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OVERVIEW ON THE RESTRICTIVE COVENANTS THAT ARE MORE IMPORTANT FOR PROTECTING YOUR BUSINESS THAN CONTENTIOUS NON-COMPETES

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For companies of all shapes and sizes, incorporating restrictive covenants into their employee policies and agreements is a critical step to protect intangible assets and goodwill developed through company operations. For technology companies, this step is highly critical due to the intangible nature of their greatest asset—their intellectual property. President Biden issued an Executive Order on July 9, directing the Federal Trade Commission to begin rule-making to develop rules that are to significantly restrict the use and enforceability of Non-Compete agreements in the United States.

The Order's announcement has led to much concern among unfair competition lawyers. But, aside from the fact that any FTC rule to broadly limit non-compete agreements would undoubtedly be subject to legitimate legal challenges, this is an important time to emphasize that there are other mightier and more effective restrictive covenants that companies should focus on over Non-Competes.

If your company is at all in the technology space, chances are that its intellectual property is its golden goose, for the protection of which every precaution should be taken and the covenants below would be an imperative for agreements with any employees who create intellectual property for the company:

• **"Works Made for-hire" Covenant –** this is an express covenant providing that any copyrightable works that the employee or contractor creates, or co-authors, are agreed to be deemed "works made for hire," i.e., works for which the company will have the express and exclusive rights to copyright. These provisions should be drafted with specificity to ensure that they are upheld.

• **Assignment of Inventions Covenant –** Contractors or employees that are working for your company to help create new products should be subject to an assignment of inventions covenant. This covenant is similar to the works-made-for-hire covenant, except that it involves creations that would be subject to protection under patent, as opposed to copyright.

• **Confidentiality/Non-Disclosure Covenants -** This prevents an employee from disclosing or using the proprietary or confidential information of their former employer, or that of their employer's customers. The information at issue need not constitute a "trade secret" per se; it must simply be confidential and not publicly available. This is a useful tool that creates a straightforward contract claim if an employee departs and begins using confidential information.

Additional covenants that address classic business considerations that may stoke desire to use non-competes, but would not likely be prohibited under any laws blocking non-competes, include nondisclosure, non-solicitation, and no-raid agreements—which do not limit an employee's ability to work in the field but do prevent them from causing harm to the former employer. Also, these more limited covenants are typically more easily enforced than a true noncompete agreement. Some examples include:

• **A non-solicitation agreement** prohibits the employee from going after the organization's customers or suppliers.

• **A no-raid agreement** prohibits the employee and a new employer from inducing other employees to leave the original employer to work for the new one, at least for some specific time after the former employee leaves employment. These agreements tend to be viewed more favorably by the courts since they do not actually keep anyone from working.

Generally speaking, the restrictive covenants set forth in this article have not been the subject of talks about reform, nor state laws to bar their use. And, more importantly, the restrictive covenants above can have far more impact in protecting your business and its assets than a non-compete agreement would anyways. ■

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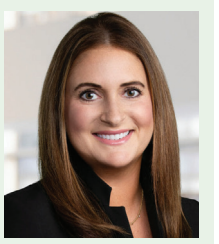
HOW TO PREPARE YOUR BUSINESS FOR LITIGATION: TOP 5 TIPS



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Litigation can be unpredictable, expensive and time-consuming. Fortunately, there are steps you can take to ensure your business is in the best possible position when a dispute arises. If your business is facing a civil lawsuit (such as an employment or contract dispute), proper preparation can mitigate the stress of going to court and potentially reduce your legal fees.

1. Report potential claims. If your business has insurance that may cover all or part of a dispute, report potential claims to the insurance carrier as soon as possible to determine whether coverage applies. The insurance contract may dictate your company's legal representation in the dispute.

2. Secure legal counsel. It is important that your business is represented by an attorney who has experience litigating the type of dispute your company is facing. They can help you explore non-litigation alternatives and provide valuable guidance if litigation is inevitable. Be honest with your attorney about the good and bad parts of your case. Communication is essential.

3. Preserve evidence. Whether your business is a plaintiff or a defendant, it is critical to identify key players and preserve relevant information at the outset of a dispute. All documents and communications (paper and electronic) relating to a dispute should be identified and saved. This includes contracts, memoranda, invoices, reports, records, letters, emails, text messages and the like. Be mindful of any retention policies your business may have in place to ensure that relevant emails, for example, are not inadvertently purged before the dispute is resolved. Do not fabricate or destroy evidence. Courts can and do impose severe penalties for such conduct.

4. Limit communications unless approved by an attorney. If you believe a dispute is likely to result in litigation or if a lawsuit has already been filed, limit written and verbal communications about the dispute unless approved by your company's attorney. Communications with your potential adversary are admissible as evidence in court. Likewise, internal communications with or among your company's employees about the dispute are generally also admissible unless a privilege applies.

5. Manage expectations. Business litigation can take years to resolve, which may feel daunting. The health of your company and its employees depends on your ability to compartmentalize the dispute and maintain normal operations. Discuss the case status and your desired outcome (which may change over time) with your attorney at regular intervals throughout the case. ■