Employment Law Advisor: Non-Compete Agreements Terms

Important Terms to Include in Non-Compete Agreements

April 06, 2013

Non-compete agreements restrict an employee's right to work for a competitor for some period of time after termination of employment. As with other types of contracts, certain terms can favor one party over the other, or can be particularly important to a party who later seeks to enforce the agreement in court. This month's edition of the *Employment Law Advisor* reviews some contract provisions that can be helpful — or may be viewed by a court as necessary — for employers to include in their non-compete agreements with employees. These provisions may be necessary for a court to find that the non-compete is reasonable, or may help the employer achieve its objective of enforcing the non-compete's terms.

Time and Geographic Scope

To be enforced by courts, non-competes must be reasonable in duration and geographical scope. Employers are at risk if their agreements include time and geographical restrictions that are too broad. Except in situations involving a sale of a business, non-compete restrictions of more than one year in duration may not be enforced and, in some industries, six months may be more appropriate.

The appropriate geographical scope for a non-compete usually depends on the nature and scope of the employer's business and the protectable interest(s) at stake. Where goodwill (*i.e.*, customer relationships) is the only business interest involved and the employee's customer contact is limited to a particular region, the non-compete should be limited to that region. Where confidential business information is the business interest (and a covenant not to disclose may not provide adequate protection), it may be appropriate for the non-compete to have no geographical limitations.

Because the scope and types of restrictive covenants that are appropriate typically vary from position to position and by industry, it is often not possible (or at least not wise) for an employer to have a one-size-fits-all agreement for all employees to sign. Moreover, courts may be more inclined to enforce a non-compete that is specific to a particular employee, as opposed to a fill-in-the-blank agreement. Furthermore, courts are often reluctant to enforce non-compete agreements against lower-level employees who do not have managerial and/or professional status.

Tolling of Non-Compete Period

Because the period that a court will enforce a non-compete is limited, the contract should include a provision stating that the non-compete period will be "tolled," or extended, for the length of time the employee is found by the court to have been in breach of his or her obligations. With such a provision, the employer should be able to obtain the full period of the non-compete's protections.

Protectable Interests, Injunctive Relief, Attorneys' Fees, and Costs

Non-competes should identify the protectable interests (*i.e.*, customer relationships, trade secrets, and confidential information) and include the following employee acknowledgements:

- the interests are vitally important to the employer's business;
- breach of the non-compete will cause irreparable harm to the employer's business;
- the employer is entitled to immediate injunctive relief in the event of the employee's breach; and
- the employee has returned to the employer and not retained any documents or electronically stored information containing confidential information and/or trade secrets.

Non-competes also should include a term requiring the employee to reimburse the employer for its attorneys' fees and court costs if the employer has to file suit to enforce the agreement. While a court ultimately may choose not to enforce an attorneys' fees provision, the existence of such a provision can provide substantial leverage to the employer. An employee considering going to work for a competitor may be less likely to do so if the employee is at risk of being responsible for the former employer's legal fees in addition to the employee's own legal expenses.

More and more frequently, employers seeking to enforce non-competes are incurring costs for engaging forensic IT professionals to examine the departing employee's computer for evidence of wrongdoing, such as stealing customer contact information and documents containing confidential information. Employers should consider including in their non-competes a promise by employees to reimburse the company for such "electronic discovery" costs.

Choice of Law and "Forum" Selection

Non-competes should include terms providing that the law of a particular state, such as Massachusetts, will control the interpretation and enforcement of the non-compete agreement, that all actions involving disputes arising under the agreement must be brought in the particular state, and that the employee consents and submits to the jurisdiction of the courts in the state. Many employers have multi-state operations and in some states, most notably California, non-competes may not be enforceable or may be enforceable only in very limited circumstances. Such "choice of law" and "forum selection" clauses may give employers some degree of predictability in assessing the likely outcome of a non-compete dispute, as well as where it will be litigated. Further, through forum selection clauses, employers can choose a location for litigation that is more convenient for them, and not the employee and/or the new employer.

Assignment

Non-competes should include a contract term expressly permitting the employer to assign the agreement to an acquirer. The existence of enforceable non-compete agreements for key employees often is an important issue when a business is being acquired. Unless a non-compete contains a proper assignment clause, courts may not permit the assignment of the non-compete to the acquirer without the employee's express consent.

Material Job Changes

Many employers assume that non-compete agreements signed by employees at the time of hire remain enforceable even if changes occur to the employees' job. However, the "material change doctrine" can be invoked by former employees to void non-compete agreements signed at the inception of employment. The material change doctrine holds that "each time an employee's employment relationship with the employer changes materially such that they have entered into a new employment relationship, a new restrictive covenant must be signed."

Although the safest course for employers is to require their key employees to sign new non-

competes in connection with substantial job changes, employers also should include in their non-compete agreements language that anticipates job changes and states that the non-compete restrictions remain applicable. An employer can argue that such language put the employee on notice that the agreement would remain in effect for the entire period of the employee's employment with the employer, regardless of any changes in the terms and conditions of employment, including changes in duties, position, and compensation.

Right to Inform New Employer

Non-compete disputes commonly are resolved by pre-litigation discussions between the employee's current and former employers. For candid discussions to occur between companies, it is helpful if the new employer can review the employee's non-compete with the former employer. As such, non-compete agreements should include a provision allowing the former employer to provide a copy to the employee's new employer. This will address at the outset any potential objection an employee may make on privacy grounds.

While the above contract provisions, in general, are helpful for all employers to include in their non-compete agreements, employers should consult with employment counsel to tailor their non-competes to their companies, industries, and employees. For questions about this topic, please contact any member of our Employment Law Group.