



Section of Litigation Business Torts & Unfair Competition

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Non-Compete Agreements: What Every Company and Employee Should Know

Many people believe that a non-compete agreement can be freely broken without consequence. In actuality, however, whether a non-compete agreement is enforceable depends on the law of the state that governs the agreement. Some states strictly enforce non-compete agreements while others only enforce them if reasonable in scope and term. This article discusses how various states construe non-compete agreements, highlights the current trends in how states deal with non-competes, and discusses how to determine when a court will enforce such an agreement.

How Different States Deal With Non-Compete Agreements

A non-compete agreement is a contract usually between an employer and employee in which the employee agrees not to enter into or start a similar profession in competition with his or her employer for a certain period of time and/or within a certain geographic scope. Most states like New Jersey, New York, Pennsylvania and Texas disfavor non-competes and construe them in favor of the employee because the employee has a weaker bargaining position and courts do not want to take away an employee's livelihood. That being said, these states will enforce non-compete agreements under certain conditions. For example,

these states require that a non-compete protect an employer's legitimate business interest, such as their confidential information or customer goodwill. In addition, these states require non-competes to be reasonably limited in time and geography, with terms no more restrictive than necessary. Courts in these states have held that non-compete agreements for one or two years are reasonable. In addition, courts in these states have held that a reasonable geography is, for example, a former employee's territory during her employment, the employer's operating area or the company's current clients within a geographic area. Certain states have upheld a worldwide or national geographic restriction because of an employer's broad market area.

Massachusetts. Massachusetts goes further in how it deals with non-compete agreements. Certain professions in Massachusetts are protected from non-competition agreements by state statute or regulation. Specifically, attorneys, physicians, nurses, social workers, and broadcasters cannot be restricted by non-compete agreements.

In an effort to protect certain professions, including Massachusetts's emerging tech sector, Bay State lawmakers went further in March 2016 by proposing even stricter non-compete laws, including (1) limiting the duration of non-competes; (2) banning non-competes for low-wage workers, interns, employees under the age of 18, and employees terminated without cause; (3) requiring employers to provide prospective employees with notice that a non-compete is required for a position and time to seek legal counsel; and (4) requiring employers to pay a former employee's pay when the employee is not working because of his or her non-compete. The Massachusetts legislature is currently debating this bill and is expected to vote on it in its next session.

California. California is the most restrictive state regarding non-compete agreements. Non-competes in California are void for employees and independent contractors. Thus employers cannot restrict (1) where an employee works after leaving his or her employment; (2) whether an employee may solicit customers of his or her former employer; and (3) whether an employee may solicit employees that work at his or her former employer. Despite these restrictions on employees and independent contractors, California law allows for a narrow exception. In California, the seller of a business or withdrawing partner of a partnership or member of an LLC can be restricted from starting a similar business in a particular geographic area and soliciting customers of the former business. Thus, California law allows non-competes to protect the goodwill and value of the business the buyer is purchasing or the business the withdrawing partner or member is leaving.

Conclusion

Many states will only enforce non-compete agreements if reasonable but some states—like Massachusetts and California—are more restrictive. Employers and employees should understand the restrictive covenant laws of the state they do business in because the “conventional wisdom” that non-competes can be freely broken is largely false.

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