

Non-Compete Agreements: Securing Your Company's Assets

By Nicholas Fortuna, Managing Partner, Allyn & Fortuna LLP

Non-compete agreements can be an effective tool to restrict an employee's post-employment ability to work for a competitor or to prevent the employee from starting a competing business.

Employers began using restrictive covenants in England in the 15th century to lock in the employment relationship between master craftsmen, journeymen and apprentices for a period of years.

During the Industrial Age, courts changed their approach to these relationships and started to balance

societal interest in a free market against an individual's freedom to contract. Judges began to look at the reasonableness of the restrictions. Today, non-compete agreements are primarily used to protect the employer's trade secrets, goodwill, customers and confidential information, and to prevent unfair competition.

The purpose of non-compete agreements is twofold: it allows the employer to invest in training and development of its employees, and protect the employer by preventing the employee from trying to take that training and going to work for a competitor. Non-compete agreements also protect the legitimate interests of the employer: trade secrets, confidential information, and goodwill developed with clients.

Because state law governs non-compete agreements, the permissible scope of restrictions and their enforcement differ from state to state. A few states, including California, do not even recognize non-compete agreements.

Employers run into trouble enforcing non-compete agreements because an employer is only entitled to protect certain legitimate interests from unfair

competition and nothing more. Legitimate interests are clients and relationships that the employee acquired while working for the employer, confidential information, trade secrets, solicitation of the employer's clients, and solicitation of other employees to work at another enterprise, and employment with a competitor.

Whether the employer's interests are entitled to protection is determined on a case-by-case basis consideration of the particular circumstances of the employment relationship. While courts in some states

will void an agreement because the employer defined its interest too broadly, courts in other states will partially enforce provisions of the agreement to the extent that the court can identify the employer's legitimate interests that are entitled to protection.

The restriction must be no broader than necessary to protect the employer's interests. It must only be limited to legitimate interests that, if not protected, would give the former employee an unfair competitive advantage, but must also be reasonable in duration and geographical area. The reasonableness of the time and area covered by the restriction will be determined based on what is necessary to prevent exploitation of the employer's interests and the former employee from having an unfair competitive advantage.

Good vs. bad non-competes

By way of illustration, here is an overly broad restrictive covenant: "The employee shall not work for or have an interest in any entity that is in a similar business as the employer throughout the United States for a period of 20 years." Courts will not enforce restrictions that in

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essence prevent an employee from working and supporting himself in his chosen field.

A more reasonable restriction would be: "For a period of two years, the employee shall not solicit or in any way service clients or potential clients said employee developed or established a relationship with during the time of his employ. A potential client is a person or entity the employee has come into contact customer relationships, business strategies, new product announcements, confidential information, goodwill, and trade secrets from unfair competition by the former employee.

Therefore, an employer should conduct a detailed analysis of what must be done to protect its interests and the extent to which it may be protected under the law of the states that govern the employment relationship. The determination of reasonableness of post-employment restrictive covenants must take into account the particular facts and circumstances giving context to the agreement.

Undue hardship and injurious to the public

After it is determined that the restrictions were narrowly tailored to protect an employer's legitimate interests, the next factor to analyze is whether the restrictions impose an undue hardship on the employee.

Notwithstanding that a restriction is reasonably drawn, if it imposes an undue hardship, it will not be enforced. A common example of an undue hardship is if that the employee is unable to work as a result of the restriction.

Lastly, the restriction on post-employment work cannot be injurious to the public. If the restriction results in the public not being able to obtain needed services in the community or the restriction causes the cost of goods or services to go up, it may be considered injurious to the public. Even if the restrictions meet all of

within the last two years of his employment and/or was solicited to become a client."

This example protects only one of many interests the employer has to protect after the employer-employee relationship comes to an end. The particular circumstances of the employment may permit broader restrictions if they are tailored and necessary to adequately protect, for instance, the employer's the other requirements, but will injure the public, they will not be enforced.

The employer's ability to protect itself from unfair competition by former employees will be more complex if the employer operates in more than one state. As previously stated, each state has its own laws with respect to post-employment non-compete agreements. Many states have similar laws with minor differences that are nevertheless consequential. Some states' laws differ in major ways.

The challenge for the multistate employer is to address differences in state law and still have adequate protection from unfair post-employment protection from unfair post-employment competition. The important point is to know in detail the applicable law and account for the differences in the law states in which the employer operates.

[Nicholas Fortuna](#) is founder and managing partner of the law firm [Allyn & Fortuna LLP](#). He concentrates in complex employment, commercial and corporate litigation and represents a broad range of clients, including Fortune 500 companies, nationwide retailers, major manufacturers, biotech firms, banks, restaurant chains, construction industry professionals, regional and family-owned businesses and non-profits. Fortuna advises these clients on issues related to employment law and commercial disputes.