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Non-Compete, Confidentiality and Non-Solicitation Clauses

During recessionary times, most people are acutely aware of the general business relationship they have with their employer. Few, however, fully appreciate the legal duties they may owe their employer as a result of documents they signed when they joined the company. This lack of understanding can lead to problems when employees, frustrated by cut-backs in compensation, decreased wages and general job instability take actions that run “afoul” of the contractual and common law agreements they have with their employers. Three (3) major pitfalls are outlined below:

Example One: Confidentiality Agreements
All but a few employers require that new employees sign some form of confidentiality agreement. This agreement usually comes in the stack of medical forms and other documents that are presented to the employee at or around their first day of work. Most of these confidentiality agreements require that the employee maintain the confidentiality of information they learn while employed at the company. This would include company policy information, customer information, financial information, sales information, technological information, etc. which it does not want shared with its competitors. Employees should use caution against downloading confidential information and removing it from the company’s premises.

Example Two: Non-Solicitation Agreements
Many companies that hire sales staff require that their sales employees sign a non-solicitation agreement. The purpose of this agreement is to stop employees from soliciting from customers (whose identities they learned of while employed by the company). Employers consider sales information to be owned by the company. Most non-solicitation agreements contain a provision called an “injunctive relief provision” which allows the company to go to Court for an Order that will stop an employee from soliciting any customers whose identities the employee learned of while employed at the company. These agreements usually contain an attorneys’ fees provision that allows the company to seek an order giving it all the attorneys’ fees the employer accrued to enforce the non-solicitation agreement. As a result, an employee who violates a non-solicitation agreement can find him or herself unable to contact customers and also responsible for expensive attorneys’ fees. There is a popular misconception that such agreements are not enforceable. This is a myth. Such agreements are generally enforceable in New Jersey to the extent that they are reasonable in scope and are designed to protect a company’s legitimate business interest.

Example Three: Non-Competition Agreements
This type of agreement is not as ubiquitous as non-solicitation agreements, but it is often used with employees such as scientist and other researchers who have access to sophisticated scientific or technological information. The affect of such an agreement is to stop an employee from working for a competitor of the former employer for a specific period of time. While these types of agreements are not generally as easily enforceable as non-solicitation agreements, many courts will enforce these types of agreements if it is shown that as a result of working for the competitor, the employee will “inevitably disclose” sensitive information. Obviously, this kind of agreement, if enforced, can have a significant impact on the employee. The employee may be barred from working in the industry that he or she is trained for some period of time. This can have a devastating economic effect on the employee.

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While many of the employees may have forgotten that they signed a confidentiality agreement, most will remember signing a non-solicitation or non-competition agreement. If the employee is not certain about this, they should take reasonable steps to determine whether or not they signed such agreements. Many prospective employers will require that employee candidates sign a document stating whether or not they have entered into a non-solicitation or non-confidentiality agreement. If an employee has concerns about an agreement they signed, or about confidential information that they may have learned, and are unsure how these things effect a potential employment with a new employer or a new business, the time to ask questions is before the employee resigns, not after. Their best bet is to consult with an employment attorney prior to making mistakes that could prove to be very costly.