

## Employer Bulletin:

*Are you protecting your company through effective, enforceable employment agreements?*



Due to the growth of competition and tightening markets, there has been an increased number of employers requiring employees to sign agreements with restrictive covenants. Such agreements can protect companies from former employees using valuable information and training which they acquired from the company and against untimely lawsuits of employment claims. Generally, these types of agreements are upheld; however, both legislation and the courts have imposed certain restrictions on the scope of enforceability.

delay required to effect notice or from the risk that notice will itself precipitate adverse action before an order can be issued. This analysis requires the court to undertake a fact specific inquiry.

***Does an employer need additional consideration for a Non-Compete Agreement?*** Starting or continuing at-will employment is sufficient consideration for a non-compete agreement in Michigan. However, the law regarding consideration varies from state to state.

### Special points of interest:

- Non-compete agreements must protect an employer's reasonable competitive business interest.
- In Michigan, continued employment is sufficient consideration for a non-compete agreement.
- Michigan allows employers, by contract, to shorten the time period for employees to file employment related lawsuits.

### NON-COMPETE AGREEMENTS

***Are they enforceable?*** Michigan statutory law provides an employer may obtain from an employee an agreement that protects an employer's reasonable competitive business interests and expressly prohibits an employee from engaging in employment, or a line of business after termination of employment, if the agreement is reasonable as to its duration, geographical area and the type of employment or line of business covered. If a court finds the time period, geographic area or line of business is overly broad, it has the authority to revise the agreement to make it "reasonable."

***To whom do they apply?*** Non-compete agreements apply to both employees and independent contractors; however, they must still meet the above reasonableness standard.

***What to do if an employee breaches or threatens to breach the Non-Compete Agreement?*** An employer may petition the court for an immediate temporary restraining order to restrain the employee from continuing to breach the non-compete agreement. However, the employer must prove, from specific facts shown by Affidavit or by a Verified Complaint, that immediate and irreparable injury, loss or damage will [or will continue to] result to the employer from the

### NON-SOLICITATION AGREEMENTS

Non-solicitation agreements, often coupled with non-compete terms, protect an employer from former employees pilfering their staff and customers/clients after the employee leaves. Solicitation involves former employees taking affirmative action to induce, urge, or request employees to leave their employment or customers/clients to terminate their business relationship with the company. These agreements are likewise enforceable if they meet the same reasonableness standards of non-compete agreements.

### CONFIDENTIALITY AGREEMENTS

***What are they?*** Confidentiality Agreements prohibit an employee from disclosing the employer's private, confidential or trade secret information to third parties. These may continue during and after termination of employment.

***Uniform Trade Secrets Act ("UTSA").*** In the event employees do not sign a separate confidentiality agreement, the UTSA provides employers with statutory recourse against those who use or obtain "trade secrets" through improper means and/or disclose this information unlawfully. "Trade secret" means information, including a formula, pattern, compilation, program, device, method,

technique, or process, that is both of the following:

- (i) Derives independent economic value, actual or potential, from not being generally known to, and not being readily ascertainable by proper means by, other persons who can obtain economic value from its disclosure or use; and
- (ii) Is the subject of efforts that are reasonable under the circumstances to maintain its secrecy

As generally set forth in the UTSA, to be a protectable, confidential or trade secret, the information must have competitive value because it is not generally known to competitors. Further, the employer must have taken reasonable steps to protect against its disclosure.

#### **REDUCED STATUTE OF LIMITATIONS AGREEMENTS**

Lawsuits based on employment discrimination are subject to statutes of limitations. The statute of limitations is a law which limits the amount of time during which a lawsuit may be filed. The effect of a statute of limitations is that when the time for filing a lawsuit has expired, the claim is permanently barred. In other words, once the statute period has lapsed, the claimant can no longer receive any financial compensation whatsoever, regardless of the merits of the claim. The statute of limitations in Michigan for bringing employment discrimination or tort based claims is three (3) years from the date of the discriminatory act(s) and six (6) years for breach of contract.

Michigan permits the term of the statute of limitations for employment related claims to be shortened or lengthened by contract between the parties. Michigan has upheld a provision in an employment contract (including an employee handbook and application), limiting the time for bringing claims against the employer to six months (180 days). The provision must be clearly stated in an employee handbook or application and may not be unilaterally changed by either party.

#### **CONCLUSION**

Employers must carefully draft employment contracts which contain non-compete, non-solicitation and confidentiality restrictions if they intend to enforce them. Agreements which contain overly broad and far reaching restrictions are likely to be viewed as unenforceable by the Courts. Thus, it is important to review your agreements to ensure they are compliant with the ever changing employment laws.

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**We are experienced, proactive and aggressive legal counsel providing superior service in all areas of employment law and, specifically, in drafting, negotiating, litigating, enforcing and defending companies and professionals regarding non-competition and confidentiality agreements. State of the art non-compete and confidentiality agreements are necessary for your business to survive in today's market. If you would like further information regarding the issues raised in this newsletter or any other employment related issues, please contact Heather G. Ptasznik at (313) 259-8586 or John T. Below at (313) 259-8597. For more information about Kotz Sangster, please visit us at [www.kotzsangster.com](http://www.kotzsangster.com).**

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