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Drafting Restrictive Covenant Agreements

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Considerations Before Drafting Restrictive Covenant Agreements

1. Does the employer really need them?
2. To whom should they be offered?
3. Should the agreements be uniform or customized?



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General Thoughts on Drafting Restrictive Covenants

1. Choice of law can be critical.
2. Don't get greedy.
3. Make it understandable.
4. Avoid unnecessary legal jargon.



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Legitimate Business Interests

1. Business interests that are legitimate:
 - Customer relationships and goodwill.
 - Confidential business information.
 - Specialized training.
2. Explain the business interests that you are seeking to protect.



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Consideration Provisions

1. Consideration must be "adequate" consideration.
2. Adequacy of consideration may depend on employee's position and salary.
3. Clearly state the consideration.
4. Identify only consideration that is adequate.
5. Include a promise to provide that consideration.
6. Include a statement of the parties' intention to be legally bound.

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Provisions Relating to Geographic Scope

1. Geographic scope must be reasonably necessary.
2. Try to use a territory with clearly-defined boundaries.
3. Explain why the geographic scope is reasonable.
4. Include language that contemplates a change in geographic scope.

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Provisions Relating to Temporal Scope

1. Temporal scope must be reasonably necessary.
2. Explain why the temporal scope is reasonable.
3. Include an extension-of-time provision.

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Provisions Relating to Scope of Activities Prohibited

1. Define the business in which the employee is prohibited from competing.
2. Include language that contemplates a change in the scope of the business.
3. Include restrictions not only on employment, but also on advising and consulting.

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Customer Non-Solicitation Provisions

1. Should they be included?
2. Belt and suspenders.
3. Prohibit not just solicitation, but also contact for competitive purposes.
4. Prohibit employee from selling or providing products or services to customers.
5. Limit "customers" to customers with whom employee had contact or with respect to which employee possessed confidential information.
6. Include time period during which customer was a customer.
7. Temporal restriction is necessary.
8. No geographic restriction is necessary.

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Employee Non-Solicitation Provisions

1. Legal basis for provisions.
2. Enforceability of provisions.
3. Be specific in types of conduct prohibited.



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Confidentiality Provisions

1. Value of confidentiality provisions.
2. Provide non-exclusive listing of types of information considered to be confidential.



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Return-of-Property Provisions

1. Require return of all business information, not just confidential business information.
2. Prohibit retention of business information in any tangible form.

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Choice of Law Provisions

1. Non-compete law varies significantly among states.
2. Choice-of-law provisions help avoid litigation-within-litigation.
3. Employer has flexibility in choosing law, provided that state whose law is chosen has reasonable connection to the agreement.
4. Explain the relationship to the state whose law is chosen, where the relationship is not evident.

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Choice-of-Forum Provisions

1. Employer has flexibility in selecting forum.
2. Forum selected must have substantial relationship to the contract and the employment.
3. Courts will consider expense and inconvenience to employee.
4. Explain relationship to the forum that is chosen, where the relationship is not evident.

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Liquidated Damages Provisions

1. Pros and cons.
2. More common in professional contracts (e.g. doctors; accountants).
3. Must be reasonably related to a reasonable estimate of just compensation for actual damages.
4. Difficulty of avoiding construction as a penalty provision.

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Forfeiture Provisions

1. Pros and cons.
2. Must be based on payment or benefit that may be legally forfeited.
3. May be enforced, if not punitive in nature.



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Attorneys' Fees Provisions

1. Should they be included?
2. Should they be one-sided?
3. Limit to payment in event employer prevails.
4. Provide for payment in actions for breach or for declaratory judgment.

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Assignment Provisions

1. Need for assignment provision.
2. Need to comply with assignment provision, if employer is acquired.

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Miscellaneous Provisions Helpful to Employer

1. At-will employment.
2. Integration clause.
3. Severability.




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Provisions that Help Ensure Employee Compliance

1. Provision requiring employee to advise prospective employers.
2. Provision providing for payment of severance pay during non-compete period.



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Provisions Showing Good Corporate Citizenship

1. Provision stating that employee has no agreements with prior employers.
2. Provision regarding use of prior employer's confidential information.

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Self-Serving Provisions of Marginal Value

1. Acknowledgement of adequacy of consideration.
2. Acknowledgement of immediate and irreparable harm.
3. Acknowledgement of ability to earn a living.
4. Acknowledgement of reasonableness of covenant.
5. Acknowledgement of entitlement to injunction.
6. Provision authorizing judge to reduce scope.
7. Provision providing for enforceability regardless of reason for termination.
8. Provision stating that breach by an employer is not a defense.



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Provisions that Satisfy Judges' Procedural Fairness Concerns

1. Advice to consult with counsel.
2. Period of time to review non-compete.
3. Opportunity to negotiate over non-compete.



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Common Drafting Mistakes

1. Getting greedy.
2. Expecting the judge to write the restrictive covenant for you.
3. Lack of temporal and/or geographic restrictions.
4. Arbitration provision, without carve-out for injunctive relief.
5. Failure to include choice-of-law provision.
6. Creating a policy, rather than an agreement.



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