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The Importance of Protecting Your Business - Reasons to Add Restrictive Covenants to Employment Agreements

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According to a 2017 Bureau of Labor Statistics study, a typical employee works for one employer for an average of 4.6 years. However, thirty years ago that same study showed that 1 in 3 individuals had been with the same employer for ten or more years. This modern era of work force fluidity means that employers must be proactive in protecting their best assets—their customer, client or patient base. The best way to do this is to include and enforce covenants restricting employees' ability to compete with your business, solicit your clients, and disclose

your confidential business information. Employers can address this by including such restrictions in employment agreements, or by having employees sign a separate non-competition/non-solicitation/confidentiality agreement.

Non-competition, non-solicitation and confidentiality restrictions, often referred to as non-compete agreements or restrictive covenants, are designed to prevent an employee from inflicting potentially damaging blows to the profitability and viability of your business. With respect to confidentiality, restrictions should be tailored to prevent employees from disclosing trade secrets, customer lists, financial information, marketing strategies and other confidential information crucial to your company's business model. A conventional non-compete clause restricts an employee for a duration of time and, in most cases, geography. For example, depending on the nature, scope and extent of your operations or client base, an enforceable non-competition restriction could limit an employee from working for a competitor within a 25-mile radius from any office location for a period of two years after termination. However, non-compete agreements are not "one-size fits all". Before drafting or requiring a restrictive covenant, it is important to do an analysis of where your vulnerabilities may lie if a particular employee leaves your company – how would that employee's departure detrimentally impact your operations? It is also important to evaluate the positions and job duties of those individuals for whom you are requiring restrictive covenants. A two-year, 25-mile restriction on a custodial worker would never be enforceable.

Ultimately, there are several reasons why restrictive covenants are an important and necessary tool to maintain successful operations:

1. **Protect your company's relationship with your clients, and enhance client trust.** When clients know that your employees are bound by confidentiality, and restricted from taking their information elsewhere, it increases the client's comfort level and reassures them that the relationship they have built with you will not be upended by your employee abruptly departing.
2. **Protect your company's investment in employee training.** When your company hires an employee, it invests not only money, but also time in training that individual. Employee turnover is a significant cost to your business. Restrictive covenants can help protect that investment by deterring employees from leaving shortly after you have invested a significant expense in training them.
3. **Protect your company's trade secrets and maintain the value of your company.** Your trade secrets and confidential information drive the success of your business. If an employee discloses confidential information to competitors, your company's value has been jeopardized.
4. **Protect your business from "wandering" employees.** In today's world, it is likely that an employee could see your company as a "stepping stone" to something bigger. A restrictive covenant would deter an employee from simply working for you as a means to an end, with the ultimate goal of taking your business model to another company or starting their own business.

As with all employment/business agreements, litigation over the enforceability of the document may become necessary. However, contrary to popular belief, agreements containing restrictive covenants are enforceable if drafted properly and narrowly-tailored. For this reason, it is important to consult with an experienced attorney who can assist you in drafting a legally-enforceable agreement.

Please feel free to contact Saxton & Stump's employment group with any questions regarding the enforceability of your current agreements, or to discuss implementing new agreements.

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