What To Do About Time Limitations in NDAs

Client Alert
1.10.2023

Clients are in regular receipt of Non-Disclosure Agreements ("NDAs") that include limited periods of the obligations not to disclose or use certain information for other than a designated purpose ("Time Limitations"). Time Limitations often range from three years from the date of disclosure to five years from the termination or expiration of the NDA. Clients wonder if their own NDAs should or must include Time Limitations and if they should accept Time Limitations in the NDAs they receive. A basic take-away from this Alert is to NOT automatically insert or accept Time Limitations in an NDA. Much depends on what will be disclosed and the choice of applicable law in the NDA.

A company's suppliers, customers, and other counterparties may have specific reasons for including Time Limitation or they may include them without any specific purpose because they have seen others do it. As to inclusion because of perceived best policy, the rationale could be that (a) it is too difficult to monitor restrictions over a long period, (b) the practice in a relevant industry (i.e., NDA's with investment bankers which are generally very short by industry custom), (c) consideration that financial and other information becomes stale and not worth protecting, or (d) a concern that applicable law may require that there must be a Time Limitation in order to enforce the NDA--in effect treating the NDA much the same as a non-competition agreement. This last concern is the topic of this Alert.

Companies typically attempt to protect both (a) trade secrets and (b) confidential information that does not rise to the level of a trade secret. A "trade secret" is confidential information that satisfies a higher level of confidentiality and protections against inadvertent disclosures. Trade secrets are protected by statute (in Michigan, the Michigan Uniform Trade Secrets Act, and the federal Protect Trade Secrets Act). In addition, all confidential information (including trade secrets) constitutes property that

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may be protected by contract (i.e., an NDA), *Follmer, Rudzewicz & Co v Kosco*, 420 Mich 394, 402-404 (1984).

In Michigan, and most states, companies do not face the issue of the risk of unenforceability of an NDA because of a lack of Time Limitation. Michigan law permits NDAs to have no time limitations. *Hayes-Albion Corporation v Kuberski*, 421 Mich 170 (1984). See also *Superior Consultant Co v Bailey*, No. 00-CV-73439, 2000 WL 1279161, at *9 (ED Mich Aug 22, 2000) ("indefinitely prohibiting the disclosure of confidential information, is also reasonable, and is consistent with Michigan public policy as embodied by the MUTSA"). Thus, many of the NDAs used by Michigan companies do not have a Time Limitation. However, in some jurisdictions a Time Limitation may be required.

The law in a few states may limit the length of time that non-trade secret confidential information may be protected in that state—particularly in the employment context. For example, some Illinois and Georgia cases require temporal limits on NDAs in the employment context. Wisconsin law prohibits all NDAs with no Time Limitation. In Iowa, the absence of a Time Limitation requires an inquiry by the court as to whether the NDA unreasonably restricts an employee's rights. West Virginia case law suggests that NDAs should be analyzed in the same way as noncompete agreements, and that an excessively broad covenant with respect to time is unreasonable on its face, which renders such NDA void and unenforceable—at least in the employment context. Similarly, Florida case law and statutes require an analysis of NDAs and noncompete agreements under the same standard, with the focus of the analysis being on reasonableness of factors such as geography and the type of business/trade. For example, including the hours a company is open to the public in the definition of confidential information would be unreasonable.

Thus, it is important to be familiar with the law of the state whose law is elected in the NDA. As a general rule, as noted above, the law of Michigan is an appropriate selection for NDAs that have a broad scope, have a Time Limitation, or have a long Time Limitation (e.g., 10 years). It is generally advisable to elect Michigan law as the NDA's governing law and to include a forum selection clause stating that any disputes arising out of the NDA shall be resolved exclusively in a Michigan court. Agreeing to another state's substantive law or jurisdiction without understanding that state's law is not advised.

Those companies that include a Time Limitation in NDAs, regardless of their reasons, have in recent years become aware of a potential flaw in using a Time Limitation. How should trade secrets be treated? Trade secrets (such as the Coca-Cola formula) do not become "stale" and are not likely red-flagged by common law limitations on NDAs, but what about NDA's that reference trade secrets and have Time Limitations? Such NDAs often also have an integration (complete agreement) clause. This permits a potential argument that protection of trade secrets expires with the Time Limitation.

A solution for companies that use Time Limitations is to draft NDAs that provide for two Time Limitations - one for trade secret confidential information and one for non-trade secret confidential information. The Time Limitation for non-trade secrets (a) should comport with the needs of the company based on the type of information at issue and (b) should be reasonable. The Time

Limitations for trade secrets should be the "longer of the specific Time Limitation or the period during which the information remains a trade secret."

Lastly, to minimize any potential confusion as to what information is a trade secret and what information is simply non-trade secret confidential information, companies should consider making a diligent effort to specifically identify in the NDA the confidential information which constitutes trade secrets. Any internal discussion of this topic should be done under the direction of counsel to maintain a privilege against undesired disclosure during discovery in litigation. Albeit burdensome, this is good business management practice. The company could then focus on maintaining the confidentiality of the identified trade secrets and have readily available information for attorneys to use in seeking injunctive relief. If appropriate, a party could specifically designate in the NDA the type of information that is a trade secret. Whether the identification is an NDA of the specific type of trade secret (not the trade secret itself) in the NDA is appropriate is open to discussion. Even if the results of such an internal study do not make it into the NDA, it will be helpful to developing a policy on a company's confidential information and enforcing it in court.

If you have any questions about this topic, please contact the authors or your Butzel attorney for further assistance.

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