

## South Carolina Business Journal, December 1998

### **NON-COMPETE AGREEMENTS PROTECT COMPETITIVE EDGE, TOO**

By David E. Dubberly

A recent column about preventing trade secret theft in today's competitive business environment focused on drafting and enforcing agreements not to disclose confidential information. Another tool available for protecting trade secrets is the covenant not to compete, which prohibits an employee from competing with the employer during employment and for some period of time after employment ends.

#### Enforceability of Covenants Not to Compete

Because covenants not to compete restrict competition and may deprive employees of their ability to earn a living once they leave the employer, they are strictly construed against the employer and enforced only if they are:

1. necessary to protect a legitimate business interest of the employer;
2. reasonably limited as to time and territory;
3. not unduly restrictive of the employee's ability to earn a living;
4. reasonable from a public policy standpoint; and
5. supported by valuable consideration.

If a covenant not to compete fails to meet any one of these five criteria, it may not be enforced. Accordingly, employers should make sure the restrictions imposed by the covenant are not overly broad in light of all the circumstances.

#### Practical Tips For Employers

Legitimate Business Interest. An employer has a legitimate business interest in preventing former employees from soliciting customers and employees. To be enforceable, covenants not to solicit customers should relate only to customers who had an existing relationship with the employer or who were being solicited at the time the employment terminated. Employers should be aware that some courts have decided that covenants not to solicit customers or employees do not prevent former employees from accepting business or applications from the former employer's customers or employees.

Time and Territory Limitations. Time restrictions should be limited to the period reasonably necessary to protect the employer=s business interests. If the employer=s interest is in preserving customer relationships, a court considering whether to enforce a covenant not to compete will ask how long it should take for the employer to place a new employee in the departing employee=s position and for the new employee to demonstrate his effectiveness to customers. While there is no general rule as to the reasonable length of a restriction on competition, courts usually enforce otherwise valid restrictions lasting no more than one year.

Territorial limitations should be no broader than the area in which the employer is engaged in active marketing efforts. If the employer does business nationwide, nationwide protection may be appropriate, especially if the employee has contact with customers nationwide. But even a countywide restriction may be overbroad if most of the employer=s business comes from only a specific area of the county. A restriction on contacting and soliciting customers may be an appropriate substitute for a territorial limitation.

Not Unduly Harsh. Courts may consider a covenant unduly harsh if it applies to an employee who did not have access to confidential information. That is why covenants not to compete are usually sought from employees with access to information about what makes a company=s products unique, and from employees having a direct relationship with customers.

Also, a covenant that prohibits an employee from doing any work for a competitor may be unduly harsh if the employee performed only a specific type of work for the employer. For example, in 1995, the South Carolina Court of Appeals refused to enforce a covenant that prohibited a Hilton Head Island facial spa employee who performed Afacials@ from working on the Island for three years in any business that competed with the spa. The employee left the spa, and following a two-month maternity leave, went to work for a competitor as a manicurist. The court concluded that the covenant was not enforceable because it would prevent the employee Afrom earning a livelihood through legitimate means.@

Reasonable From A Public Policy Standpoint. Courts have recognized that covenants not to compete often impact the public at large. If the impact is detrimental, for example, if enforcement would prevent the public from being able to access certain products or services, the covenant may not be enforced. Public policy issues frequently affect the enforcement of non-compete agreements in the medical profession. When medical practices seek to enforce covenants not to compete against specialists who leave to join competing practices, courts typically examine whether there is a shortage of specialists in the area, and what would be the impact on the public if an emergency situation arose, in deciding whether a noncompetition covenant should be enforced.

Consideration. The employee must receive Aconsideration,@ or something of value, in exchange for signing a covenant not to compete. As far as a new hire is concerned, a job offer is sufficient consideration. In South Carolina, continued employment of an at-will employee has been held to be sufficient consideration for a covenant not to compete signed after employment has begun.

To be on the safe side, however, employers may consider offering something extra, such as a promotion, a pay increase, or a bonus when a current employee is asked to sign a noncompetition agreement.

Additional Provisions. Finally, additional provisions can be added to put more teeth into covenants not to compete. These include:

1. A liquidated damages provision that requires the employee to pay the employer a specified amount of money as compensation for lost sales or profits if customers leave the employer and become customers of the former employee or his or her new employer during a certain period of time after the ex-employee's departure.
2. A forfeiture provision that requires an ex-employee to forfeit severance payments or other post-termination benefits if he or she competes against the employer within a certain territory or solicits the same business from the employer's customers during a certain period of time after the employee leaves the employer.
3. An inventions and work for hire provision that obligates the employee to disclose and assign to the employer any inventions, products, or writings relating to its business that the employee develops during his or her employment.

In conclusion, while non-compete agreements can help employers maintain a competitive stance, overly broad covenants not to compete are usually struck down, leaving the employer without any protection at all. Accordingly, employers should take a close look at the business interests they are attempting to protect, and determine the least burdensome restrictions that will protect their interests.