Covenants Not to Compete Are Tough to Enforce

By Tim Ducar, Law Offices of Timothy Ducar, PLC

Covenants not to compete instill terror in employees. As written, covenants not to compete can force an employee to stop working in his or her profession for months or years. Basic principles of law, and common sense, teach that contracts between parties should be enforced. Most contracts are enforced as written. However, courts look at some contractual provisions with skepticism, including covenants not to compete.

A covenant is a promise. A covenant not to compete is a promise in an employment agreement that states that, if that employee ever stops working for the employer, he/she will not compete against the employer.

Covenants not to compete are "strictly construed" against the employer. This means that if there is any doubt as to whether a court will enforce it, a court will not enforce it.

A court will not enforce a covenant not to compete if it is not reasonable. This means that a court will not enforce a covenant not to compete if 1.) the restraint is greater than necessary to protect the employer's legitimate interest or 2.) if the hardship to the employee outweighs the employer's legitimate interest. An employer has a legitimate interest in keeping its customer base and customer sources. It also has a valid interest in protecting its trade secrets. On the other hand, an employer has no legitimate interest in simply keeping the employee from working simply because the employer can.

When deciding whether a restraint is greater than necessary to protect its interest, courts look to the length of time and the geographic scope of the restraint. As for the length of time of the covenant, the time should be no longer than necessary to hire a new employee and for that new hire to demonstrate his/her effectiveness to customers. Thus, covenants that are three years long are often found to be too long. In the roofing context, if it would take three months to replace and train a salesman/estimator, a three month restriction may be reasonable.

As for the geographic scope, the geographic areas need to be limited. A geographic radius of 5 miles from the employer's office may be reasonable, but 50 miles may not be reasonable. Whether the radius in the covenant is reasonable depends upon the type of business.

Even if the restraint is reasonable, courts will balance the harm that enforcing the covenant would place on the employee with the employer's interest in keeping its customers and trade secrets. Courts are very reluctant to keep ex-employees from making a living and will err on the side of protecting the employee.

Courts are also not as likely to enforce a provision that causes harm to the public, for example, one that keep a surgeon from performing surgeries. Courts have found that this particular skill is needed by the public and it should not be unduly constrained.

Finally, covenants not to compete are more likely to be upheld when the sale of a business is involved.

In all, covenants not to compete should not instill terror in employees. While a properly drafted covenant not to compete can be found to be enforceable, they are rarely written narrowly enough that a court would find a particular covenant enforceable.

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