

GALLAGHER & KENNEDY

— P.A. —
LAW OFFICES

DONALD PEDER JOHNSEN
DIRECT DIAL: (602) 530-8437
CELL: (602) 332-4215
E-MAIL: DPJ@GKNET.com

2575 EAST CAMELBACK ROAD
PHOENIX, ARIZONA 85016-9225
PHONE: (602) 530-8000
FAX: (602) 530-8500
WWW.GKNET.COM

Donald Peder Johnsen

Don Johnsen is a shareholder with the law firm of Gallagher & Kennedy, P.A., in Phoenix. He practices exclusively in the area of employment and labor law and civil litigation, counseling and representing management in such matters as employment discrimination and harassment claims, wrongful discharge claims, wage and hour disputes, employee hiring, discipline, and discharge procedures, drug and alcohol testing matters, arbitrations, restrictive covenants, and miscellaneous employment policy matters.

Don received his bachelor's degree from the University of Arizona (B.A. 1981). He received his law degree from the College of William & Mary (J.D. 1987), where he was Managing Editor of the William & Mary Law Review and a member of the Order of the Coif. After law school, he served as a judicial clerk to the late Hon. Clement F. Haynsworth, Jr., United States Court of Appeals for the Fourth Circuit. He is admitted to practice law in Arizona and Minnesota. He is a member of the Employment & Labor Law Section of the State Bar of Arizona, and a member of the Labor & Employment Law Section of the Minnesota State Bar Association. He has an "AV" rating from Martindale-Hubbell, and is listed in the 2007-11 editions of "The Best Lawyers in America" in its "Labor and Employment Law" category.

1. Employment Discrimination/Sexual Harassment.

- a. Representation of employers in charges of discrimination and harassment with the Equal Employment Opportunity Commission, the Arizona Civil Rights Division, and other agencies.
- b. Representation of employers in discrimination and harassment litigation in state and federal courts.

2. Wrongful Discharge.

- a. Counseling employers on employee discipline and discharge matters.
- b. Representation of employers in litigation in state and federal courts (wrongful discharge, breach of employment contract, breach of covenant of good faith and fair dealing, wrongful discharge in violation of public policy, intentional and negligent infliction of emotional distress, negligent hiring, retention, and supervision, defamation, invasion of privacy, and false imprisonment).

3. Miscellaneous Employment Matters.

- a. Review of employment applications and recruitment, interviewing, and hiring procedures.
- b. Counseling employers on drafting employment agreements and severance agreements.
- c. Counseling employers on negligent hiring, retention, and supervision issues.
- d. Review and interpretation of employee handbooks and policy manuals.
- e. Review and interpretation of personnel policies (absenteeism, vacation, sick leave, discipline, wage payment, etc.).
- f. Counseling employers on internal complaints and investigations.

4. Federal/State Workplace Regulation.

- a. Counseling employers on federal and state workplace regulatory compliance:
 - Fair Labor Standards Act (overtime and minimum wage matters, child labor matters)
 - Family & Medical Leave Act
 - Worker Adjustment Retraining & Notification Act (plant closing statute)
 - immigration matters
- b. Representation of employers in administrative claims before federal and state regulatory agencies.
- c. Representation of employers in civil litigation with federal and state regulatory agencies.
- d. Representation of employers in private civil actions by current and former employees.

5. Drug and Alcohol Testing.

- a. Counseling employers on development, implementation, and administration of drug and alcohol testing programs.
- b. Counseling employers on compliance with the Drug-Free Workplace Act.
- c. Counseling employers on compliance with state statutes and local ordinances regulating permissive workplace drug and alcohol testing.

- d. Counseling employers on compliance with the Omnibus Transportation Workplace Testing Act of 1991, requiring drug and alcohol testing.
- e. Representation of employers in litigation over drug and alcohol testing, including invasion of privacy claims.

6. Labor-Management Relations.

- a. Representation of employers in grievance arbitration proceedings.
- b. Representation of employers in unfair labor practice charges before the National Labor Relations Board.

7. Unemployment Compensation Claims.

- a. Counseling employers on claim adjudication procedure.
- b. Representation of employers in contested claim proceedings.
- c. Representation of employers in appeals of contested claims.

8. Non-Competition Agreements.

- a. Counseling employers on the development of agreements.
- b. Representation of employers in litigation to enforce agreements.
- c. Defense of employers in litigation over unenforceable agreements.

The Enforcement of Restrictive Covenants Against Former Employees

Don Johnsen
Gallagher & Kennedy, P.A.
September 14, 2011

1

Judicial Bias Against Restrictive Covenants

- Restrictive covenants are a form of "restraint of trade"
- Courts are biased against restrictions
- Courts only enforce reasonable restrictions
- Ambiguities are construed against the employer

2

Restrictive Covenants Are Governed By State Law

- No federal law regulating the topic
- Each state makes its own rules concerning enforcement
 - Statutes (California, e.g.)
 - Case law
- Need to consult with attorney in your state

3



“Consideration” For Employee’s Promise

- A restrictive covenant is a contract
- No contract is valid unless it is supported by legal “consideration”
 - Employee receiving some value in exchange for his or her promise
 - Employer giving up some value in exchange for employee’s promise

4



“Consideration” For Employee’s Promise

- New hire
 - Requiring that new hire sign restrictive covenant as a condition of hire: valid consideration
 - But only if all new hires in that position also had to sign similar agreements, or actually bargained for job without restrictions


5



“Consideration” For Employee’s Promise

- Existing employees
 - Bonus, pay increase, promotion, desirable transfer, etc.
 - But only if workers who do not sign the restrictive covenant do not get the bonus, etc.


6



Reasonableness Of Restrictions

- Temporal scope (duration)
- Geographic scope
- Functional scope


7



Reasonableness: Duration Of Restrictions

- Restriction valid only for time required for a replacement to prove himself or herself to the customers
 - Employment records will be relevant
 - Impact of periodic nature of contact with customers
 - One year is usually fairly safe

8



Reasonableness: Geographic Scope Of Restrictions

- Restriction must be limited to geographic area where employer does business
- Many cases have voided restrictions that were not limited to geographic area where the employee worked

9



Reasonableness: Geographic Scope Of Restrictions

- Nonsolicitation clause is reasonable in geographic scope by self-definition
- But beware of nonsolicitation clause that includes clients with whom the employee did not work

10



Reasonableness: Functional Scope Of Restrictions

- Restriction must be limited to the type of service or product that the employer provides

11



Legal Effect Of Invalid Restrictions

- Invalid restrictions are unenforceable
- "Blue Pencil" rule
 - Court may strike out an unenforceable clause, and then see what's left
 - Only if contract contains a "severability" clause
 - But court may not re-write unenforceable clauses

12



Legal Effect Of Invalid Restrictions

- “Blue Pencil” rule
 - Value of “step-down” provisions
 - Geographic areas
 - Time periods
 - Court may strike out portions of restriction, while leaving remainder in place

13



Damages Issues

- Difficulty in proving actual damages
 - Customer testimony re placement of business
- Consider “liquidated damages” clauses
 - Damages for breach of nonsolicitation
 - Damages for actual loss of business

14



Further questions?

15
