Taking your non-compete agreement from good to great

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If your company is like many others, it has been using the same non-compete agreement for years with little or no changes.

So far, there haven't been any major problems and it seems to cover the bases: departing employees are not permitted to compete against your company for a specified period of time within an appropriate geographic area.

Figuring it's best to leave well enough alone, why make any changes?

As it turns out, lots of companies believe that their non-compete agreements provide better protection than they actually do and don't discover that there's a problem until it's too late.

All too often, an employer that finds itself needing to enforce its non-compete agreement will send a demand letter or file a lawsuit and, unfortunately, only after testing the application of its agreement in the context of a dispute, discovers that its agreement is not designed to handle specific situations, or worse, that the agreement is wholly unenforceable.

But you're a savvy advisor, so your company's non-compete agreement is good and it will hold up in court. The question remains, how can you turn your good non-compete agreement into a great non-compete agreement?

There are several provisions that might be missing from your standard form agreement — provisions that will provide your company a better shot of having its interests protected to the fullest extent possible when an employee leaves to join a competitor.

So, to help improve your company's chance of obtaining the best possible results, you can add a few simple clauses to your standard form agreement right now.

Some considerations

Non-competes, like all contracts, must be supported by consideration, so if you are making changes to any existing agreements with employees, make sure that consideration — which in some New England states is satisfied by continued employment — is provided in exchange for the modified non-compete.

For purposes of this discussion, we will assume that your non-compete has all of the basic provisions necessary for an enforceable agreement:

First, that it has a reasonable term — typically, a one-year limitation against working for a competitor is permissible.

Second, we'll assume that your non-compete specifies a geographic reach that is reasonably tied to your company's legitimate business interests (i.e., most often the protection of trade secrets, other confidential information, and goodwill).

Third, we'll also assume that the scope of the proscribed activities described in your non-compete is reasonably related to your company's legitimate business interests; e.g., a prohibition against performing work for a competitor that is similar to the work the employee is currently performing for your company is reasonable, while a restriction against working for any company — competitor or not — is unreasonable.

The elements above are, of course, just the basics. Here are some provisions that will help move a good non-compete agreement along the path to becoming a great:

Tolling provision. Say an employee leaves your company but neglects to disclose that they are leaving to work for a competitor in violation of their non-compete agreement. This is

not an uncommon scenario. What happens if that breach only comes to light two months later? Assuming that the non-compete agreement has a one-year duration, that would mean the effective duration would be reduced to the 10 remaining months.

However, a clause that extends the duration of the non-compete period for the amount of time that passes before the employer learns that its former employee is engaged in prohibited activity provides additional protection.

The same clause could also toll the non-compete period for the time it reasonably takes the employer to obtain injunctive relief to halt further impermissible competition. In both of these circumstances, the tolling stops the clock for activities beyond the employer's control and helps to ensure that the employer obtains the full benefit of its non-compete agreement.

It is important to note that, in some states, such a tolling provision can create ambiguities, which militate against its use, while in others, it may suffice to limit its reach, as a court may construe an excessive tolling period as unreasonable.

Assignment/successor-in-interest clause. Some Massachusetts trial courts have ruled that non-compete agreements are not assignable without the employee's consent and that a non-compete cannot be enforced by a successor company. In order to have the best chance of overcoming the effect of these rulings, your non-compete agreement should contain a provision that expressly provides that the agreement will be binding upon assignment or sale, and enforceable by your company's assignees and successors.

Change of position/responsibilities. When an employee's position or set of responsibilities within a company changes, the employee's non-compete agreement may thereby be vitiated. A provision that specifies that the parties anticipate that the employee's position and/or responsibilities within the company may change during his or her employment, and that the same non-compete will govern in any such circumstances, will provide a persuasive defense in the event the non-compete is challenged in court on these grounds.

Choice of law/forum selection. As with any agreement, it is in the interest of the parties to a non-compete to designate the governing law in the event there is a dispute and to select a forum where those disputes will be resolved. The choice of law provision is especially critical in non-compete agreements, as there is significant variation among the states as to their enforcement, ranging from Massachusetts, where non-compete agreements are routinely enforced, to California, where non-compete clauses are generally invalid.

Disclosure obligation. If it is the case that all problems are problems of imagination, it is also the case that many problems can be solved with effective communication. Productive communication between an employer and its former employee is encouraged by a provision that requires an employee to (1) show any new employer a copy of the non-compete agreement and (2) notify the former employer of any offers for employment that may violate the non-compete agreement.

Acknowledgment of consideration and irreparable harm. Among the first lines of defense for any employee who is defending against a claim for violation of a non-compete is to argue that the agreement is not supported by proper consideration, the non-compete is not protecting legitimate business interests, and that, in any event, the former employer is not irreparably harmed by the employee's competitive activity.

One way to head these arguments off is to incorporate the employee's own acknowledgment in your non-compete agreement that the agreement is, in fact, supported by valid consideration, the company has specific business interests at stake (generally, trade secrets, confidential information, and goodwill), and that the company would be irreparably harmed in the event the employee violates the terms of the agreement. Having straightforward language to this effect in a non-compete agreement can provide a neat quote for a motion for preliminary injunction seeking to enforce that agreement.

Supplement with backup agreements. So long as you're considering the protection provided by your company's non-compete agreement, now is also a good time to assess whether your company is availing itself of the protections provided by the array of restrictive covenants available to it, including (1) nonsolicitation agreements, which prohibit the solicitation of the company's customers, (2) no-raid or antipiracy agreements, which bar departing employees from soliciting the company's other employees to go work for the new employer, and (3) confidentiality agreements, which restrict an employee's use of the company's confidential information and trade secrets.

Even with the addition of all of these provisions to your company's non-compete agreement, there is no guarantee of success in the courtroom in the event your company finds itself in the position of enforcing its non-compete. However, the time that you or your outside counsel devotes to making these changes will be time well spent if your company ever needs to enforce its non-compete agreement with a departing employee.

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