So your sales manager just quit and you're concerned customers will follow. Tips for successful enforcement of noncompete and nondisclosure agreements.

By John F. Reha

DISCLAIMER/NOTE: The author is not giving any legal advice to the reader of this article. The reader is advised to seek advice from counsel competent in the areas of competition restrictions before taking any action. No attorney-client relationship exists between the author and the reader unless and until the reader formally retains the author as counsel.

This article is directed to the Colorado business owner or manager who is confronted with enforcement of a covenant not to compete, a non-disclosure agreement or some other competition restriction. The danger of immediate, substantial erosion of the customer base is often present when key employees leave. Accordingly, a concerted, focused, and rapid approach is often necessary for effective enforcement and protecting the business's assets.

Any discussion regarding non-competes in Colorado starts with the Colorado Non-Compete Statute, C.R.S. §8-2-113. That statute provides that most non-compete agreements are "void." However, the same statute recognizes three situations in which enforcement is permitted. In sum, agreements not to compete: (1) executed as part of the sale of a business, (2) executed with "executive and management personnel," as well as "professional staff to executive and management personnel," and (3) those which protect trade secrets are enforceable. Successful enforcement of a non-compete requires establishing one or more of these exceptions. If an exception can be established, a business may seek both injunctive (a prohibition on activity) or monetary relief (damages). A discussion of each of these exceptions and other practical considerations follows:

1. Determining and establishing an exception. Again, the statute starts with the premise that all non-compete agreements are void. It is thus imperative that either a business sale, executive or management employee status, or a trade secret be established.

a. Sale of business. If the non-compete arises out a business sale, Colorado adopts a robust policy of enforcing such restrictions, particularly against the seller of the business. It is highly likely that it will be necessary to show that the person burdened by the covenant is either the seller of the business or a significant stockholder (or LLC member) of the sold business for the non-compete to be enforced. However, if a non-compete is part of a buy-sell agreement between owners of the business, it is entirely possible that an exiting shareholder will be subject to enforcement under the sale of business exception.

b. Managers/executives (or "professional staff" thereto). The "management exception" applies to those employees who had management authority and responsibility while employed. A number of factors will go into the analysis of whether an employee qualifies as a manager or executive such as type and amount of compensation, the exercise of independent discretion, the ability to bind the employer to contracts, and perhaps most importantly, supervision of other employees. Professional staff to management or executive personnel is

limited to those employees who engage in a professional practice (law, engineering, accounting, medicine, etc.), and then only to those professional employees who engage in their profession as part of management. It thus appears that few employees are subject to the "professional staff" exception.

c. Trade secrets. A number of types of information can qualify as a trade secret, including customer identity, customer lists, formulas, recipes, pricing and other information, provided such information is kept confidential and not otherwise readily available. A good idea is not necessarily a trade secret and neither is information which is publicly displayed via website, advertising and the like.

2. Your non-compete appears to meet an exception---What now?

a. Choose effective counsel. Employers should first and foremost retain counsel who have particular expertise in unfair competition. Although many attorneys understand contracts on a general level, competition restrictions are a completely different animal. A specialist who fully understands non-competes and information restrictions is oftentimes the difference between winning and losing.

b. Strategy. A strategic plan should be determined which should include remedies to pursue and how best to obtain them. Key personnel should be interviewed, and if necessary affidavits from such personnel should be obtained prior to any demand letter and definitely before the institution of litigation. Affidavits attached to demand letters may be particularly persuasive to the former employee, his or her counsel and his or her new employer. If necessary, an attempt should be made to obtain a temporary restraining order (a "TRO") against the former employee preventing him/her from conducting any objectionable activity until an additional hearing can take place to determine if such activities will continue to be prohibited (a preliminary injunction hearing). The window between filing a lawsuit and getting a preliminary injunction hearing can often be unacceptably long, thus often necessitating a TRO. Once litigation commences, discovery should be conducted as soon as allowed by the court.

c. Demand. Demand on the ex-employee to immediately cease and desist competition, use of the employer's trade secrets and other matters at hand should be made. The demand letter should be focused on relevant facts, supported by legal authority, and clearly state the demand made. It should also specify a short period of time for compliance and notify the ex=employee of the employer's willingness to proceed to litigation (including seeking immediate injunctive relief) if needed.

d. Evidence preservation. Today, "electronic footprints" are everywhere. Such information as emails, texts and social media posts, as well as bank and credit card records will go a long way to tell any story of improper competition, solicitation and the like. Indeed, the demand letter should notify the former employee of the legal requirement that such person maintain all electronic and hard copy files and not close any accounts or delete or "wipe" any electronic messages, computer files and the like. Likewise, the employer should take immediate steps to marshal all electronic and hard-copy records, including emails, on its system to determine what evidence of such things as pre-termination competition, plans for future

competition, discussions of same with co-employees and others, etc. exist. In that regard, all parties to litigation are under the same duty to preserve all electronic and hard-copy documents, files, emails and the like.

e. The injunction hearing. For a number of reasons, the preliminary injunction hearing will typically effectively determine the entire case. At the end of such hearing, the former employee will either be restricted or will be free to compete, at least until trial. In turn, trial will likely be a year away. Because of this necessary but uniquely rapid procedure, need for quick yet meaningful preparation and presentation is paramount. Witnesses should be subpoenaed, counsel should have interviewed them and prepared them to present testimony, and necessary hard copy and electronic evidence needs to be ready to go.

All too often, employers take an unfocused, scattershot approach to non-compete enforcement. This is not only unwise, it is fraught with such dangers as lack of effective information capture, an inability to timely and effectively secure relationships with at-risk clients, and even to obtain enforcement of the covenant itself. A concerted strategy will greatly assist a successful enforcement effort.

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