Warner Norcross&Judd® LLP
ATTORNEYS AT LAW

HR Focus

HUMAN RESOURCES NEWSLETTER SUMMER 2017

Protect Your Business with Non-Compete, Non-Solicitation And Confidentiality Agreements

DEAN PACIFIC

616.752.2424
dpacific@wnj.com

In today's information-based economy, it is more important than ever to protect your confidential business information. Having the right agreements in place with your employees is a critical part of any company's strategy to protect these assets. Employers should consider whether and how to use non-compete, non-solicitation and confidentiality agreements with their employees to protect their trade secrets and customer relationships.

Non-compete agreements provide the broadest potential protection. A non-compete agreement generally prohibits an employee from working for anyone who competes with your business. Under Michigan law, these agreements are enforceable so long as they are reasonable in duration and geographic scope, and protect a legitimate competitive business interest. (Laws of other states vary, so if you have employees outside of Michigan you must consider the laws in the state where they are located as well.) Generally, in Michigan, non-competes of one to two years will be found reasonable, as will those that limit the geographic scope to places where the company actually does business. And courts will generally find a legitimate competitive business interest worthy

of protection where the individual's new employment threatens either a disclosure of the company's trade secrets, or interferes with customer relationships.

This is not to say, however, that simply having a signed non-compete agreement can guarantee you that a departing employee will never be allowed to work for a competitor. Lawsuits involving enforcement of non-compete agreements are "equitable" in nature, meaning that judges have discretion to decide what they believe is fair in a particular case. Among other things, a judge will look at:

1. **Who is the departing employee?** Courts are more likely to enforce a non-compete against higher level employees and those who are well compensated, as opposed to those with lesser salaries or responsibilities.

2. **Who is the new employer?** Courts are more likely to enforce a non-compete if a new employer is a direct and significant competitor, as opposed to someone you cross paths with only occasionally in the marketplace.

3. **What were the circumstances of the employee's departure?** Courts are more likely to enforce a non-compete if the employee failed to disclose their plans for new employment, or took company records with them on their way out (as opposed to an employee who openly discloses their future intentions and is careful to return all company records before departing).

Because non-compete agreements are not "bulletproof," and because a requirement to execute a strict non-compete agreement may affect your ability to recruit top talent in some industries, it is important to consider other options to protect these interests as well. One such option is a non-solicitation agreement.

A non-solicitation agreement does not prevent a former employee from working in your industry, but instead requires the individual to refrain from soliciting any of your customers for a period of time. Courts are more likely to fully enforce a non-solicitation agreement, as they acknowledge it takes time, effort and resources to build customer relationships. They also acknowledge that it would be unfair to allow an employee who built client relationships with your time and resources to immediately call on those same clients on behalf of their new employer. When an employee departs, courts recognize fairness in providing the former employer with time to solidify their customer relationships through new representatives. One to two year non-solicitation agreements are routinely upheld and may provide the protection your business needs without creating the potential recruiting problems of a stricter non-compete agreement.

Confidentiality agreements are also a key part of any business's strategy to protect its confidential information. Confidentiality agreements may be enforced against employees at any level of the company, and there are no time limits on the enforceability of a confidentiality agreement. A good confidentiality agreement will state that:

1. **The employee will have access to the employer's confidential information;**

2. **All such information is the property of the employer;**

3. **This information will be used only for purposes of doing the work of the employer;**

4. **This information may not be disclosed to anyone outside the company; and**

5. **These restrictions never expire and apply even after the individual no longer works for the company.**

A properly drafted confidentiality agreement can be enforced to prevent anyone — from a production worker to an executive — from disclosing the company's valuable information.

Non-compete, non-solicitation and confidentiality agreements can be useful tools in protecting your assets. Your Warner Norcross attorney can help determine which agreements are appropriate for your business and help you craft agreements to meet your business needs.

Business Immigration Planning in Changing Times

MICHAEL WOOLEY
989.698.3715
mwooley@wnj.com

Immigration has been a hot topic in the news for some time now. Regardless of the ebbs and swells of this debated area of law, the need of many industries for highly skilled foreign workers has remained essentially the same, as evident in the health care, higher education and manufacturing sectors. HR personnel must be able to navigate ever-changing regulations in order to plan the acquisition or continued employment of foreign talent with the least possible disruption to the employer's business.

Perhaps the greatest regulatory change affecting the employment of foreign workers is the suspension of the United States Citizenship and Immigration Services' (USCIS) premium processing program for H-1B visas. H-1B visas are one of the most common employment visas used by foreign professionals. Under the premium processing program, for an additional $1,225 fee, USCIS would process H-1B petitions in two weeks, as opposed to processing times that could otherwise vary from five to seven months or more. USCIS suspended premium processing for H-1B petitions on April 3rd for a period of "up to 6 months." By suspending H-1B premium processing, USCIS hopes to return to the approximately two month processing times of years past. Processing does seem to be improving, at least according to the "less than fresh" data posted on USCIS's website.

The lack of premium processing can be particularly troublesome to HR personnel in new hire situations. Lengthy H-1B processing times can significantly delay employment start dates when the desired foreign professional is presently in a visa status that does not allow employment (such as some H-4 spouses of H-1B nonimmigrants) and also when the foreign professional has work authorization, but applies for employment close to the expiration of authorization that cannot be renewed (such as recently graduated students closing out a grant of Optional Practical Training [OPT]).

One way to manage the premium processing suspension dilemma is to request that USCIS expedite the H-1B petition. USCIS may expedite a petition where not doing so would cause severe financial loss, in emergency situations or for humanitarian reasons. Other uncommon criteria exist, such as matters concerning the U.S. national interest. Recent experience suggests that USCIS is favorably viewing financial loss and humanitarian requests.

Although premium processing has been suspended, longstanding provisions of H-1B law remain intact, such as "H-1B Portability." Under the portability regulations, a foreign professional who has not engaged in unauthorized employment and who currently holds H-1B status with another employer may immediately begin work with a new employer upon the filing of the new employer's H-1B petition. Thus, foreign H-1B professionals can switch employers and wait for the H-1B approval to catch up to them.

Two additional remedies can help alleviate H-1B processing delays, although neither can be said to be a panacea. First, new regulations allow the extension of some forms of work authorization upon filing. Thus, although a potential new hire's work authorization may be close to expiring, some may be able to continue working, instead of having to wait approximately 90 days for a new employment authorization document to arrive by mail. Unfortunately, this does not apply to most foreign graduates on OPT. Second, the TN nonimmigrant visas for citizens of Mexico and Canada under the NAFTA treaty are sometimes overlooked by employers. If the NAFTA treaty applies to the employee and the job offered, TN visas are efficient alternatives to their costly H-1B counterparts.

Business immigration is a highly politicized area of the law making it subject to volatile regulatory swings. HR personnel hiring foreign nationals should attempt to craft an immigration plan as early as possible to avoid delays and disruptions in the hiring process.

401(k) Hardship Distributions: Do They Have To Be So Hard?

MARY JO LARSON
248.784.5183
mlarson@wnj.com

The cost of administering 401(k) plans has decreased steadily over recent years, in part due to the efficiencies gained through technology. Electronically processing hardship distributions has been a challenge, however, because of the fact-based nature of the determinations plans must make. Although many providers, including the largest and most well-known, have used online, participant self-certification to process hardships, serious questions remain whether this process is adequate—and the employer, not the provider, remains responsible for any improper hardships. Recent changes to IRS audit guidelines for its examiners indicate the IRS may be more flexible than in the past, as long as certain notice and documentation requirements are met.

BACKGROUND

The ability to defer taxation by contributing current income to a 401(k) plan comes with some strings attached. One is that access to the deferred amounts is strictly limited during employment. Allowing early access to 401(k) funds can disqualify the entire 401(k) plan for tax purposes. If the participant experiences a heavy and immediate financial need, however, and the participant's other resources are insufficient to satisfy that need, the 401(k) plan can make an in-service distribution to the participant—as long as the plan terms allow it.

> ...the employer, not the provider, remains responsible...

The IRS has established safe harbor rules that plans can use to ensure the hardship requirements are met. These rules, used by most 401(k) plans, provide a list of events that qualify as a heavy and immediate financial need, such as medical expenses and home purchases, and presume other resources are insufficient if all other loans or other distributions available from other plans of the employer are taken and deferrals are suspended for six months. The challenge arises from making sure the event cited by the participant is legitimate. For example, was the expense for a home purchase and was it for the participant's primary residence?

Until now, the IRS has required the plan to have documentation showing that the expenses support the need cited. Electronic self-certification has been problematic both because the plan did not obtain or retain the documents required and because no one was checking to see whether the documentation supported the hardship.

NEW IRS SAFE HARBOR HARDSHIP SUBSTANTIATION GUIDELINES

The new "Guidelines for Safe Harbor Distributions from Section 401(k) Plans" (Guidelines) for Employee Plans Examinations employees, appear to loosen the strict documentation

requirements. The Guidelines allow a summary of the relevant documents to be provided and maintained in the records in lieu of the actual documents, as long as the participant:

1. Receives advanced notice explaining the requirements and taxation of hardship distributions; and
2. Agrees to preserve the source documents and make them available on request.

The summary must specifically detail how the requirements are met. In addition, the provider must give an annual report, or access to data, to the employer describing the hardship distributions made during the plan year.

These seem like fairly straightforward requirements that could be met through an electronic process. However, the process could still be problematic on a couple of fronts.

First, the summary of documentation and factual representations must support the hardship being requested. If there is no human being on the receiving end looking at exactly how the questions are answered and the list of documentation, the hardship could be processed even though the summary is insufficient. Because the providers do not consider themselves fiduciaries, they generally do not want to exercise any discretion in reviewing hardship distributions.

This has already been a problem for several clients of ours, including even those with large, well-known providers. In a sample of ten hardships we reviewed for one client, eight were insufficient based on the self-certifications made. In another case, our client, who reviewed the hardships itself, realized a strange, repetitive consistency in the foreclosure notices provided with the hardship requests and discovered an internal employee manufacturing foreclosure notices for other employees. This would not have been caught under an electronic summary process.

Second, even if everything looks consistent and complete, if one participant receives more than two hardships in any plan year, the Guidelines instruct the examiner to further investigate and ask for the actual documents to substantiate the distribution. Further documentation may not be required, however, if there is an adequate explanation. Examples include follow-up medical expenses or tuition on a quarterly school calendar.

RECOMMENDATIONS

If you are processing your own hardship distributions and requiring actual documentation, and you are comfortable with the process, then you should maintain that process. If you either rely on your provider to process hardship distributions or would like to hand off that responsibility to your provider, we recommend that you:

- Expressly limit hardships to no more than two per year;
- Ask your provider whether it is using the actual documentation or summary document process and have them document that process for you;
- Audit a sample of hardship distributions to ensure that the process chosen is being followed and that the hardship distributions are justified by and consistent with the documents or summary provided by the participant; and
- Review and document your review of data or reports provided to you as required under the summary process, if the provider is using that process. This review ideally should be conducted during your regular committee meetings.

If you would like to have assistance with reviewing your provider's hardship determination process or have any other questions about hardship distributions, please feel free to contact me or your Warner Norcross & Judd attorney.

U.S. Union Membership Rates Reach a Historic Low

According to the U.S. Bureau of Labor Statistics, the overall union membership rate in the U.S. fell by 0.4 percent in 2016 to 10.7 percent of workers. This is down from 11.1 percent in 2015. Public-sector workers had a union membership rate of 34.4 percent — more than five times higher than that of private-sector workers, of which only 6.4 percent were union members. In 1983, the first year for which comparable union data is available, the union membership rate was 20.1 percent. Union membership in Michigan in 2016 declined to 14.4 percent of workers compared to 15.2 percent in 2015.

ERISA Fidelity Bond

Most retirement plans subject to ERISA are required to obtain an ERISA fidelity bond that protects the plan against losses resulting from fraud or dishonesty caused by anyone who handles plan assets. The bond must be at least 10% of plan assets as of the beginning of the year, with a minimum of $1,000 and a maximum of $500,000 ($1,000,000 if the plan includes employer securities). We often find that the bond amount has not been updated as plan assets grow. The amount of the bond is reported on the plan's Form 5500 and an insufficient bond increases your audit risk. Check the amount of your ERISA bond before you file your Form 5500 each year to avoid increasing your audit risk.

Think Twice When Asking for Salary History

It is fairly standard for an employer to ask an applicant about salary history. This information can then be used to negotiate a starting salary. Some argue that this practice can propagate wage disparities between women and men (and between minorities and whites). Some jurisdictions are now taking steps to stop this practice. The cities of Philadelphia and New York have adopted laws prohibiting employers from asking applicants for their salary histories. Under California's Fair Pay Act, salary history is not a proper justification for a pay disparity (meaning that an employer cannot use prior salary history as a basis for paying one worker more than a co-worker who is performing "substantially similar" work). Employers should expect this trend to likely continue.

Attorney Spotlight: Karen VanderWerff, Labor and Employment Partner

Karen VanderWerff specializes in employment and occupational health and safety law. Karen counsels and represents employers on employment and policy matters, including charges of discrimination, employee discipline/termination, and federal health and safety compliance. As a former forensic scientist, she assists businesses that have experienced a catastrophic event and handles investigations into workplace discrimination, harassment and retaliation.

1. Tell us about your unique experience in testifying in over two dozen murder trials.

I was a firearms and tool marks examiner with the Illinois State Police crime lab for over seven years before joining Warner Norcross. I testified in numerous murder trials and was one of three women in the United States who held that position. I was a distinguished member of the Association of Firearm and Tool Mark Examiners and attended special training at the FBI Academy. As a firearms and tool mark examiner, I determined what firearm was used, at what distance and helped piece together the investigations.

2. Why did you change careers and why did you choose Warner Norcross?

I had reached the pinnacle in my career as a firearm and tool mark examiner, and I felt it was time for a new challenge. I worked full-time in my position with the Illinois State Police while I attended law school. I strongly believe that my prior experience is instrumental in my career now, because I conduct many internal investigations for clients. I chose to work for Warner Norcross because of its outstanding reputation and the work environment. Working at Warner allowed me to carve out my niche while providing me the flexibility to spend time with my family.

3. As an employment lawyer, what are your areas of expertise?

I counsel employers on hiring, firing, discipline, harassment, discrimination and retaliation issues. I really like knowing my clients. I tailor my advice to their core business philosophies and help them remain true to who they are. I also specialize in catastrophic events and workplace fatalities. I help clients navigate through MiOSHA and OSHA citations, audits and compliance issues.

4. What have been some of the more serious crisis management matters you have handled?

I've counseled clients through chemical releases in which the fire department takes over a company's site and multiple government agencies get involved, such as MiOSHA, state fire marshals and the DEQ. I answer questions and help guide employers through issues that arise with employees, the government agencies, the media and the community. I've also counseled organizations through workplace fatalities and helped employers investigate the accident, address issues with employees and interact with the media. I make sure appropriate government agencies are provided with the right information and try to minimize any potential civil and criminal liability. I even assist employers in hiring crisis management counselors to help their employees deal with these types of events.

5. You were recently named the chair of the Warner Norcross Labor & Employment Law Practice Group. What are recent trends in this area of law and how is the law changing?

The change from the Obama administration to the Trump administration will significantly affect the enforcement of employment laws and regulations. We are already seeing the Trump administration back off from some Obama administration employment initiatives.

At the same time, this doesn't mean that the employment laws went away. Our clients continue to face legal claims and challenges from employees, unions and governmental agencies. Further, we are seeing states and local governments adopting additional laws affecting the workplace. All of this strains the resources of our clients' HR teams, as they attempt to stay up-to-date and in compliance.

Warner Norcross&Judd® LLP
ATTORNEYS AT LAW

A Better Partnership®

By providing discerning and proactive legal counsel, we build a better partnership with clients.

900 FIFTH THIRD CENTER, 111 LYON STREET NW, GRAND RAPIDS, MI 49503-2487

ADDRESS SERVICE REQUESTED

Human Resources Attorneys

LABOR AND EMPLOYMENT

Edward Bardelli*	616.752.2165
Andrea Bernard*	616.752.2199
Gerardyne Drozdowski*	616.752.2110
Robert Dubault	231.727.2638
Pamela Enslen*	269.276.8112
Amanda Fielder*	616.752.2404
C. Ryan Grondzik*	616.752.2722
DeAndre' Harris	616.752.2331
Angela Jenkins	616.752.2480
Margaret Stalker Jozwiak*	616.752.2767
Warda Kalim	616.752.2570
Jonathan Kok	616.752.2487
Matthew Nelson*	616.752.2539
Dean Pacific*	616.752.2424
Steven Palazzolo	248.784.5091
Louis Rabaut	616.752.2147
Allyson Terpsma	616.752.2785
Karen VanderWerff	616.752.2183
Elisabeth Von Eitzen*	616.752.2418
Michael Wooley	989.698.3715
B. Jay Yelton III	269.276.8130

EMPLOYEE BENEFITS

Stephanie Grant	248.784.5068
Anthony Kolenic, Jr.	616.752.2412
Norbert Kugele	616.752.2186
Mary Jo Larson	248.784.5183
Heidi Lyon	616.752.2496
Vernon Saper	616.752.2116
Kent Sparks	616.752.2295
Justin Stemple	616.752.2375
Jennifer Watkins	248.784.5192
Lisa Zimmer	248.784.5191

** Litigators*