

RESTRICTIVE COVENANT DRAFTING CHECKLIST

1. Representation/warranty
 - a. have employee warrant that they are not subject to a restrictive covenant with another entity that would interfere with employment with client
 - b. have employee agree that they were aware that a restrictive covenant would be required at the time they accepted employment
 - c. have employee agree to provide a copy of the agreement to all prospective employers during the term of the restrictive covenant
 - d. If employee is 'at-will,' have employee acknowledge same
 - e. have employee acknowledge the consideration received – whether new employment or raise/benefits/promotion, etc., and that such consideration would not be received absent the employee's agreement to the restrictive covenant
2. Duty of loyalty
 - a. have employee acknowledge that they have a duty of loyalty to client
3. Exposure to legitimate business interests
 - a. have employee acknowledge that they will be provided with, exposed to and/or in possession of material that underlies the legitimate business interest of the employer
 - i. make this specific to the employee signing the agreement (i.e. reference the actual training, client relationships, trade secrets, etc. involved)
4. Acknowledgement of legitimate business interest
 - a. have employee acknowledge the material in no. 3, above, is a legitimate business interest of the employer, and that employer has a right to protect same
5. Confidentiality
 - a. if the employer's legitimate business interests include confidential or trade secret information, either

- i. put a confidentiality clause in the agreement OR
- ii. reference a separate confidentiality agreement the employee must sign.

6. Terms of restrictive covenant

- a. Reasonable time
 - i. Limit time to 1-2 years, unless you can justify a longer term with facts from client
- b. Reasonable geographic scope
 - i. Limit to the territory in which employee works for client
 - ii. Add nonsolicitation of clients and vendors with whom employee will interact
 - iii. Add nonsolicitation of employees of client
- c. Reasonable substantive scope
 - i. Limit restrictive covenant to services provided by employee to client within last few years of employment
- d. Survival
 - i. Specify that obligation not to compete will survive termination of agreement
 - 1. Specify that employer's breach of any duty to employee will not be available as a defense to enforcement of noncompete

7. Remedies

- a. Specify that damages will be recoverable by client
 - i. Consider whether liquidated damages clause is required
- b. Specify that client may seek injunctive relief
 - i. Any preliminary injunctive relief will be without the necessity of posting bond
- c. Specify that client will be able to recover costs of enforcement, including attorneys' fees

- d. Specify that any injunctive relief will run for full period of noncompete from date of order (minus any time already compliant with noncompete)

8. Miscellaneous

- a. Specify that court may blue pencil agreement
- b. Specify that any unenforceable section of agreement will be severable
- c. Specify venue
- d. Specify law – Commonwealth of Pennsylvania
 - i. Irrespective of conflicts of law
- e. Specify that parties waive right to jury trial on any issues arising out of the agreement
- f. Specify that the employer may assign the agreement to a third party
- g. Provide employee with notice of right to have agreement reviewed by attorney
- h. Provide that employee will cooperate with employer in carrying out terms of agreement
 - i. Employee agree to execute such other documents as necessary to do so