Employers Must Plan Ahead When Drafting Employee Non-Competition Agreements

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Employers often have misconceptions about the enforceability of employee non-competition agreements. Some employers believe that employee non-competition agreements are not enforceable at all. Others assume that an employee will be bound by the terms of a non-competition agreement exactly as written. In fact, the reality under Massachusetts law is somewhere in between.

As a general statement, Massachusetts courts will enforce a non-competition agreement signed by an employee if the agreement protects a legitimate business interest of the employer and if the scope of the restriction on competition is reasonable in relation to the interests that the employer seeks to protect (there are special exceptions to this general rule for physicians and for employees in the broadcast industry).

The types of legitimate business interests that Massachusetts courts have recognized include the employer's goodwill, trade secrets, and confidential information. In evaluating the scope of the restriction on competition, Massachusetts courts frequently consider the length of time of the restriction, the geographic area covered by the restriction, and the breadth of the activities that are prohibited.

Unfortunately, identifying the factors that a court will examine in ruling on the enforceability of an employee non-competition agreement does not necessarily lead to a meaningful prediction as to how a court will decide a particular case. In some instances, enforcement of the non-competition agreement is very likely.

For example, assume that an employer hires an inexperienced sales representative, provides her with sales training, assigns her an exclusive sales territory with an existing customer base, and provides marketing support for her efforts to retain existing customers and to develop additional customers. If this sales representative resigns two years later so that she can work for a competitor, then it is probable that a Massachusetts court would enforce a non-competition agreement that prohibits her from soliciting business from her prior employer's customers in her former territory, on behalf of the competitor, for a period of one year following her termination of employment.

In these circumstances, a judge is likely to find that the goodwill arising

from the customer relationships belongs to the employer, and that the scope of the restriction on competition is reasonably limited in time, geography, and restricted activities.

At the other end of the spectrum are circumstances in which enforcement of an employee non-competition agreement is very unlikely. For instance, assume that an employer owns a fleet of trucks used to deliver goods to customers, the identity of such customers is public information, and the truck drivers have little or no contact with the customers. If the drivers do not have access to the employer's trade secrets or confidential information, then there is little chance that a non-competition agreement that prohibits the drivers from working for competitors of the employer would be enforced (regardless of its duration or geographic scope).

In this example, a court would probably conclude that it does not protect any legitimate business interest of the employer, but rather is intended only to stifle competition.

The circumstances of most employee non-competition agreements fall somewhere between the extreme examples described above, and thus there will often be some uncertainty as to enforceability. An employer can improve the chances for enforcement by carefully tailoring the terms of the non-competition agreement as it is written.

This involves an approach that is contrary to the usual mindset for business negotiations, because it requires the employer to limit voluntarily what is asked of the employee, rather than compromising through a bargaining process. For example, an employer may limit the term of a non-competition agreement to one year, even though the employer would have preferred a much longer time period, in order to increase the likelihood that the agreement will be enforced.

Most non-competition agreements include a so-called savings clause that says, in effect, that if a court finds that the scope of the agreement is too broad, the court should still enforce the agreement within a scope that the court finds reasonable. However, it is generally considered safer to limit the scope of the agreement from the start than to rely upon the savings clause.

In addition to those mentioned above, courts sometimes consider other factors in deciding whether to enforce a non-competition agreement. Some examples:

- Was the agreement was disclosed as a requirement of employment before employment commenced?
- Will the employee will be able to earn a living if the agreement is enforced?

- Did the employee's position with the employer change after the date that the non-competition agreement was signed?
- Has the employer honored all of its payment and other obligations to the employee?

Employers can raise the odds of enforcement of an employee non-competition agreement by requiring that it be signed as a condition of the start of employment, or if employment has already started, by linking the signing of the agreement to a benefit that has not already been promised, such as a bonus or a promotion with a salary increase. Timely efforts to enforce a non-competition agreement are also important, as any unreasonable delay in pursuit of enforcement can be detrimental to the employer's case.

In summary, multiple factors affect the enforceability of employee non-competition agreements and make it difficult to predict a court's decision in many instances. Nevertheless, an employer can take practical steps in writing, entering, and enforcing such agreements to improve the employer's chances for success in requiring employees to honor their non-competition agreements.