

# FOLEY EXECUTIVE BRIEFING SERIES



## Noncompete Agreements and Trade Secrets in Uncertain Times



Speakers: Russell Beck  
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# About Us

- Foley & Lardner
- Russell Beck
- Jeffrey Rosin



# Topics To Be Covered

- Overview: trade secrets, confidential information, and goodwill
- Overview: types of restrictive covenants and applicable law
- Impact of the economy on the enforceability of restrictive covenants
- Maximizing the protections available through restrictive covenants and other mechanisms/drafting an enforceable agreement
- Navigating the legal process for both the enforcement of and defense against restrictive covenants
- Finding the right balance of the need for protection against the imposition of restrictions
- Questions



## Protecting Trade Secrets, Confidential Information, and Goodwill

- Defined:
  - Trade secrets
    - G.L. c. 266, § 30
    - Restatement of Torts § 757, comment b
  - Confidential information
  - Goodwill
- Governing Law
  - Statutory
  - Common law



## Pop Quiz

- Questions to answer:
  - Is it a trade secret?
  - Is it confidential, proprietary information?
  - Does it reflect goodwill?
- Customer list
- Information not in documents



## Types of Restrictive Covenants

- Noncompetition Agreements
- Garden Leave Clauses
- Confidentiality Agreements (Nondisclosure Agreements)
- Non-Solicitation Agreements
- Anti-Piracy Agreements
- No-Hire Agreements
- Forfeiture for Competition Agreements (but not “straight” Forfeiture Agreements)



## The Law of Restrictive Covenants

- Common Law
- Noncompete Agreements
  - Context – Employment versus Others
  - Requirements – Time, Geography, Restricted Activities
  - Basic Contractual Requirements
  - Legitimate Business Interests
  - Touchstone: Reasonableness
  - Defenses
- Treatment of Other Restrictive Covenants



## Pop Quiz

- Which of the following are enforceable?
  - One year noncompete agreement for a sales person?
  - Two year noncompete agreement for a sales person?
  - One year nonsolicitation agreement for a sales person?
  - One year no-hire agreement?
  - Noncompete agreement designed to protect the company from a departing employee with specialized training and skills?





## Impact of the Economy

- Context: Balancing of the Harms
- Assessment of the Impact of the Economy
- Response to the Impact of the Economy



## Maximizing the protections

- Enforcement scheme
  - Assessment: Trade secret audit
  - Framework: Agreements; Notifications
- Drafting tips
  - Preparation to compete
  - Assignment/successors
  - Governing law
  - Others



## Enforcing and Defending Against Restrictive Covenants

- Former employer
- Former employee
- New employer



## Finding the Right Fit

- Business interests
- Corporate culture
- Changing times



## *Hypothetical*

- Facts
- Issues
- Strategy
  - Former employer
  - Employees
  - New employer (competitor)

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