IDAHO'S NEW EMPLOYEE NON-COMPETE LEGISLATION

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During the 2008 legislative session, the legislature enacted Senate Bill 1393, entitled "Agreements and Covenants Protecting Legitimate Business Interests." The new law relates to non-compete agreements between businesses and employees. **It will go into effect on July 1, 2008.**

The new law will have a significant impact on individuals and businesses that enter into non-compete agreements.

Non-compete agreements are intended to prohibit individuals from competing with an employer after employment has ended. However, our courts do not always enforce non-compete agreements. Historically, Idaho courts have refused to enforce non-compete agreements that go too far in restricting individuals from finding gainful employment with a new employer.

This new law will have a significant impact on individuals and businesses that enter into non-compete agreements. It will also affect businesses that would like to hire someone who has signed a non-compete agreement with a prior employer.

Non-Compete Agreements Must Be Reasonable

In part, the new legislation echoes decades of court decisions finding that non-compete agreements by employees are permissible in Idaho under certain circumstances. The bill states that "key" employees or independent contractors may enter into written agreements that protect the employer's "legitimate business interest" and prohibit employees or independent contractors "from engaging in employment or a line of business that is in direct competition with the employer's business after termination of employment."

In the past, courts have uniformly refused to enforce non-compete agreements when restriction on an employee appears too broad in light of the employer's business interests. Senate Bill 1393 endorses this view, stating that the agreement must be "reasonable as to its duration, geographical area, type of employment or line of business." The law also states that the agreement must "not impose a greater restraint than is reasonably necessary" to protect the employer's legitimate business interest.

When an employer sues an employee for violating the terms of a non-compete agreement, the employee often defends the claim by arguing the employer had no "legitimate business interest" in enforcing the terms of the agreement. When the dispute evolves into litigation, the burden falls to the employer to identify its legitimate business interest and the interfering actions by the employee.

The new law may make it easier for Idaho employers to identify a "legitimate business

interest," which is illustrated by lengthy list of examples: the employer's goodwill, technologies, intellectual property, business plans, business processes and methods of operation, customers, customer lists, customer contracts and referral sources, vendors and vendor contracts, financial and marketing information, and trade secrets. The statute indicates the list is not exclusive. Therefore, employers may also identify other business interests they believe worthy of protection.

New Rule on the Term of a Non-Compete Agreement

The new law creates an 18-month limit on the term of a noncompete agreement unless there is consideration given to the employee in addition to employment.

The term of a non-compete agreement has been another source of contention when it comes to enforcing a non-compete agreement. On this point, the new law creates a clear rule. It states that non-compete agreements cannot establish a post-employment restriction of direct competition that exceeds a period of 18 months from the time of termination "unless consideration in addition to employment or continued employment is given." As a result, employers should limit the term of a non-compete agreement to 18 months, unless they offer their employees some sort of payment or other benefit in consideration for a longer term.

Employer-Friendly Presumptions of Enforceability

Idaho courts regularly emphasize that non-compete agreements must be as least restrictive as possible to protect an employer's interest. As a result, employees often argue that the agreement is too long in duration, too wide in geographic scope, or covers too many types of post-employment activities.

The new legislation assists employers by creating a few key presumptions. First, as to the term, the statute states, "It shall be a rebuttable presumption that an agreement or covenant with a postemployment term of 18 month or less is reasonable as to duration."

Second, as to area, the new rule is that the geographic restriction is presumptively valid as long as it is limited to the area where the individual "provided services or had a significant presence or influence."

Third, since the law relates to the permissibility of non-compete agreements with *key employees* and *key independent contractors,* it defines these terms, and it does so in a relatively broad manner. It includes individuals:

> [W]ho, by reason of the employer's investment of time, money, trust, exposure to the public, or exposure to technologies, intellectual property, business plans, business processes and methods of operation, customers, vendors or other business relationships during the course of employment, have gained a high level of inside knowledge, influence, credibility, notoriety, fame, reputation or public persona as a representative or spokesperson of the employer, and as a result, have the ability to harm or threaten an employer's legitimate business interests.

This definition is coupled with a presumption that employees and contractors who are among the highest paid 5% of the employer's staff are *key employees* and *key independent con-*

tractors. The legislation also pushes the burden to any employee or contractor who falls within the 5% category to show he or she has no ability "to adversely affect the employer's legitimate business interests."

Finally, when it comes to the type of competitive activities an employer may prohibit in a non-compete agreement, the legislation looks favorably on any restriction that is "limited to the type of employment or line of business conducted by the key employee or key independent contractor while working for the employer."

Employers May Ask Courts to Modify a Non-Compete Agreement to Make It Enforceable

For years, Idaho courts have declared their power to modify any non-compete agreement that is too restrictive on an employee's post-employment activities in order to make it enforceable under the law. Despite their proclamation, however, courts have been surprisingly reluctant to go ahead and make any such modifications.

The new legislation may result in more judicial modifications of non-compete agreements that are too harsh. It states that in cases where a non-compete agreement is found to be "unreasonable in any respect," then a court "shall limit or modify" the agreement to "reflect the intent of the parties and render it reasonable in light of the circumstances in which it was made."

The new legislation may result in more judicial modifications of non-compete agreements that go too far in restricting an employee's ability to work after engagement with an employer has ended.

Practical Applications for Idaho Businesses

Any businesses that ask employees to sign non-compete agreements should update their agreements to comply with the new law. In the right circumstances, and with careful drafting, businesses will be able to take advantage of the employer-friendly presumptions the new legislation contains. In addition, any business that hopes to hire an employee who is bound by a non-compete agreement with a former employer should also be familiar with the new law.

About the Author

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