BARNES & THORNBURG LLP
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TRUE / FALSE QUESTIONS
TO HELP YOU UNDERSTAND NONCOMPETE AGREEMENTS

1. **Noncompete agreements aren't enforceable anyway.**

In almost all states this is **FALSE**. There are exceptions – most notably, with very few exceptions noncompetes are not enforceable under California law. But in the vast majority of states, noncompetes generally are enforceable to the extent they are reasonable. (More on what that means below.)

2. **What a court will find to be a "reasonable" noncompete is unpredictable and depends on the specifics of the particular situation.**

TRUE. Noncompetes are an area that lawyers call "fact specific." That means it is very hard to draw general rules that apply to a broad range of circumstances, which in turn means it is a challenge for companies to draft agreements with sufficient certainty that they will be enforceable. Courts will look at all the particulars of the situation in determining what is enforceable, and different courts will have different views on similar situations.

3. **Despite the unpredictability, companies can usually enforce a noncompete for one year.**

Assuming the noncompete is reasonable in terms of geography and the scope of limited activities, this is **TRUE**. There are certainly exceptions, but a one year noncompete in a situation where the employer can demonstrate a reasonable business need for the restriction will often be enforced.

4. **The company will not be able to enforce a noncompete if it let the last guy who left with a noncompete leave without contesting it.**

FALSE. However, it certainly becomes harder to enforce noncompetes the more that the company chooses not to enforce it against departing employees. When trying to enforce a noncompete, the company will need to demonstrate for the court its business need for the restriction. The less the employer enforces its agreements, at least without a convincing explanation, the harder it becomes to enforce them.

5. **The company cannot enforce a noncompete agreement against an employee who was terminated.**

FALSE. There is no rule in most states that a noncompete cannot be enforced against an employee who was terminated. However, as a court balances all of the factors in a particular situation, it may weigh the circumstances of the employment separation when crafting a solution.

6. **A company cannot enforce its own noncompete agreements if it hires employees in violation of its competitors' reasonable noncompete agreements.**

FALSE as an absolute rule, but this is a close call. Again, there is no rule that a company cannot enforce noncompetes just because it does not have clean hands when it comes to other companies' noncompetes, but such conduct will often make it harder for the company to enforce its agreements. Noncompete cases are really about *fairness* and *reasonableness* – it is hard to win many disputes over standards under these circumstances.

7. **A noncompete signed by an employee after the employee has already been employed is worthless unless the employer gives the employee some additional compensation or other benefit.**

In Ohio, this is **FALSE**. The Ohio Supreme Court decided several years ago that the mere continuing employment is sufficient "consideration" to support a noncompete agreement. However, this rule is different in some states.

8. Ohio is a good state for employers seeking to enforce noncompete agreements.

TRUE. Because of the rule stated above, as well as the fact that Ohio courts will modify overbroad noncompetes to the extent needed to make them reasonable and enforceable, Ohio is one of the better states for an employer to seek to enforce noncompete agreements.

9. Since Ohio is a good state for enforcing noncompetes, by having the agreement specify that it will be subject to Ohio law, employers can ensure that courts in any state will treat their agreements favorably.

FALSE. The general rule in most states is that a court will respect the parties' choice of law provision provided that choice does not offend the public policy of the state in which the court sits. If the court sits in a state with significantly different noncompete rules, that court may simply reject the choice of Ohio law and apply its own law.

10. Noncompetes are most effective if they are tailored to different groups of employees' particular situations rather than using a single global agreement.

TRUE. The employer will most effectively be able to show a reasonable business need to support a noncompete if the agreement was prepared with specific reference to the employee signing it. For example, the agreements for sales employees and engineering employees might be expected to be somewhat different because those types of employees have different kinds of information and other company assets. Of course, the benefit of tailoring agreements must be balanced against the administrative hassle of multiple agreements – the system must be clear enough that employees can effectively administer it – but in most organizations at least 2 or 3 forms of agreements will likely be advisable.

11. Where a company decides not to utilize noncompetes, it may be beneficial to use lesser restrictions such as non-solicitation and confidentiality agreements.

TRUE. Some companies after careful consideration make a reasonable decision not to use noncompete agreements, for a variety of reasons. It may nonetheless be advisable for companies to use less restrictive covenants. In many organizations it is strongly advisable for most if not all employees to have confidentiality agreements. Another level of restriction is a covenant against soliciting employees and/or customers – because these covenants are more restricted, in some respects they can be easier to enforce.

12. A company can interfere with the at will status of its employees by having them enter into noncompete agreements.

FALSE, at least if the agreements are properly drafted. There is no reason in Ohio and most states that a company cannot have enforceable noncompetes and other restrictive covenants with at will employees.

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