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A Deal's A Deal – A New Idaho Law Gives Employers Guidance on Drafting Enforceable Non-Compete Agreements

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In recent years, Idaho's Supreme Court has gradually limited the enforceability of non-compete agreements between employers and employees. Idaho courts have consistently said that these agreements are not favored and any ambiguities will be interpreted in favor of the employee. In response to these court decisions, the Idaho legislature passed a new law this last session, which went into effect July 1, 2008. The law sets out the requirements for an enforceable non-compete and takes some burdens off employers who must file lawsuits to prohibit former employees from violating non-compete agreements.

A non-compete agreement generally prohibits an employee from working for a direct competitor of the employer for a certain period of time after leaving employment. A new law¹ provides that non-compete agreements between employers and "key employees" or key independent contractors will be enforceable if the agreement protects a legitimate business interest of the employer, is reasonable as to its duration, geographical area, type of employment, and does not impose a greater restraint than necessary to protect the employer's legitimate business interest.

Who is "key" to your business?

The new law defines key employees and independent contractors as those who have gained a high level of inside knowledge, influence, credibility, notoriety, fame, reputation or public persona because of the employer's investment of time, money, trust, exposure to the public or technologies, intellectual property, business plans, business processes and methods of operation, customers, vendors, or other business relationships during the course of employment. The law presumes that an employee or independent contractor is key if he or she is among the highest paid five percent of the employees or independent contractors. Others, however, may still meet the definition.

What constitutes a "legitimate business interest"?

A legitimate business interest includes an employer's goodwill, intellectual property, business plans, business processes and methods of operation, customers, customer lists, customer contacts and referral sources, vendors and vendor contacts, financial and marketing information, and trade secrets. The law indicates that other employer interests may also be worthy of protection, even if not specifically listed.

What kind of restrictions can be imposed on employees?

Valid non-compete agreements can prohibit the key employee or independent contractor from taking another job in a line of business that is in direct competition with the former employer's business. The

¹ Idaho Code Sections 44-2701 through 44-2704

agreement becomes effective as of the date the employee is terminated, regardless of whether the employee is fired or resigns.

Restrictions on the employee's direct competition will be enforced if reasonable as to duration, geographical area, and type of employment or line of business. An agreement will be presumed reasonable if its term restricts the former employee for a period of 18 months or less, is limited to the geographic areas in which the employee provided services or had a significant influence, and is limited to the type of employment or line of business the employee conducted while working for the employer.

These presumptions operate in favor of the employer if it is forced to file suit to enforce the agreement. Prior to the passage of this law, the burden was on the employer to establish the reasonableness of the agreement. Now, however, if the agreement contains terms such that it is presumed to be reasonable, the burden is instead on the employee to show the terms of the agreement are unreasonable.

Courts must try to enforce valid agreements

The law also instructs courts to make every effort to enforce non-compete agreements, even if the courts initially find some terms to be unreasonable. The new law requires courts to limit or modify the agreement as necessary in order to make the agreement reasonable and reflect the intent of the employer and employee at the time they entered into the agreement.

Things to consider when drafting non-compete agreements

1. Although the law presumes an employee is key if he is among the highest paid 5%, salary is not the only factor in determining who is key. Any employee who has gained significant inside knowledge of your operations, close relationships with your clients, or confidential knowledge concerning your operations can be considered key, regardless of the salary earned.
2. The law's list of legitimate business interests is not all inclusive. While the interest must be something unique to your business operation, a legitimate business interest can be anything a former employee could use when working with one of your direct competitors to exploit and compete against your business.
3. Make sure the duration, geographical limitation and type of employment terms in your agreement meet the law's requirements for when an agreement will be presumed reasonable. Having that presumption in your favor will put the legal burden on your former employee to show that the terms are unreasonable.

Finally, review existing non-compete agreements and determine whether they should be amended, or entirely new agreements prepared. An attorney should be consulted if this is done.