

NONCOMPETES: Taking Your Drafting and Enforcement Strategies To the Next Level

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Today's Agenda

- Start with the basics
- How state laws drive strategy ... more than you might think
- Strategy issues – drafting and enforcement
- True/False
- Sample Agreement

Types of restrictive covenants

- Noncompete (don't work or contract for certain entities, industries, and/or geographies in certain positions)
- Nonsolicit
 - Don't contact, solicit, sell to clients, customers, prospects
 - Don't chase our personnel
- Confidentiality (keep your mouth shut)

Enforceability

- In general, most states will enforce restrictive covenants only if *reasonable* in:
 - time
 - geography
 - substance
- If any of the three is overbroad, courts will usually not (fully) enforce

State Laws Drive Strategy

- Both at drafting and enforcement stages
- Why?
 - Courts may not enforce choice of law
 - May even disregard choice of forum / venue
- In short: if you can be “competed with” in another state, you may end up in court there

State Laws Drive Strategy

This comes into play more often and for more employers and employees than many of them and their lawyers realize.

Key Differences Across States

1. *Is continuing employment sufficient consideration?*

- Examples

- YES - *Leatherman v. Management Advisors*, 448 N.E.2d 1048 (Ind. Ct. App. 1983)
- YES - *Lake Land Employment Group v. Columber*, 101 Ohio St. 3d 242 (2004)
- NO – *Labriola v. Pollard Group*, 100 P.3d 791 (Wash. 2004)

Key Differences Across States

2. *Will the court blue-pencil/modify your agreement to make it enforceable?*

- Examples

- *Rogers v. Runfola & Assoc., Inc.*, 57 Ohio St. 3d 5, 8 (1991) (“to the extent necessary to protect employer’s legitimate interests”)
- *Central Indiana Podiatry, P.C. v. Krueger*, 882 N.E. 2d 723 (Ind. 2008) (will only strike offending provisions)

Key Differences Across States

3. *Will the court extend the restrictive period during a period of violation?*

– NO – *Oxford Fin. Group v. Evans*, 795 N.E.2d 1135 (Ind. Ct. App. 2003)

– YES - *Rogers v. Runfola & Assoc., Inc.*, 57 Ohio St. 3d 5, 8 (1991) - YES

Some Key State Developments

- Talk of legislation restrictions (e.g. Massachusetts)
- Key states
 - Georgia towards the mainstream (11/2010 Constitutional amendment)
 - Texas towards mainstream? (*Marsh USA Inc. v. Cook*, 354 S.W. 3d 764 (Tex. 2011))
 - Illinois and continuing employment? (*Fifield*, 993 N.E. 2d 938 (2013))

California

- By state statute, unenforceable with extremely few exceptions
- Most workarounds ... don't
 - inevitable disclosure
 - choice of law
- Probably need separate agreement

How To Handle Differences Among State Laws?

- Choice of Law?
 - General test: If not offend public policy of forum state
 - How does that play on those key state differences?

How To Handle Differences Among State Laws?

- Choice of Forum / Venue
 - Even California may enforce these! (E.g., *Hartstein v. Rembrandt IP Solutions, LLC*, 2012 U.S. Dist. LEXIS 105984 (N.D. Cal. July 30, 2012))
 - But still not foolproof
- Filing First Matters

Drafting: How Aggressive Should You Be?

- Competing risks
 - One hand: insufficient protection
 - Other hand: possibility of nothing
- First question: what state(s)?

Drafting: How Aggressive Should You Be? (cont.)

- Second question: what business need can you articulate?
 - Not across the board: different positions pose different risks
 - Sales: how long to reinforce the relationship
 - Product / business plans: how long to market
- Does providing the court with a “menu” in the agreement work?
 - E.g. “whichever of the following is the most restrictive that the court will enforce”

Drafting: Considerations When Dealing with Multiple States

- Ease of administration calls for minimizing # of templates
- Important steps to make it work
 - Choice of law and forum
 - Tie employees to home state
 - Strong confidentiality program
 - Separate California document often advisable

Drafting: Transition Is Toughest

- Examples
 - Acquire companies
 - New implementation
 - Audit / clean up
- Consideration rules become key
 - Do you pay some and not others?

Other Drafting Pointers

- Employment contract can be at will
- Include nonsolicitation of employees and customers
- How much boilerplate: has purpose but often can be trimmed
- Assignability can be important
- Need clarity as to how it relates to any other employment documents

Enforcement: Do You Have To Go After Every Violation?

- Why you might not want to
 - Expense
 - Wasn't that good an employee anyway
- But if you do not, expect to explain it in the NEXT case
- Not an absolute but at some point ...

Enforcement: Should You Send a “Cease and Desist” Letter?

- Benefits
 - Often avoid litigation
 - Minimize any question regarding employee’s awareness
 - Show reasonableness
- Downside
 - Declaratory judgment action
 - Find yourself in another jurisdiction

Enforcement: How Quickly Do You Need To Act?

- Legal standard for injunction includes “irreparable harm”
- Hard to show irreparable harm if company let it slide

What If You Are On The Hiring Side?

- Critical: assurance from employee that no agreement
 - Avoid “tortious interference” against company
- Option: contact former employer first
- Option: employ individual outside restrictions for a period of time
- Document efforts

TRUE
or
FALSE?

Noncompete agreements aren't
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FALSE

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TRUE

Despite the unpredictability,
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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.

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FALSE

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

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FALSE

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

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FALSE

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.

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FALSE

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TRUE

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FALSE

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TRUE

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

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TRUE

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THANK YOU!

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