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Top Five Non-Compete Agreement Tests

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T&N TOP 5

Non-Compete Agreement Tests

There are circumstances in which an employer may want protections from key employees who could take training and customer information straight to a competing business — or start their own business. While there are a variety of agreements designed to protect customer lists and other proprietary information, covenants not to compete (also known as non-compete agreements) are used to protect an employer from having a business advantage misused by a departing employee. The effectiveness of a non-compete agreement depends on whether the employer has properly attended to a number of considerations. Here are the top five tests to apply to your agreements:

1. Was something given in exchange?

In order for a competition restriction to be enforceable, the employer must give something in exchange for that agreement. This is known as "consideration." If an employee has not received anything of substance in exchange for the promise not to compete, there is no consideration and the agreement is unenforceable. The consideration must be adequate, which courts have determined is dependent on the facts and circumstances of every case, but there are numerous options for adequate consideration available both at the start and even during an ongoing employment relationship.

2. When was the covenant signed?

There is sufficient consideration when an employee is required to sign a covenant as a condition of, and prior to, being hired. However, if the employee already has begun work when she signs the covenant, even if only one or two days of work, an employer must provide additional consideration beyond hiring that person (examples include bonuses, raises, or promotions). If nothing further is given in exchange for the agreement (such as a bonus, raise, or promotion), there is no consideration. Courts have made it clear that mere continued employment is not sufficient consideration.

3. Is the scope of restriction reasonable?

Whether the restriction the employer seeks to impose is too broad is a very subjective (but very important) consideration. The "scope" of the restriction can refer to both the activities of the former employee that are restricted, as well as the people or places from which the employee is prohibited to work. The basic rule is that the restriction cannot be greater than what is necessary to protect the employer's legitimate interest.

Courts examine the following primary criteria to determine whether the restriction is reasonable: the relationship between restricted territory and employer's current territory; the nature of the work performed by the restricted party; the amount of customer contact by the restricted party; the resources that had been furnished to the employee by the employer; and the similarity of the restricted party's current position to the former position. As a rule of thumb, a court is not going to enforce a restriction that is broader than where the former employer was doing business.

In Minnesota, under a concept called the "blue pencil doctrine," the court can rewrite the restriction to be reasonable if it doesn't think the restriction is reasonable as stated. While that doctrine exists, creating a restriction that is too broad can risk making your entire non-compete agreement invalid or ineffective.

4. Is the time of restriction reasonable?
The length of time of the restriction is also subjective and is subject to the rule that the duration of the restriction cannot be greater than necessary to protect the employer's legitimate interest. Factors affecting this consideration include the length of time of restriction compared to length of time of the contract with the former employer. Lengths of time up to three years have been enforced, though this factor is dependent on the facts of each case.

5. What are remedies for breach?
Where "the rubber hits the road" for non-compete agreements is what the consequences would be if the agreement was broken. A well-drafted non-compete agreement will specifically say that the employer is entitled to an order from the court stopping the former employee from continuing to breach the agreement (also known as "injunctive relief"). Whether damages can also be recovered and whether attorneys' fees are recoverable are additional considerations that require a careful drafting and/or reading of the contract.

The law in Minnesota does not allow covenants not to compete to be blunt instruments. They must be carefully tailored to a particular industry, situation, or employee. Each situation creates its own variables that skilled legal counsel can help assess when putting such an agreement together or determining how an existing agreement may apply. To determine how to proceed in constructing a non-compete agreement, or determining the enforceability of such an agreement, you have just read five reasons why you should contact our professionals.

Our Firm
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