

Business & Law Newsletter

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For a noncompete to be enforceable, it must be drafted correctly with the appropriate consideration given at the appropriate time.

IS YOUR NONCOMPETE ENFORCEABLE?

Many employers and employees have signed noncompete, non-solicitation and non-disclosure agreements. One of the questions we, as lawyers, are most often asked is whether these agreements are enforceable in Texas. The answer largely depends on the agreement. Certainly enforceable agreements can be drafted. Over the course of the last year, however, Texas courts, especially those in Dallas, have clarified the rules making it more difficult to enforce noncompetes. Now, more than ever it has become necessary to re-examine each part of the agreement to determine if the agreement is, in fact, enforceable.

WHAT IS A NONCOMPETE AGREEMENT?

Generally, a noncompete agreement appears as a statement in an employment agreement providing that in return for some stated consideration, the employee agrees he will not compete with the employer for a specified time period (i.e. six months or one year) after the employee leaves or is terminated. Most often, the employer remains an at-will employee, meaning he can leave his job or be terminated for any reason except an illegal reason.

WHAT IS THE CONTROVERSY OVER "THE ENFORCEABILITY" OF NONCOMPETES?

Virtually all of the recent discussions about enforceability centers around what is sufficient consideration and when does it have to be exchanged. For example, with every contract, such as purchasing a home, something of value is exchanged between the parties at closing-which is the time the deal is completed. Likewise, with noncompetes, the important moment is at the time the agreement is signed. With noncompetes, this time period is dictated by statute. Thus, a court will look to see if at the time the agreement was signed something of value was given by the employer to the employee in exchange for the agreement not to compete.

Further, the type of consideration for noncompetes is important. Generally, courts do not like to enforce noncompetes because they are considered restraints on trade and could prevent an employee from obtaining a job which would feed his or her family. Thus, the consideration for a noncompete must be of a type which would "give rise" to a reason to restrain trade. That appears to be code words for confidential information or specialized training. Overall, to be enforceable there needs to be confidential information or specialized training provided to the employee at the time the agreement is made.

WHAT OTHER REQUIREMENTS ARE NECESSARY FOR A NONCOMPETE?

In addition to the consideration and timing requirements, the noncompete must be reasonable in scope, time or geography. Specifically, the noncompete should be related to the clients or subject matter on which the employee worked while employed; the time period restrained should likely be no more than two years and the geographic restrictions should be reasonably related to the employer's business. The applicable statute provides for reformation of the noncompete if it is enforceable, but overly broad in scope, time, and geography. If, however, the agreement is so broad that it is viewed as unreasonable, it may be judged unenforceable. The agreement should be drafted to be narrow enough to be enforceable, yet broad enough to protect the business.

**FOR MORE INFORMATION
ON THIS TOPIC,
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WHAT ABOUT NONDISCLOSURE AND NONSOLICITATION COVENANTS?

Nonsolicitation covenants are agreements not to call on or solicit clients or customers of the business once an employee leaves. Because they arguably restrain trade, meaning they limit the employees ability to work, they are treated like noncompetes and the same analysis is applicable.

Nondisclosure covenants are agreements not to use or disclose confidential information. Nondisclosure covenants are more frequently enforced than noncompetes because they do not restrain trade. Meaning, they do not prevent an employee from seeking new employment. Further, there is a common law duty not to use or disclose confidential information. Therefore, even without an agreement, there is a duty owed by the employee. The agreement is worthwhile, however, because it becomes contractual and could allow for the recovery of attorney's fees if an enforcement action becomes necessary.

WHAT CAN BE DONE TO ENFORCE A NONCOMPETE?

Many employers seek to enforce a noncompete by obtaining a temporary restraining order. By its nature it is temporary but it does restrain an individual from conduct for generally at least seven days. This means it could keep a person from working for a competitor for that time period until the hearing on the temporary injunction is scheduled. The temporary injunction hearing requires the person or entity pursuing the relief to show imminent harm, irreparable injury and that there is no adequate remedy at law. In other words, that money will not solve the problem. The purpose of the temporary injunction hearing is to freeze the circumstances or preserve the status quo until the time of trial. The matter will still be tried to determine if the noncompete was enforceable, the employee breached the agreement and whether confidential information was used or disclosed.

CONCLUSION

As you can see, the world of noncompetes can be complex. More importantly, for the noncompete to be enforceable, it must be drafted correctly with the appropriate consideration given at the appropriate time. While we have attempted to simplify the analysis, the cases discuss whether the agreement is "ancillary to an otherwise enforceable agreement" at the time the agreement is made and there also remain many issues regarding existing employees and what to do about past consideration. In other words, if the employer has already given the employee the confidential information, can it bind him to a noncompete without giving him something new? (The answer is most likely no.)

BOTTOM-LINE

Due to the complexity of these issues, if you believe either the noncompete or non-disclosure needs a second look, you may wish to do so before your top-sales associate finds a new position. Likewise, if you have signed a noncompete and question its enforceability, it may be worth seeking an opinion before you find that dream job. ■

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