

Ask The Lawyer

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COVENANTS NOT TO COMPETE

Many employers require their employees to sign a covenant not to compete (also referred to as a non-competition agreement) as a condition of employment. Simply stated, it prohibits the employee, for some period of time after leaving employment, from competing with the employer in a designated geographical area. The duration and geographic scope of the covenant not to compete varies on a case-by-case basis. There is no bright-line rule for determining whether an agreement containing a covenant not to compete will be enforced.

What is clear, however, are the criteria the courts use for determining whether a non-competition agreement is enforceable. First and foremost, the courts will inquire as to whether the employer has what is commonly referred to as a "protectable interest." What constitutes a protectable interest is determined on a case-by-case basis. For example, trade secrets, confidential customer lists, an employee's "unique or extraordinary" services, existing business relationships and goodwill have been held to constitute valid protectable interests.

On the other hand, information that is readily accessible to the general public outside of the business setting is not. Similarly, the fact that an employee is knowledgeable and experienced does not render the individual's services unique or extraordinary where a protectable interest exists.

If a protectable interest is found, the courts will determine whether the covenant not to compete is reasonable geographically and in duration. As with respect to what constitutes a protectable interest, the courts have not defined what is a reasonable geographic scope and time duration. The shorter the duration and smaller the geographic territory, the more likely a court will enforce the non-competition agreement.

Once deciding that the covenant not to compete is reasonable, a court must determine if the restriction is unduly burdensome on the employee and if the general public will be harmed by its enforcement. This inquiry is predicated on the fact that New York law generally disfavors such agreements and that the courts of New York State do not want to prevent individuals from earning a living.

So, as an employer, how do you begin to enforce a covenant not to compete? First, do not wait. Immediately contact your attorney. Second, provide your attorney with as much information as possible, including, but not limited to, the agreement you wish to enforce, any printed materials establishing that the former employee is soliciting your clients or is otherwise competing with you, and statements from your clients which demonstrate the agreement violation. The more due diligence you can do at the beginning, the better off you will be. What you don't want to do is start an action seeking to enforce a non-competition agreement without support for your position.

In many cases, your attorney will suggest that you immediately seek judicial intervention. The typical form of relief is known as a "preliminary injunction."

An employer's request for a preliminary injunction is presented to the court through what is called an "Order To Show Cause." Typically, it contains a temporary restraining order which prevents the former employee from engaging in certain conduct pending the hearing on the application for the preliminary injunction. The time frame between issuing the temporary restraining order and the hearing on the request for a preliminary injunction is short – usually between 10-14 days. Once again, each

judge is different.

To get a preliminary injunction, you must be able to prove to the court that there is (1) a likelihood of success on the merits; (2) the likelihood of immediate and irreparable harm, which cannot be compensated by money damages; and (3) that the balance of the equities weigh in your favor. Whether your application for a preliminary injunction is granted or denied, the lawsuit will continue. Practically speaking, however, your position is weakened if the court denies the request for a preliminary injunction.

In light of the fact that there are no definitive rules when discussing the enforceability of non-competition agreement, you should seek the advice of counsel when drafting one. □

Nothing contained in this article is to be construed as a legal opinion or the creation of an attorney-client relationship. For more information, consult your attorney.

Small-Biz Snapshot

Small-business owners were asked what step they would take if they knew that in six months, their payroll costs would rise by 5 percent.



37.8%	Raise prices
23.2%	Absorb it with lower earnings or profits
10.8%	Layoff some employees or not fill existing vacancies
9.1%	Nothing
6.6%	Freeze or cut employee wages or benefits
6.6%	Cut, eliminate, or delay business investment
2.5%	Increase business volume
0.6%	Sell the business or go out of business
3.4%	Other

Source: National Federation of Independent Business