Common Mistakes That Will Ruin a Non-Compete Agreement

By Jake Edmiston

An internal investigation at a commercial travel agency found an employee was filing fraudulent expense claims, cheating on time sheets and embellishing his deliverables. But the salesman had a major airline as a client, and when the company fired him he took the client with him to a competitor.

"We could have stopped him," says New York attorney Nicholas Fortuna, who didn't draft the contract but was called in to help when it became clear that the employee's non-compete agreement was poorly drafted – fraught with common errors that can see companies lose major clients and trade secrets.

The attorney with Allyn & Fortuna LLP tells the story as a cautionary tale of the perils of non-compete clauses, specifically after corporate investigations find grounds for an employee's dismissal.

"Even if the employee is proven to be a loathsome character," Fortuna says, "if he has clients, someone is going to hire him."

But stopping former employees from divulging confidential information is a complicated undertaking, as judgments on non-compete clauses vary wildly from state to state. California, for example, generally refuses to enforce them, and most courts will reject any broadly "restrictive covenants" that cause undue harm to the employee.

"If it makes it impossible for the employee to participate in the economy, the court's won't enforce it," Fortuna said. "The restriction can't be any broader than is necessary to protect an employer's interests."

The bulk of mistakes are made during the drafting of a non-compete agreement – all of which can be avoided.

How to Ensure Your Non-Compete Agreement is Valid

- **Know your assets.** "The biggest mistake we see is employers are too broad when they define their interests," Fortuna said. Non-compete clauses are meant to allow employers to invest in training and expose new hires to sensitive company information, so any non-compete that broadly restricts an employee from working for a competitor is unlikely to hold up in court.
- **Be specific.** According to Fortuna, the contract needs to clearly establish what interests would be at risk if an employee defected to a competitor.

Clients signed or courted during the employee's

tenure are considered property of the employer, since the client relationship was developed using "the interests and resources of the company."

For a company asset be considered a trade secret – which ranges from formulas and processes to devices – the employer needs to prove it's truly a secret. To do so, it must be clear that the company had exclusive knowledge of the asset and it took precautionary measures to keep the knowledge secret.

- **Don't get carried away.** Contracts will often set arbitrary temporal and geographic restrictions, which make the agreement less likely to be enforced. The time and area where an ex-employee cannot work for a competitor should "cover no more than is necessary to protect the employer's legitimate interests," Fortuna said.
- **Be wary of where the employee works.** Each state brings a different set of challenges to non-compete enforcement, and employers can sometimes decide which laws they'd prefer. For example, if a company is headquartered in New Jersey but the employee works at a facility in West Virginia, Fortuna said the employer may be able to choose which law the non-compete contract will be governed by. But it's a multi-factor decision that should be made alongside legal counsel, he said.