MAKING NON-COMPETE AGREEMENTS STICK

BY ROB RADCLIFF

Post-employment covenants—contractual obligations that survive the employment term—often include a non-compete agreement, a non-solicitation agreement and an anti-raid provision. The enforceability of these provisions often comes down to their wording, the facts and the leanings of the judge. Here are five questions the legal department should ask when drafting agreements, with an eye toward making them enforceable.

1. What type of post-employment covenant makes sense? Agreement drafters have many options, but almost all must comply with the Texas Non-Compete Statute, Texas Business and Commerce Code §15.50.

The standard non-compete prevents a former employee from taking a similar job with a competitor. The non-solicit prevents a former employee from calling on former customers. An anti-raid provision prevents a former employee from hiring employees away from the employer.

Some companies, especially in the financial services industries, use what are called garden-leave provisions. Popular in Europe, these essentially prevent the former employee from working for a certain time period, such as one to two months, while the former employer continues to pay him. The name "garden leave" comes from the idea that the employee can work in his garden during the time period.

Some options are easier to enforce than others. From an equitable standpoint, courts generally have been more willing to enforce an agreement that prohibits an employee from calling on former customers than one that completely prevents him from working.

The non-solicit and anti-raid provisions often turn on the facts of the dispute. A common employee defense to a former employer's lawsuit is that the customer contacted the ex-employee first. Discovery becomes especially important when trying to enforce these provisions. Garden leave is a relatively new concept in Texas, and a Texas court has not yet considered it.

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2. Does the covenant satisfy the statute? Answering this question requires a case-specific analysis. Generally, the covenant has to be ancillary to an

enforceable agreement and reasonable in time and scope. The Texas Supreme Court has made postemployment covenants easier to enforce over the years, culminating in its 2011 opinion in *Marsh USA v. Cook*. In *Marsh*, the high court held that a stock option agreement could support a non-compete agreement. No longer is the consideration for non-compete agreements limited to specialized training or providing confidential/proprietary information.

3. Is the company going to enforce the covenant? Many industries really do not need a non-compete or non-solicit provision, yet companies include them in the employment contract for leverage or intimidation. However, if the lawyer drafting the agreement must include such a provision, the employer should be serious about enforcement.

Don't include these types of covenants if, from the outset, the company does not plan on enforcing the agreement. A former employee defending against a non-compete lawsuit will argue that the employer's failure to enforce that provision in the past means there is no irreparable harm and injunctive relief is not necessary. Though it is rare, an employee can sue to declare the non-compete unenforceable and recover attorney fees.

4. What else should companies include in an employment agreement?

• *Forum selection clause:* It is generally easier to enforce a covenant where the former employee resides. All too often, generic forum provisions simply tie venue to the location of the company's headquarters. This rarely works in a non-compete fight.

Enforcement often involves filing an application for a temporary restraining order, followed by expedited discovery and an injunction hearing. It is far easier to move forward with these proceedings in a timely manner in the place where the former employee lives.

• *Choice-of-law provision:* Coupled with the forum selection clause, the lawyer drafting the agreements needs to include a choice-of-law provision that selects a state that favors enforcement. Understandably, judges are typically more familiar with the laws of their own state, which is an advantage when seeking immediate relief.

• *Arbitration clause and jury trial waiver:* Two additional provisions to consider are an arbitration clause and a jury trial waiver. Lawyers can construct arbitration clauses to permit initial injunctive relief in court. If the company doesn't want to use arbitration, the legal department may want to consider a jury trial waiver, which is enforceable in Texas when properly drafted.

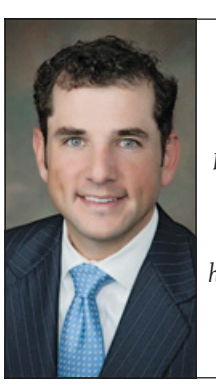
Another miscellaneous provision to consider is a requirement that the former employee must notify her new employer of her employment agreement and provide the new employer with a copy. Because many of these lawsuits target the new employer, it is useful to show that the new employer had actual knowledge of the agreement and its post-employment covenants.

5. How will the judge perceive the employer? Before moving forward with the lawsuit, the legal department should consider how the judge may perceive the company. Is the employee doing bad things, such as taking confidential information and contacting customers? Has the company made reasonable attempts to get the employee to stop what he or she is doing?

Those facts make the company's predicament more clear to a judge and will provide him the needed impetus for taking action. The point is for the company to appear reasonable, as opposed to vindictive.

Thanks to the Texas Supreme Court, non-competes are easier to enforce in Texas. However, clarity in the law does not necessarily translate to enforcement success. Court resolves most of these disputes early in the process, meaning the judge's initial rulings often shape the outcome. Hopefully, by considering some of the issues outlined above, the chances of enforcement success will improve. IHT

A FORMER EMPLOYEE DEFENDING AGAINST A NON-COMPETE LAWSUIT WILL ARGUE THAT THE EMPLOYER'S FAILURE TO ENFORCE THAT PROVISION IN THE PAST MEANS THERE IS NO IRREPARABLE HARM AND INJUNCTIVE RELIEF IS NOT NECESSARY.



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