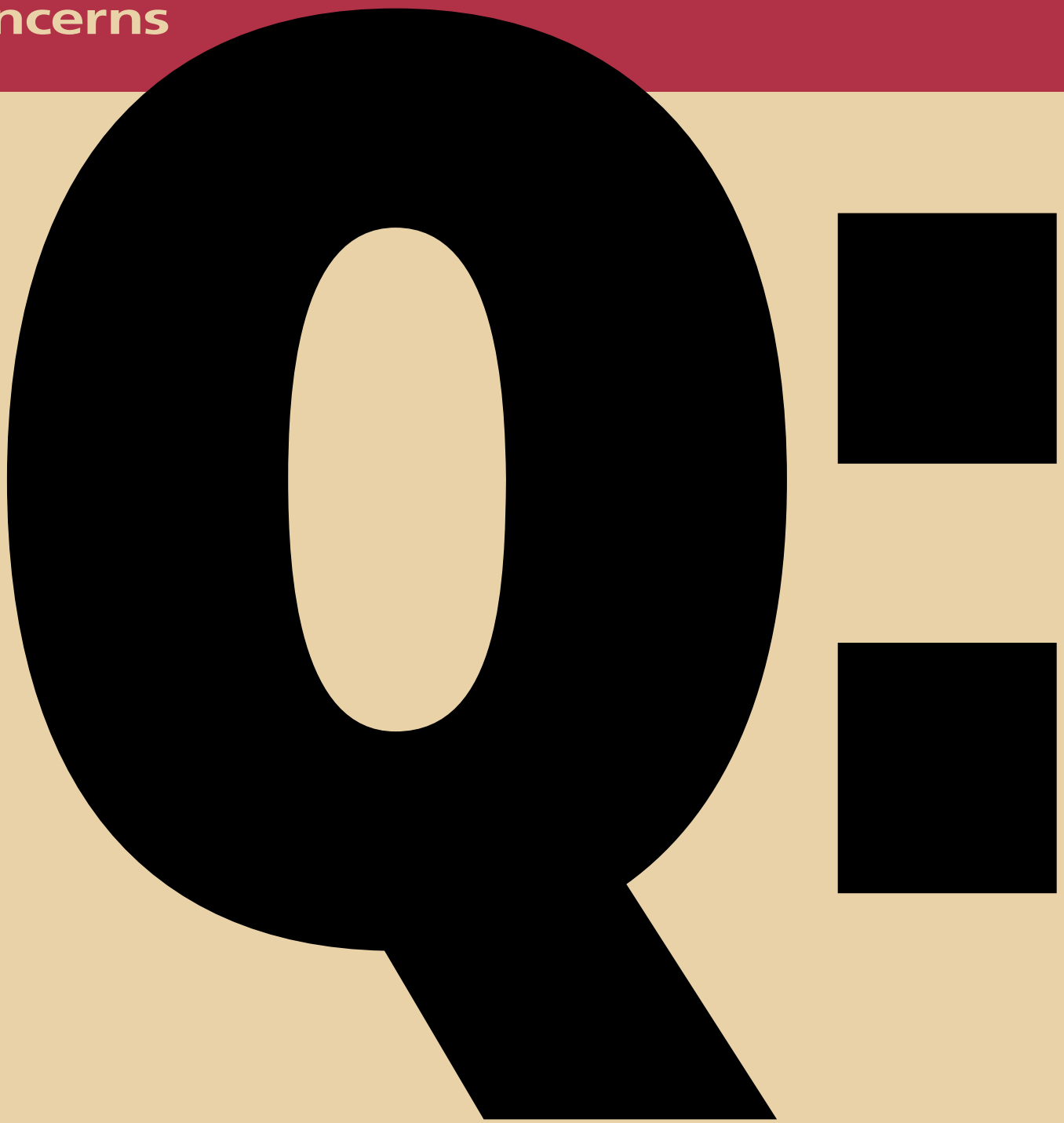
Executive Counsel:

Expert Advice That Addresses All Your Business Concerns



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Dear EC,

My company had the unfortunate experience of having one of our top sales reps jump ship recently, taking a number of our major clients with him to a competitor. We pay our sales reps a lot of money to build these customer relationships, and now they've been stolen away. If I ask my remaining sales force to sign "noncompete agreements," will I be able to keep this from happening again?

Sincerely,
Burned Once

Dear Burned:

Having a valued employee defect and take customers with him or her is a painful, but all-too-common experience for employers. Making it sting even more is that your sales rep went to a direct competitor, giving "the enemy" the benefit of your hard work and substantial investment in time and money. It's not just a loss of business, it's a betrayal.

Do your best to put your economic pain and emotion aside, then consult your attorney so he or she can draft a noncompete agreement that's specifically tailored to your business. New Jersey courts will recognize and enforce such agreements, when they are reasonable, to protect customer relationships, trade secrets and goodwill. Such covenants are carefully scrutinized by the courts, though, because they restrict competition and the right to earn a living in one's chosen profession. The best time to get such agreements is when an employee begins working for you, making the contract a mandatory condition of employment.

In New Jersey, a company can also require that existing employees sign a noncompete agreement as a condition of employment. However, a New Jersey court recently held that if an employee is terminated shortly after the noncompete agreement is imposed, then the covenant

might not be enforced due to "failure of consideration" -- in other words, it would be unfair because the employee received little benefit in exchange for the restriction. In contrast to New Jersey law, Pennsylvania requires that "additional consideration" be provided to impose noncompete agreements on existing employees.

PLEASE. BE REASONABLE.

To be enforced, the noncompete agreement must be reasonable in time and scope. This means that it should be only as broad as needed to protect the employer's legitimate interests and investments. Each case is evaluated by the courts on its own facts, but restrictions of one or two years are frequently enforced. An employer will have to show special circumstances to enforce a longer restriction.

As for scope, noncompetes that are limited to a sales rep's territory or customer base are likely to be enforced, while those that extend to cover large portions of the nation or customers that the employee never worked with are more likely to be narrowed by the court or deemed unenforceable altogether. The courts are generally hostile to employers "overreaching" and trying to impose onerous, expansive restrictions on employees. In a case currently pending before the New Jersey Supreme Court, an appellate court ruled that it may violate the state's whistleblower law to terminate an employee for refusing to sign a restrictive covenant that, on its face, is too broad to be enforced. The lesson is that employers should tailor their noncompete agreements to fit the circumstances of each employee or position, making each agreement only as broad as needed to protect the confidential information and customer relationships at issue.

GETTING FULL (NON)DISCLOSURE

Your agreement should also prohibit disclosure of confidential information and trade secrets. Things like customer contracts, novel business processes, patents, trade secrets, customer lists, prospective deals, and other private information can be extremely valuable in a competitive market. In addition to such "nondisclosure" or confidentiality provisions, the common law duty of loyalty bars employ-

ees from disclosing such confidential proprietary information to competitors. So, if you have learned that your ex-sales rep is using your trade secrets or confidential documents to steal your customers, then you may be able to take legal action against him or her, even without a noncompete agreement.

NO SOLICITATION ALLOWED

Your agreement should also include a non-solicitation provision barring the ex-employee from soliciting your employees, customers, contractors and suppliers post-termination. The only thing more painful than losing one top sales rep to a competitor is losing half a dozen top sales reps as the ex-employee "cherry picks" your best remaining employees and customers. Courts tend to enforce these restrictions because the issue is not the ex-employee earning a living, but that the ex-employee is trying to pillage and pirate away valuable employees and assets from his former employer.

GETTING YOUR DAY IN COURT

Finally, you should know that no matter how well you craft your agreements, they are not bulletproof. Employees will leave and will break their promises! Still, if you have an employee bound by a reasonable restrictive covenant, you will then be in a much stronger position to go to court to enforce your employment agreement and bar the employee from working for a competitor. If your hands are clean (you haven't done anything dishonest or unfair to the ex-employee), and you can prove a breach has occurred, you have a very good chance of getting the agreement enforced by a court. Usually within a matter of days or weeks, your former employee will be banned from working for a competitor or stealing your accounts. And that, Burned Once, is a very soothing salve. ■

This month's Executive Counsel, Michael D. Homans, is labor and employment counsel at Flaster/Greenberg P.C. in Cherry Hill.

Send your "Executive Counsel" questions to editorial@sjbusiness.com.