Confidentiality Agreement: Non-Solicitation Clause (PA)

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A standard restrictive covenant, governed by Pennsylvania law, for use in a confidentiality or nondisclosure agreement between parties to a potential commercial transaction covering non-solicitation of employees, and including an optional sub-clause covering non-solicitation of customers and suppliers. This Standard Clause has integrated drafting notes with important explanations and drafting tips.

DRAFTING NOTE: READ THIS BEFORE USING DOCUMENT

Parties evaluating and negotiating many types of prospective commercial transactions commonly enter into confidentiality agreements (also known as nondisclosure agreements or NDAs) to:

- Preserve the confidentiality of sensitive non-public information disclosed by one or both parties to the other.
- Restrict the recipient's use of the other party's confidential information except for limited purposes relating to the evaluation and negotiation of the proposed transaction.

For sample unilateral and mutual confidentiality agreements, see Confidentiality and Nondisclosure Agreements Toolkit (3-502-1883). For more information on confidentiality agreements in Pennsylvania, see Practice Note, Confidentiality and Nondisclosure Agreements (PA) (w-007-8132).

If the parties to the confidentiality agreement are business competitors, the disclosing party is often also concerned that, during the evaluation or negotiation process, the recipient may:

- Become aware of or come into contact with the disclosing party's key executives and other employees.
- Obtain information about the disclosing party's customers, suppliers, or both.
- Based on these contacts and this information:
  - solicit or offer employment to the disclosing party's employees (often referred to as poaching or raiding); or
  - use the confidential information to divert business away from the disclosing party or otherwise interfere with the disclosing party's relationships with its customers and suppliers.

To address this concern, disclosing parties often insist on including a non-solicitation clause in the confidentiality agreement.

A non-solicitation clause is a form of restrictive covenant that prohibits the recipient (and sometimes its affiliates and representatives), for a limited period of time, from:

- Soliciting for employment (and sometimes hiring of) some or all of the disclosing party's employees.
- Inducing some or all of the disclosing party's customers or suppliers to alter their business arrangements with the disclosing party (and sometimes soliciting business from the customer or supplier).

Most non-solicitation provisions include exceptions to these broad restrictions (see Employee Non-Solicitation Clauses and Customer and Supplier Non-Solicitation Clauses) to support their enforceability (see Enforceability).

In addition to considering enforceability as a matter of Pennsylvania law, agreements that restrain competition implicate federal antitrust laws. For general information on US antitrust law, see Practice Note, US Antitrust Laws: Overview (9-204-0472). For more information on antitrust issues involving dealings between competitors, see Practice Note, Competitor Collaborations in the US (0-202-2806). For a discussion on the federal antitrust implications of non-compete clauses in employment agreements, see Practice Note, Antitrust Considerations in Employment Agreement Non-Compete Clauses (w-002-2106).

ENFORCEABILITY

The enforceability of non-solicitation clauses is dependent on state law. However, no Pennsylvania statute explicitly governs restrictive covenants. In addition, little case law or legal commentary exists in Pennsylvania that speaks directly to the enforcement of non-solicitation clauses in confidentiality agreements between two potential parties to a commercial transaction. However, at least one district court has addressed the issue while noting that the enforceability of such clauses in commercial transaction has not been resolved by Pennsylvania's appellate courts (see *GeoDecisions v. Data Transfer Solutions, LLC,* 2010 WL 5014514 (M.D. Pa. Dec. 3, 2010)).

In *GeoDecisions*, the parties were competitors in the information technology field. When one company proposed to the other that they consider teaming on various projects, they entered in a confidentiality agreement to exchange confidential information to develop a mutually beneficial business relationship. Their agreement included a clause that restricted either party from recruiting or hiring the other's employees for two years from the date of execution. At some point during the restricted period, one of the parties tried to hire a dozen of the other's employees, and litigation ensued over whether such a contract in restraint of trade was enforceable in Pennsylvania.

As discussed in *GeoDecisions*, contracts involving restraints on trade are generally void as against public policy under Pennsylvania law unless the restraints are:

- Ancillary to the main purpose of a lawful transaction.
- Necessary to protect a party's legitimate interests.
- Supported by adequate consideration.
- Reasonably limited in time and geographic scope.

(2010 WL 5014514, at *4 (citing *Volunteer Firemen's Ins. Serv. ., Inc. v. Cigna Prop. and Cas. Ins. Agency*, 693 A.2d 1330, 1337 (Pa. Super.Ct.1997)).)

In *GeoDecisions,* the key threshold issue centered on whether the party could meet the ancillarity requirement outside the context of either:

- An employment relationship.
- The sale of a business.

(2010 WL 5014514, at *3.)

The district court noted that the parties had not identified any Pennsylvania cases squarely addressing a similar no-hire provision in an agreement between two business entities under Pennsylvania law (*GeoDecisions*, 2010 WL 5014514, at *3). Ultimately, the court concluded that the

purpose of the ancillarity requirement was to ensure that the proposed restraint was **not** the main purpose or sole object of the contract (*GeoDecisions*, 2010 WL 5014514, at *4). Rather, the court examined whether the party seeking to enforce the no-hire provision had inserted it to protect some other legitimate business interest, such as:

- Trade secrets (see State Q&A, Trade Secret Laws: Pennsylvania (9-508-2227)).
- Confidential information.
- Goodwill.
- Unique or extraordinary skills of its employees.
- Specialized training of its employees that would benefit competitors.

(*GeoDecisions*, 2010 WL 5014514, at *5 (citing *Zambelli Fireworks Mfg. Co. v. Wood*, 592 F.3d 412, 424 (3d Cir.2010)); see also *WellSpan Health v. Bayliss*, 869 A.2d 990, 997 (Pa. Super. Ct. 2005) (discussing protectable business interests).)

The court found that the agreement, particularly the non-solicitation provision, was reasonably related to a protectable interest because it served to:

- Protect confidential information exchanged in the course of discussions regarding teaming.
- Prevent the poaching of staff who possess the company's "know-how."

(*GeoDecisions*, 2010 WL 5014514, at *5.)

The court also concluded that employment agreements or agreements for the sale of a business were not the only ones that Pennsylvania law would allow to include restrictive covenants such as the non-solicitation clause. For example, other types of agreements used in lawful commercial transactions could utilize such restraints as well if the remaining requirements for the enforceability of restraints on trade were also met. (*GeoDecisions*, 2010 WL 5014514, at *4-5.)

Again, because there is not a large body of Pennsylvania case law regarding the use of non-solicitation clauses in commercial transactions, most of the cases that address these provisions arise in the context of:

- Employment (where employees are subject to post-employment non-solicitation obligations).
- The sale of a business (where the seller is restricted from soliciting employees, customers or suppliers of its former business after the deal has closed).

Also, many of the cases and the legal commentary address non-compete provisions, which restrain the ability to engage in competitive activities generally. Such restrictive covenants almost always have a greater anticompetitive effect than non-solicitation provisions relating to restraints on the recruitment or solicitation of:

- Employees.
- Independent contractors.
- Customers.
- Suppliers.
- Vendors.

(See State Q&A, Non-Compete Laws: Pennsylvania (1-505-1121).)

State laws vary on the enforceability of restrictive covenants. Pennsylvania enforces them under appropriate facts and circumstances. A restrictive non-solicitation provision is likely to be scrutinized in a similar manner as Pennsylvania courts generally assess non-competes and non-solicitation agreements using the same factors (see *Missett v. Hub Int'l Pa., LLC*, 6 A.3d 530, 540 (Pa. Super. Ct. 2010)). When considering the enforceability of a restrictive covenant, like a non-solicitation provision, they focus on whether the restrictions meet the criteria discussed in *GeoDecisions*. Courts permit the equitable enforcement of restrictive covenants only so far as necessary for the protection of a party's legitimate interests, thereby making the substantive scope of the restraint another important factor (see *Sidco Paper Co. v. Aaron*, 351 A.2d 250, 254 (Pa. 1976)).

The application of the factors discussed in *GeoDecisions*, particularly the reasonableness of the restraint's duration, territorial reach, and substantive scope, are fact-sensitive inquiries that require a court to balance all of the relevant circumstances

and interests (see, for example, *Insulation Corp. of America v. Brobston,* 667 A.2d 729, 733-34 (Pa. Super. 1995) (determination of whether restrictive covenant is reasonable, and therefore enforceable, is a factual one that requires consideration of all facts and circumstances)).

Because the enforceability of restrictive covenants governed by Pennsylvania law is a factor-driven and fact-sensitive inquiry, it is difficult to say whether Pennsylvania courts regard non-solicitations involving employees in a commercial transaction agreement as more or less enforceable than non-solicitations involving customers or vendors in an employment or sale of business agreement. The enforceability determination depends more on how the circumstances presented affect the application of the relevant factors, rather than on categorizing the dispute as arising in either:

- A commercial transaction context.
- An employment or sale of business context.

At this time, there is not a lot of case law in Pennsylvania regarding the enforceability of non-solicitation covenants in commercial transactions to draw conclusions about whether courts will view such restraints in a systematically different manner than they view them in the employment or sale of business context.

Employee Non-Solicitation Clauses

Pennsylvania courts enforce employee non-solicitation clauses because they frequently have a limited anticompetitive impact (see, for example, *GeoDecisions,* 2010 WL 5014514, at *7) (noting that non-solicitation clause had limited impact on affected employees because it only affected employment at one company and this factored favorably in the reasonableness analysis)). The more limited the restraint is in terms of duration, geographic scope, and the universe of and impact on affected employees, the greater the chances of enforcement (see Drafting Note, Defining the Protected Employees).

When assessing restrictiveness, the parties should consider the industry in which they operate. If there are relatively few individuals who are qualified to perform particular roles, Pennsylvania courts may scrutinize the restraint more closely due to its:

- Increased anticompetitive effect.
- Impact on the affected employees.

Customer and Supplier Non-Solicitation Clauses

Customer and supplier non-solicitation clauses generally have a greater anticompetitive effect. Outside of the employment context, they are most commonly used when business competitors are discussing a potential commercial arrangement. While the disclosing party should protect its competitive business information, the recipient should also protect its competitive position by avoiding unnecessary constraints on its business activities. Therefore, Pennsylvania courts scrutinize these restrictions in the same way they consider a non-compete.

When entering into a confidentiality agreement, the disclosing party should carefully consider whether a customer and supplier non-solicitation provision is necessary. If so, counsel should pay particular attention to enforceability concerns.

Equitable Remedies

If the recipient breaches a non-solicitation clause, in addition to or instead of pursuing monetary damages, the disclosing party typically seeks an injunction ordering the breaching party to cease its actions (see Provisional Remedies: Initial Considerations and Drafting the Required Documents for Injunctive Relief (PA) (w-000-1070)). While monetary damages are available to a prevailing party as a matter of legal right, US courts have complete discretion over whether to grant an equitable remedy, including injunctive relief (if a party has established the traditional prerequisites for securing such relief) (see *Iron Age Corp. v. Dvorak*, 880 A.2d 657, 662 (Pa. Super. Ct. 2005) (discussing prerequisites which a party must establish prior to obtaining injunctive relief)).

To support the disclosing party's application for injunctive relief, the parties should include an equitable remedies clause in the confidentiality agreement that expressly includes the recipient's:

- Acknowledgment that the monetary damages are insufficient to remedy a breach.
- Intention that the disclosing party is entitled to obtain equitable remedies.

For more information on equitable remedies and equitable remedies clauses, see Practice Note, Contracts: Equitable Remedies (0-519-3197) and Standard Clauses, General Contract Clauses: Equitable Remedies (6-518-8602).

ASSUMPTIONS

This Standard Clause assumes that:

- **The agreement is governed by Pennsylvania law.** If the law of another state applies, these terms may have to be modified to comply with the laws of the applicable jurisdiction.
- **There are two parties to the confidentiality agreement.** This provision must be revised if there are multiple parties to the agreement. For example, multiple recipients must determine whether their obligations are **joint**, **several**, or **joint and several** and amend this clause accordingly. For an example of a provision for several and joint and several liability, see Standard Clauses, General Contract Clauses: Joint and Several Liability (PA) (w-000-0418).
- **The parties to the agreement are US entities and the transaction takes place in the US.** If any party is organized or operates in, or any part of the transaction takes place in a foreign jurisdiction, these terms may have to be modified to comply with applicable laws in the relevant foreign jurisdiction.
- **These terms are being used in a business-to-business transaction.** This Standard Clause should not be used in a consumer contract, which may involve legal and regulatory requirements and practical considerations that are beyond the scope of this resource.
- **These terms are not industry-specific.** This Standard Clause does not account for any industry-specific laws, rules, or regulations that may apply to certain transactions, products, or services.
- **Capitalized terms are defined elsewhere in the agreement.** Certain terms are capitalized but not defined in this Standard Clause because they are defined elsewhere in the agreement (for example, Affiliates). The parties should revise or replace these defined terms as necessary to preserve consistency with other provisions of the confidentiality agreement.

BRACKETED ITEMS

Bracketed items in ALL CAPS should be completed with the facts of the transaction. Bracketed items in sentence case are either optional provisions or include alternative language choices, to be selected, added, or deleted at the drafter's discretion.

1. Non-Solicitation. Except as may be provided in any [Transaction Document/Definitive Agreement/definitive written agreement between the Parties entered into after the date hereof], [each Party/the Recipient/[DEFINED TERM FOR PARTY 2]] agrees that [during the Term [and for a period of [NUMBER] [month[s]/year[s]] after the expiration or earlier termination of the Term]/for a period of [NUMBER] [months/year[s]] after the Effective Date], without obtaining the prior written consent of [the other Party/the Disclosing Party/[DEFINED TERM FOR PARTY 1]], neither [such Party/the Recipient/[DEFINED TERM FOR PARTY 2]] nor any of its [Affiliates or] Representatives (each, a "**Restricted Person**") shall directly or indirectly, for itself or on behalf of another [Person/person or entity]:

DRAFTING NOTE: NON-SOLICITATION

The Standard Clause includes an employee non-solicitation provision (Section 1(a)) and an optional customer and supplier non-solicitation provision (Section 1(b)). Both clauses contain optional and alternative language selections that permit the parties to customize their draft to clearly define "solicitation," something that can be important to establish the enforceability of the restriction given the fact-sensitive set of factors that Pennsylvania courts consider when such clauses are challenged. When customizing these provisions, the parties should:

- Consider Pennsylvania law and how it may apply to:
  - the particular facts and circumstances of the contract; and
  - the proposed restrictions.
- Draft the language of these provisions to support enforceability.

Non-Solicitation clauses are often the most heavily negotiated section of any confidentiality agreement. Many recipients object to these provisions and it is common to limit and qualify their terms during the negotiation process.

MUTUAL VERSUS UNILATERAL NON-SOLICITATION OBLIGATION

Non-Solicitation clauses are usually drafted unilaterally to protect the disclosing party. In some situations (especially if the two parties are competitors), it may be appropriate for the employee non-solicitation to apply to both parties. Also, if the confidentiality agreement is mutual and both parties are supplying confidential information, circumstances may support a mutual non-solicitation provision. However, the parties should be aware that a mutual obligation has a greater anticompetitive effect and is more likely to be:

- Challenged by the antitrust agencies or private parties (see Practice Note, Antitrust Considerations in Employment Agreement Non-Compete Clauses: Analysis of Non-Compete Clauses Under the Federal Antitrust Laws (w-002-2106)).
- Characterized as per se (automatically) illegal if it is not necessary to a pro-competitive collaboration (see Practice Note, Competitor Collaborations in the US: The Ancillary Restraint Doctrine: Testing Restrictions on Venture or Parent Operations (0-202-2806)).

This Standard Clause includes alternative language selections that can be used for either a unilateral or a mutual clause. It assumes that Section 1(a) and Section 1(b) are treated similarly. If the parties agree, for example, to make the employee non-solicitation mutual but to draft the customer and supplier non-solicitation unilaterally in favor of the disclosing party, they must divide this Standard Clause into two separate sections to individually address the formulation of restricted persons in each section.

TERM OF THE NON-SOLICITATION OBLIGATION

Most non-solicitation obligations are effective for a period that may be shorter than the term of the parties' overall confidentiality obligations. In many cases, non-solicitation terms are for one or two years. Selecting a shorter duration:

- Limits its anticompetitive effects.
- Helps to support enforceability.

This Standard Clause assumes that the non-solicitation period is the same for the employee non-solicitation and the customer and supplier non-solicitation. If the parties agree to apply different terms to each of these obligations, they must revise this Standard Clause to create a separate non-solicitation period within each of the clauses.

Disclosing Party

In Pennsylvania, the duration of the restraint should be no longer than reasonably necessary to protect the relevant interest (see *Sidco Paper Co.*, 351 A.2d at 254). For example, if the purpose of the restraint is to protect confidential information, a party should reasonably tie the length of the restraint to how long the information disclosed retains its value before growing stale. Generally, a non-solicitation term of two years or less is often considered

reasonable, although the precise circumstances and interests requiring protection matter a great deal (see, for example, *GeoDecisions*, 2010 WL 5014514, at *6-7).

Because recipients consistently try to negotiate for a shorter term, the disclosing party might consider whether to specify a longer term in the first draft (such as three years) as part of a negotiation strategy. A practitioner, however, should be mindful that overly broad clauses can lead to litigation challenges. While Pennsylvania courts have the power to reform overly broad covenants (see *Hillard v. Medtronic, Inc.*, 910 F. Supp. 173, 177 (M.D. Pa. 1995)), choosing the minimum duration that adequately protects the interests at stake can have the salutary effect of decreasing the likelihood of litigation challenges due to the increasing likelihood of enforcement.

Recipient

The recipient should try to restrict the term to one year or less.

DEFINING THE RESTRICTED PERSONS

A key element of a non-solicitation clause is the universe of persons subject to its restrictions. In addition to the recipient, different formulations also include the recipient's:

- Representatives.
- Subsidiaries.
- Affiliates.
- Subsidiaries or affiliates and representatives.

When drafting this provision, the parties should consider relevant commercial and contractual facts and circumstances, including:

- Whether the recipient has the right to disclose any confidential information to its representatives, its affiliates, or both (and which of the recipient's representatives and affiliates is actually likely to receive any confidential information).
- The type of business conducted by the recipient's affiliates (and whether it is even likely that any of the recipient's affiliates might otherwise pursue any of the restricted activities).
- How broadly or narrowly "Covered Persons" and "Customers and Suppliers" are defined (and whether these definitions increase the possibility that the recipient's affiliates might pursue any of the restricted activities).
- The scope of "Affiliates" and "Representatives" if these terms are defined in the confidentiality agreement (and whether the defined term for "Representatives" includes a party's subsidiaries and other affiliates).
- Each party's relative bargaining leverage.

Disclosing Party

Disclosing parties commonly aim to broadly define the universe of restricted persons to include the recipient and its affiliates and other representatives. (The bracketed term "Affiliates or" should be omitted if the definition of "Representatives" in the confidentiality agreement includes the recipient's affiliates.) Even if the recipient is successful in excluding some or all of its affiliates and representatives from this definition, the disclosing party should insist on including the recipient and its officers, employees, and directors to avoid any disagreement over whether the acts of a particular individual were taken on behalf of the entity.

Recipient

The recipient aims to define the restricted persons as narrowly as possible. A key concern to the recipient is to avoid liability for the actions of those individuals and entities beyond its legal or practical control. However, the disclosing party often has a legitimate interest in extending these obligations beyond the recipient itself.

If the recipient cannot completely exclude its affiliates and other representatives, it should consider some or all of the following limitations:

- Excluding the recipient's legal and financial representatives, unless they are acting on behalf of the recipient or its affiliates in making the solicitation.
- Restricting covered affiliates to specified affiliates of the recipient that are

competitors of the disclosing party or expressly excluding any affiliates that operate in different business sectors.

- Excluding any of the recipient's representatives that do not actually receive any confidential information.
- Excluding any affiliates (and their representatives) that do not actually receive any confidential information.

In practice, the recipient may have to agree to restrictions on the persons who are entitled to receive access to the confidential information (such as its affiliates and their representatives) to be able to negotiate limitations on the definition of restricted persons.

Enforcing Breaches Committed by Non-Parties

If the restricted persons include the affiliates or other representatives of the recipient, the disclosing party must consider that, as non-parties to the agreement, affiliates and representatives are not bound by this restriction unless they either:

- Execute a document agreeing to be bound.
- Sign on to the contract for that limited purpose.

If they are not bound, the disclosing party cannot bring a claim against an affiliate or representative that fails to comply with its non-solicitation obligation. Many confidentiality agreements include a general term deeming the recipient liable for any breaches of the confidentiality agreement committed by its affiliates or representatives. Others go further and require each individual receiving any confidential information to agree in writing to be bound by these restrictions.

If either of these terms is not included, the disclosing party should negotiate language into the non-solicitation provision that provides for a potential source of recourse (for example, "[The Recipient/Each Party/[DEFINED TERM FOR PARTY 2]] shall be liable for any failure of its [[A/a]ffiliates or representatives/Representatives] to comply with the restrictions set out under this Section [NUMBER].").

(a) solicit for employment or otherwise induce, influence, or encourage to terminate employment with [the other Party/the Disclosing Party/[DEFINED TERM FOR PARTY 1]] [or any of its [Affiliates/subsidiaries]][,] [or employ [or engage as an independent contractor],] any [person listed on Schedule 1 attached hereto/[current or former] employee of [the other Party/the Disclosing Party/[DEFINED TERM FOR PARTY 1]] [or any of its [Affiliates/subsidiaries]] [with a title of or equivalent to [JOB TITLE(S)] or above]][,] [with whom the Restricted Person had [more than incidental] contact or who became known to the Restricted Person in connection with the [Transaction/Proposed Transaction/Purpose] or the evaluation thereof] (each, a "**Covered Employee**"), except (i) pursuant to a general solicitation through the media [or by a search firm, in either case,] that is not directed specifically to any employees of [the other Party/the Disclosing Party/[DEFINED TERM FOR PARTY 1]], unless such solicitation is undertaken as a means to circumvent the restrictions contained in or conceal a violation of this Section 1(a) or (ii) if [the other Party/the Disclosing Party/[DEFINED TERM FOR PARTY 1]] terminated the employment of such Covered Employee before the Restricted Person having solicited or otherwise contacted such Covered Employee or discussed the employment or other engagement of the Covered Employee[; or/.]

DRAFTING NOTE: NON-SOLICITATION OF EMPLOYEES

In addition to establishing duration and specifying the universe of restricted persons (see Drafting Notes, Term of the Non-Solicitation Obligation and Defining the Restricted Persons), the key terms of an employee non-solicitation define:

- The universe of protected employees.
- The restricted activity.

DEFINING THE PROTECTED EMPLOYEES

The definition of covered employees is essential to any employee non-solicitation provision. In practice, these definitions range from covering a few to all of a disclosing party's and its affiliates' employees. The definition chosen should be specific to the facts and circumstances presented by the commercial transaction to which the agreement is ancillary. Different formulations include:

- Specific named employees of the disclosing party (and sometimes those of its subsidiaries or affiliates).
- All or certain categories of employees of the disclosing party (and sometimes those of its subsidiaries or affiliates) that the recipient:
  - became aware of (from confidential information or otherwise) in connection with the proposed transaction and the evaluation process; or
  - had contact with in connection with the proposed transaction and the evaluation process.
- All officers and executives of the disclosing party (and sometimes those of its subsidiaries or affiliates).
- All employees of the disclosing party (and sometimes those of its subsidiaries or affiliates) at or above a stated position or executive level.
- All employees of the disclosing party (and sometimes those of its subsidiaries or affiliates).

The parties must revise this Standard Clause to reflect their agreed formulation by selecting the appropriate optional and alternative language.

Disclosing Party

Many disclosing parties try to protect all of their employees. However, to support enforceability, the disclosing party should consider limiting this protection to:

- Key executives.
- Employees (of the disclosing party and any of its subsidiaries or affiliates) that the recipient had any contact with or became aware of during the evaluation and negotiation process.

The disclosing party should also consider whether to add language clarifying that covered employees include both current and former employees. Without this clarification, the restriction may be deemed ambiguous if a solicitation or hiring occurs after an employee who otherwise satisfies the definition of covered employee ceases to be employed by the disclosing party. Usually, this language should be acceptable to the recipient if:

- The universe of covered employees is limited (for example, to key senior executives).
- The clause contains a standard exception for soliciting or hiring employees that are terminated by the disclosing party (see Exceptions to the Restricted Activity).
- The restraint with respect to former employees expires after a certain period time following the employee's voluntary resignation (for example, the restraint covers any person formerly employed by the disclosing party within X months preceding such employee's voluntary resignation).

The broader the universe gets, the more likely a court may find the restriction unreasonable (for example, if it covers all former and current employees of the disclosing party with a title of vice president or higher, instead of limiting it to the sub-group of these individuals of whom the recipient became aware or with whom it had contact during the evaluation or negotiation process). As courts have found in other jurisdictions, restrictions are more likely to be upheld if the employer can demonstrate that the employee was

irreplaceable and the employee's departure put the company at risk for special harm (see, for example, *Ken J. Pezrow Corp. v Seifert*, 602 N.Y.S.2d 468 (4th Dep't 1993)).

In these situations, besides including a provision for involuntary termination, the disclosing party should consider adding an exception for former employees who left their employment voluntarily more than some specified period (for example, six months) before the solicitation or hiring occurred (see Exceptions to the Restricted Activity).

Sometimes, it may also be appropriate for the disclosing party to treat certain independent contractors as covered employees for the purposes of this restriction if the contracts with the applicable independent contractors support this type of restriction.

Recipient

The recipient tries to limit the universe of covered employees to as few employees as possible, often to key senior executives with whom the recipient had more than incidental contact or of whom it became aware during the evaluation process. In many instances, this formulation should be sufficient to protect the disclosing party's legitimate business concerns. In particular, the recipient does not want to allow the disclosing party to protect employees that the recipient:

- Does not know.
- Knew of and interacted with before any discussions regarding the potential transaction or receipt of the confidential information.

Other concerns exist if the parties operate in a specialized industry, particularly if there are few qualified professionals in the relevant pool of potential employees.

The recipient should also consider the likelihood that covered employees may be bound by exclusive employment agreements. If the parties operate in an industry that historically enters into employment contracts with senior executives (and sometimes also mid-level executives), a disclosing party is likely protected by the contracts during the term of employment. The recipient should consider adding an exception permitting solicitation and hiring of covered employees after their contracts expire.

If the recipient cannot exclude former employees, it should try to negotiate an exclusion for solicitation and hiring of those covered employees that voluntarily terminated their employment with the disclosing party before the solicitation or hiring occurred (see Exceptions to the Restricted Activity).

DEFINING THE RESTRICTED ACTIVITY

Employee non-solicitation clauses typically prohibit the restricted persons from taking one or more of the following actions:

- Soliciting any covered employee for employment.
- Indicating any interest in entering into an employment or services arrangement with a covered employee.
- Encouraging any covered employee to terminate employment.
- Hiring any covered employee.
- Engaging any covered employee as an independent contractor or consultant.
- Entering into any form of services contract with a covered employee.

Many employee non-solicitation provisions are limited to restricting solicitation or encouragement, but do not include an outright prohibition against hiring (often referred to as a no-hire). Other provisions also include a no-hire obligation. A no-hire is more protective than a true non-solicitation and may be easier to prove from an evidentiary perspective.

However, because a no-hire has greater anticompetitive impact, similar to a non-compete, Pennsylvania courts may be less willing to enforce a non-solicitation provision that contains a no-hire. As noted by the Pennsylvania Supreme Court, restrictive covenants are not favored in Pennsylvania (*Hess v. Gebhard*, 808 A.2d 912, 917 (Pa. 2002)). They are, however, enforceable to protect legitimate interests such as goodwill, confidential information, and unique or specialized skill sets (see Drafting Noe, Enforceability), but only to the extent reasonably necessary to achieve such protection (see *Sidco Paper Co.*, 351 A.2d at 254).

Therefore, the more stringent the restriction in the covenant, the more scrutiny it will receive as a general proposition. If a party challenges a no-hire clause, the disclosing party should be prepared to articulate how the clause, as drafted:

- Has a narrow impact.
- Is reasonably calculated to protect a legitimate interest.

It would also be worth noting the propriety of the clause because of the burdens the disclosing party would face when trying to prove breach of a non-solicitation without a no-hire if discussions between the recipient and the covered employee only occurred orally.

To support enforceability, the disclosing party should also consider including one or more commonly accepted exceptions for certain types of activities that recipients typically request.

Exceptions to the Restricted Activity

There are several standard exceptions to the restricted activity in an employee non-solicitation provision.

General Solicitations Using the Media

This commonly used exception excludes solicitations made using ads in the media. It is usually limited to solicitation not directed to employees of the disclosing party. In some instances the parties specify the categories of media that are acceptable. If general solicitations using social media are permitted, the parties should also consider specifying whether this exception applies to posts made to closed groups on social media networks such as Facebook friends, LinkedIn connections, and other closed user groups. These solicitations are not truly general in nature as they are targeted to a limited universe of recipients.

While the law is not yet fully developed in this area, there are indications that Pennsylvania courts may consider social media posts to constitute prohibited solicitations depending on factors like:

- The nature of the posts.
- The apparent audience for them.
- The extent of the direct interactions between the restricted party and the protected individuals in the audience.

(See, for example, *Joseph v. O'Laughlin*, 2017 WL 3641351, at *6-7 (Pa. Super. Aug. 22, 2017) (finding breach of non-solicitation clause where defendant created Facebook page to highlight a competitive venture and interacted with posters on the page); *Liberty Fencing Club LLC v. Fernandez-Prada*, 2017 WL 3008758, at *10 (E.D. Pa. Jul. 14, 2017) (allegations that defendant posted pictures on Facebook with images of him posing with potential customers sufficient to state claim for breach of non-solicitation agreement); and *Scott v. Giacomelli*, 2016 WL 5210883, at *5, 12 (Pa. Super. Jul. 27, 2016) (affirming trial court findings, including finding that postings on website constituted breach of non-solicitation agreement).)

Although the law is trending towards considering social media posts as evidence of the breach of a non-solicitation clause, parties should negotiate this point and expressly address it in the provision to clarify the parties' intent, for example, by restricting social media solicitations only if they are directed specifically toward company employees. For more information on general solicitations using the media, see Practice Note, Social Media and Restrictive Covenant Litigation (2-599-2107).

Solicitations Using a Third-Party Recruiter or Search Firm

Similar to the exception for general solicitations using the media, this exception permits the solicitation of a covered employee in a general recruitment process handled by a recruiter or search firm engaged by the recipient.

Soliciting Former Employees

This exception usually permits the restricted person to solicit covered employees that have been terminated by the disclosing party, but not those employees who voluntarily leave their employment. Even though the recipient may not have actually prompted an employee's voluntary departure, disclosing parties argue that this is a reasonable restriction because of the difficulty in proving non-compliance with little or no tangible evidence if none of the discussions were made in writing.

In some situations, solicitation and hiring of former employees that left voluntarily is permitted after a specified period following termination of employment. The stated period should be sufficiently long to ensure that it protects the employer against voluntary departures for the specific purpose of going to work for the recipient.

Employee-Initiated Approaches

This exception carves out solicitations initiated by the employee without any previous solicitation from the recipient. This Standard Clause does not include this exception because, similar to former employees that voluntarily left their employment, it poses an undue evidentiary burden on the disclosing party to prove that the initial indication of interest did not come from the recipient if it was communicated orally and not in writing. Also, relationships between employees on opposing sides of a deal often develop organically when the parties are evaluating or negotiating the potential transaction. It is not unreasonable for the disclosing party to include protection against employee defections that only occurred because of this process.

Disclosing Party

The disclosing party aims to balance the desire to best protect its business interests against creating a provision that a court may deem overly broad and unreasonable. Therefore, the disclosing party should carefully consider the practical implications of each exception and narrowly tailor the description of restricted activities to those that are reasonable and necessary. This may support including a no-hire, especially if appropriate exceptions are also included.

When negotiating exceptions, the disclosing party should:

- Insist on limiting the exception for former employees to those covered employees whose employment has been terminated by the company.
- Consider carving out solicitations directed to closed social media groups from the general solicitations exception.
- Include non-circumvention and non-concealment language to qualify the exceptions for general solicitations.
- Include a prohibition against using confidential information to conduct any excepted activity.
- If agreeing to allow solicitation or hiring of employees that voluntarily terminate their employment, require a substantial waiting period (for example, six months) before permitting the recipient to solicit or hire the former employee.

Recipient

The recipient should try to limit its obligations to those of non-solicitation and not include a no-hire. If unsuccessful, it should try to:

- Restrict the scope of the overall no-hire restriction to the employment of any covered employees and not include engagement of covered employees as consultants or other types of independent contractors.
- Include multiple exceptions.

When negotiating exceptions, the recipient should try to:

- Include an exception for approaches made by covered employees.
- Broadly define permitted general solicitations to allow those made to closed social media groups.
- Include an exception for covered employees solicited or hired using a search firm.
- If the provision covers former employees, add an exception for covered employees that voluntarily terminated their employment with the disclosing party before the commencement of any solicitation by the recipient (with the understanding that the disclosing party may insist on a waiting period).
- Permit solicitation and hiring of covered employees under contract to the disclosing party after the term of the employment contract has expired.

(b) [induce, influence, or encourage, any client, customer, supplier, or other similar third party of [the other Party/the Disclosing Party/[DEFINED TERM FOR PARTY 1]] [or any of its [Affiliates/subsidiaries]] [that became known to the Restricted Person directly or indirectly pursuant to any Confidential Information or any discussions or communications relating to the evaluation or negotiation of the [Transaction/Proposed Transaction/Purpose]] (each, a "**Customer or Supplier**") to alter, terminate, or breach its contractual or other business relationship with [the other Party/the Disclosing Party/[DEFINED TERM FOR PARTY 1]] [or any of its [Affiliates/subsidiaries] [or, solicit business from any Customer or Supplier]]. [Notwithstanding the foregoing, nothing in this Section 1(b) restricts any Restricted Person from soliciting business from or engaging in business with any Customer or Supplier in the normal course of business, so long as the Restricted Person does not use any Confidential Information to identify such Customer or Supplier or to communicate or negotiate with such Customer or Supplier.]]

DRAFTING NOTE: NON-SOLICITATION OF CUSTOMERS AND SUPPLIERS

Section 1(b) is an optional customer and supplier non-solicitation provision that parties can use under appropriate circumstances. Similar to an employee non-solicitation clause, besides establishing duration and specifying the universe of restricted persons (see Drafting Notes, Term of the Non-Solicitation Obligation and Defining the Restricted Persons), the key terms of a customer and supplier non-solicitation include:

- The universe of protected suppliers, customers, and other types of clients.
- The definition of the restricted activity.

Pennsylvania courts regard solicitation of suppliers, customers, and other types of clients as competitive activities, but enforce non-solicitation agreements relating to them where reasonably necessary to protect legitimate business interests (see for example, *Worldwide Auditing Services, Inc. v. Richter*, 587 A.2d 772, 776 (Pa. Super. 1991) (enforcing two-year restraint on solicitation of customers) and *Morgan's Home Equipment Corp. v. Martucci*, 136 A.2d 838, 846-847 (Pa. 1957) (enforcing restraint against solicitation of customers)).

Although the case law has developed in the context of agreements that document an employment relationship or the sale of a business, the *GeoDecisions* case suggests that Pennsylvania law would support restraints that are:

- Are ancillary to other types of agreements.
- Meet the remaining elements for enforcing restrictive covenants under Pennsylvania law, including the element of a reasonable relationship between the restraint and some interest worthy of protection.

(See *GeoDecisions*, 2010 WL 5014514, at *4-5.)

As discussed above, many confidentiality agreements include employee non-solicitations. Customer and supplier non-solicitations are less frequently included as courts more heavily scrutinize them than employee non-solicitations. They are used primarily when:

- The confidentiality agreement is between two competitors.
- The confidential information is expected to include non-public information regarding:
  - the disclosing party's customers and suppliers (for example, customer lists); or
  - other information that the recipient can use to offer the same customers and suppliers more favorable terms.

Pennsylvania recognizes the protection of confidential information as a legitimate business interest sufficient to support a non-solicitation restraint (see *Morgan's Home*, 136 A.2d at 842-43).

Section 1(b) assumes that the appropriate term to describe these parties is "customer or supplier." If circumstances warrant a different formulation (for example, omitting suppliers or referencing clients instead of customers), the parties should revise this language accordingly.

DEFINING THE PROTECTED CUSTOMERS AND SUPPLIERS

The universe of protected customers and suppliers often covers one of the following:

- All current customers and suppliers of the disclosing party (and sometimes those of its subsidiaries or affiliates).
- All current and prospective customers and suppliers of the disclosing party (and sometimes those of its subsidiaries or affiliates).
- The current (or current and prospective) customers and suppliers of the disclosing party (and sometimes those of its subsidiaries or affiliates) that the recipient became aware of:
  - because of the confidential information; or
  - otherwise during the evaluation or negotiation of the potential transaction.

To support enforceability, this Standard Clause uses a limited formulation that covers existing customers and suppliers of the disclosing party (and, if appropriate, those of its subsidiaries or affiliates), but not prospective ones. The optional bracketed language further limits this definition to those customers and suppliers that the restricted person became aware of:

- From confidential information.
- Otherwise during the evaluation or negotiation of the potential transaction.

Even if the parties use a broader formulation to define protected customers and suppliers, the exception for business in the ordinary course (see Exceptions Permitting Solicitation) significantly lessens the potential anticompetitive effect of this restriction.

Disclosing Party

The disclosing party should consider:

- Whether a customer and supplier non-solicitation is necessary to protect the disclosing party's legitimate business interests. Factors to consider include:
  - the number and relative size and quality of the customers and suppliers in the relevant industry and geographical territory;
  - the likelihood that the disclosing party and the recipient actually compete for the same customers and suppliers;
  - the likelihood that the confidential information will include information that the recipient can use to divert business away from the disclosing party's current and prospective customers; and
  - whether key customer and supplier relationships are exclusive or non-exclusive (and whether they are protected by contract).
- How to craft the non-solicitation to ensure that it is reasonable in scope.
- Whether to include both customers and suppliers or limit the scope of protected persons to only one of these categories.
- Whether to list some or all protected customers or suppliers by name.

Recipient

If the recipient is unsuccessful in completely excluding the customer or supplier non-solicitation, the recipient should try to negotiate a narrow formulation of covered customers and suppliers. If appropriate for the relevant business or industry, the recipient should try to restrict the provision to customers and suppliers that are in exclusive arrangements with the disclosing party (or, if applicable, its subsidiaries or affiliates).

DEFINING THE RESTRICTED ACTIVITY

Customer and supplier non-solicitation clauses typically prohibit the restricted persons from taking one or more of the following actions:

- Soliciting business from any protected customer or supplier.
- Entering into a contract with any protected customer or supplier.
- Encouraging or otherwise inducing any protected customer or supplier to divert business from or terminate its business

relationship with the disclosing party (and sometimes its subsidiaries or affiliates).

- Otherwise altering or interfering with the relationship between the disclosing party (and sometimes its subsidiaries or affiliates) and its protected customers and suppliers (and sometimes those of its subsidiaries or affiliates).
- If prospective customers and suppliers are protected, encouraging or otherwise inducing any protected prospective customer or supplier to refrain from entering into a contractual or other business relationship with the disclosing party (and sometimes its subsidiaries or its affiliates).

A provision that includes a blanket non-solicitation obligation, which prohibits the recipient from soliciting any business from protected customers and suppliers, is more restrictive and more likely to be treated by Pennsylvania courts as a true non-compete. Therefore, parties often include certain standard exceptions to limit the anticompetitive effect of these provisions.

Exceptions Permitting Solicitation

Customer and supplier non-solicitation clauses often include exceptions permitting solicitation of protected customers and suppliers:

- In the normal course of business.
- That are in existing relationships with the recipient or its affiliates.
- That were in a contractual relationship with the disclosing party that has expired (even if the parties continue to do business with one another).

Disclosing Party

The disclosing party must balance the desire to protect its customer and supplier relationships against creating an overbroad and unenforceable provision. If the clause contains a blanket non-solicitation obligation, the disclosing party should consider including the bracketed final sentence that permits solicitations made in the normal course of business but restricts the recipient from using any confidential information when:

- Identifying customers and suppliers.
- Communicating or conducting negotiations.

Recipient

The recipient should try to limit the scope of restricted activities to:

- Interfering with exclusive relationships.
- Using confidential information to communicate or negotiate with customers and suppliers.

If the disclosing party insists on a standard provision, especially one with a blanket non-solicitation obligation, the recipient should insist on including exceptions permitting:

- Solicitation of the recipient's and its affiliates' existing customers and suppliers.
- Conducting business in the ordinary course with existing and prospective customers and suppliers.

[[Recipient/[DEFINED TERM FOR PARTY 2]/the Parties] agree[s] that the duration, scope, and geographical area of the restrictions contained in this Section 1 are reasonable. Upon a determination that any term or provision of this Section 1 is invalid, illegal, or unenforceable, the court may modify this Section 1 to substitute the maximum duration, scope, or geographical area legally permissible under such circumstances to the greatest extent possible to effect the restrictions originally contemplated by the Parties hereto.]

DRAFTING NOTE: ACKNOWLEDGMENT OF REASONABLENESS; REFORMATION

The final optional paragraph of this Standard Clause includes:

- An acknowledgment by the recipient that the restrictions contained in the non-solicitation provision are reasonable.
- The parties' agreement to permit the court to reform these restrictions if they are held to be overly restrictive.

Many non-solicitations used in business-to-business confidentiality agreements do not include this language. However, the disclosing party should consider including this paragraph if the non-solicitation clause includes provisions that are more restrictive (which poses greater enforceability concerns), including, for example:

- A restrictive employee non-solicitation obligation that contains a no-hire (particularly in an industry where there are a limited number of qualified professionals or individuals with a particular skill set).
- A customer and supplier non-solicitation obligation (especially if it contains a blanket non-solicitation obligation without standard exceptions).

For more information on reforming provisions, see Standard Clauses, General Contract Clauses: Severability (PA): Drafting Note: Reform of Contract Terms (w-000-0646) and Practice Note, Contracts: Equitable Remedies: Reformation (0-519-3197).