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Primer for better understanding restrictive employment agreements - by Donna Toman Salvidio

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The Ties That Bind (part 1 of 2)

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Restrictive covenant agreements are frequently relied upon by employers to restrict the future activities of former employees following their separation from employment.

These agreements are sometimes generically referred to as a “non-compete,” but there are three types of restrictive covenants that employers commonly use:

- non-competition (or “non-compete”) agreements
- non-solicitation agreements
- non-disclosure agreements

Each of these types of agreements prohibits an employee from engaging in certain activities after his or her employment has ended. Restrictive covenant agreements were originally relied on in the business world to ensure that key employees with knowledge of the inner workings of their employers could not accept employment with a competitor, solicit fellow employees to leave the employer and/or disclose the employer’s trade secrets to their new employer’s advantage. Once limited to senior executives, restrictive covenants agreements are now being utilized by employers to bind employees at all levels.

In the condominium context, restrictive covenant agreements are becoming more commonplace between property management companies and property managers. Management companies want to cultivate experienced managers without risking the loss of those employees and their know-how, relationships and proprietary information to their competition. At the same time, management companies and community associations want the ability to hire experienced managers without the limitations commonly imposed by restrictive covenant agreements. Likewise, managers also resist any limitations placed on their options for future employment.

Is there a way to balance the competing interests of condominium associations, their managers and management companies? With the right restrictive covenant agreements in their legal toolbox, management companies can safeguard their proprietary information while imposing appropriate restrictions on their former employees. Before deciding what type (or combination) of restrictive covenant agreement is right for your situation, it is important to understand the basic differences among these types of agreements and how they are used in the context of condominium association management.

Non-Compete Agreements

The broadest form of restriction is the non-compete agreement. In simple terms, a non-compete limits what an employee can do, where he or she can do it and for whom an employee can work next. When drafted appropriately, a non-compete agreement prohibits a former employee from competing with his or her former employer in the same industry for a specific period of time, within a particular geographical area. When drafted too broadly, a non-compete can thwart an employee from leaving to take a better job opportunity, or it can prevent an employee from earning a living in his or her chosen trade altogether.

Non-Solicitation Agreements

Non-solicitation agreements are less restrictive than non-compete agreements. A non-solicitation agreement forbids a former employee from soliciting his or her former employer's clients and employees for a specific period of time. This prevents a former employee from poaching clients and talent from a former employer while not necessarily limiting the employee from working for another employer within the same industry. Since management companies rely heavily upon the talents of their individual managers to keep their association clients satisfied, a non-solicitation agreement can be a less onerous means of ensuring that former employees do not solicit their former clients for business or poach other talented managers away from their former employers.

Enforceable non-solicitation agreements are typically limited to a specific period of time not exceeding two years in the management company context.

Non-Disclosure Agreements

A non-disclosure, or confidentiality, agreement is the final type of agreement available in an employer's arsenal to protect its business investment.

part 2 will appear in the December 22 , 2017 front section

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