important factors for establishing the reasonableness of the non-compete restriction. None of those factors, however, should be reviewed independently. For example, a New York court upheld an unlimited non-compete restriction in a case where the restraint was limited to only a small geographic area. The scope of the restriction, however, generally cannot be overbroad, such as the restricting of employment in an entire major industry.

Employees in transition, along with their future prospective employers or business partners, should carefully assess any applicable non-compete agreements with a qualified attorney to minimize or avoid any potential liability. Each situation is unique and will merit its own considerations in evaluating the reasonableness of the non-compete restriction.

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