Should I Have my Employees Sign a Non-Compete?

As previously reported, President Biden signed an Executive Order in July, encouraging the Federal Trade Commission to ban or limit non-competition ("non-compete") agreements, agreements that generally restrict employees from going to work for a competitor or competing against you themselves. There has been no regulatory action by the FTC *yet*, and non-competes remain legal where, and to the extent which, they are permitted by state law. So, should you have your employees sign a non-compete agreement?

Consider the Nature of Your Business

In determining whether a non-compete makes sense, you should consider the nature of your business, job positions, employee access to confidential information and how harmful it could be if such information was used against you. Some industries are heavier in trade secrets and confidential information than others are. For example, a Silicon Valley tech company developing source code is situated quite differently than your average swimming pool maintenance company. Notably, when challenged by the New York Attorney General's Office, sandwich retailer Jimmy Johns backed off from requiring its minimum wage sandwich makers to sign non-competes. Probably a wise decision on their part.

Chances are, your business is somewhere in between the ends of the confidentiality spectrum. You may have developed pricing, bid or estimating information over the years. You may have specific information about customers in your industry, including their identity and needs, which is not generally known. In addition, you may have developed sales techniques or methods and provided training, which give you a unique competitive advantage. The greater the investment, value and secrecy of your proprietary information, the greater the need for comprehensive protection.

How Much Protection Do Existing Statutory Protections Provide?

Another thing to consider is what protections already exist under the laws in place. Certain assets and trade secrets enjoy protection under existing statutory law and do not necessarily require additional contractual protection.

Intellectual property ("IP") is a general term, which includes patents, trademarks, and copyrights. Specific laws exist which do (or can) provide protections to your IP assets, so you may have recourse under federal statute, regardless of whether your employees have signed a non-compete agreement.

Because statutes – both at the federal and state level – protect trade secrets, you do not necessarily need the additional contractual protection that comes with a non-compete. The Defend Trade Secrets Act (federal) and Texas Uniform Trade Secrets Act have broad, though not absolute protections. A departing employee attempting to make off with company trade secrets could be ordered by a court not to use, disclose or possess that data and be sued for damages. Note: not all valuable confidential and proprietary information constitutes a "trade secret," a term which generally refers to the highest level of confidentiality.

Is it Overkill and Could Other Contractual Provisions Suffice?

A non-compete agreement may be more than you need. There are *other* contractual provisions, which stop short of prohibiting a departing employee from working for himself or herself or a competitor, which may be adequate to protect your interests. For instance, consider whether a confidentiality/non-disclosure agreement and a non-solicitation agreement, alone or in tandem, would provide needed protection, without restricting an employee's ability to gain new employment. A "works for hire" clause can provide protection for intellectual property developed by the departing employee for Company purposes on the Company's dime.

Is There Any Downside to Utilizing Non-compete Agreements?

Yes, there may be. The employment relationship is a relationship. If you do not have considerable pre-marital assets, you probably would not ask for a prenuptial agreement (and maybe even if you did). It is, potentially, an extra source of tension between employer and employee and may not foster a sense of confidence and trust in the relationship. Which is simply to say, you might want to forgo it if there is nothing really to protect in the first place or you are otherwise covered.

Indeed, with a high demand for employees, an employer requiring a non-compete agreement may well be less attractive and have more difficulty recruiting. In addition, there may be a bigger downside if the FTC pursues regulatory action and the drumbeat for freer movement of workers continues. Moreover, while the agreement may have at least a deterrent effect on employee malfeasance, whether to seek enforcement of a non-compete carries its own considerations, including risk and cost. More on that in the next newsletter.

Having protection for your intellectual assets is critical. Andrews Myers can help you determine whether a non-compete or some other mechanism is best for you.

For more information, please contact Chuck Jeremiah.