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Noncompete provisions can undermine future opportunities

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In these tough economic times, many Naperville residents find themselves with a variety of unexpected and undesired reasons to pursue new employment and arrangements. While the maxim that crisis creates opportunities is true, such notions create little comfort in uncertain times and certainly do not provide for needs of the family. Unfortunately, with employers tightening payroll and placing freezes on new hiring, relief is not on the horizon and Naperville residents are finding it more difficult to locate suitable employment equal to their skill and experience.

Many residents are taking the opportunity to offer their services on a consulting basis as an independent contractor. It is in this environment that companies are using such techniques as hiring on a project basis or entering into consulting employment arrangements to minimize costs and long-term risks.

Before diving into the consulting world, the would-be consultant must consider some of the documents they may have signed at the initiation of their previous employment or the documents they agreed to as part of a severance package. Specifically, the would-be consultant must review the prior employment contract or severance agreement for clauses pertaining to the issue of competition. Any portion of the agreement that refers to subsequent employment is generally referred to as a noncompete provision.

It is natural and expected for a company to want to control an employee's or soon-to-be former employee's conduct subsequent to the termination of the employment relationship. In fact, companies desire the same sort of control for their independent contractors.

It is with those fears in mind that companies draft their noncompete provisions to be as broad reaching as possible to encompass a variety of behaviors a company views as undermining its interests. The noncompete can include provisions designed to prevent contact with the company's clients or hiring the company's employees. The noncompete provision will include the geographical limitations, for example 20 miles from the company's headquarters, and time restrictions as to when the former employee or independent contractor can compete. This provision allows the company to sue the employee or independent contractor if they violate the noncompete provision. This exposes the employee or independent contractor to liability, which the company can seek enforcement in court.

However, for a noncompete to be upheld in a court of law, it must be considered reasonable. So the question becomes what is "reasonable" for the purposes of a noncompete. Unfortunately, reasonable is a term of art in which one size does not fit all, so a significant amount of gray area exists in determining what a court would find reasonable. There are several factors the courts consider, including where the company's customers are located, the geographical limitations of the clause and the time restrictions in the clause. Just as every business is different, what is considered reasonable for one industry is not necessarily considered reasonable in another industry.

What is certain is the would-be consultant or independent contractor must review carefully their agreements from prior employment as well as the prospective consulting agreement to make sure their conduct does not expose themselves and their family to liability or that noncompete provisions unreasonably limit future opportunities.

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