IS YOUR NONCOMPETE ENFORCEABLE?

By Daniel N. Janich

So you decided that a job change is in order and you embark on the adventure of finding your new position. Suddenly you remember that when you were first hired or sometime during your employment you signed an agreement with your current employer that included a noncompete provision prohibiting you from taking employment elsewhere for a specific period of time and within a certain geographic area following your employment termination. Perhaps you realized this when you interviewed at your prospective employer, who mentioned that you would need to sign a declaration that you are not subject to a noncompete should you be offered and accept employment with the company.

Most likely you did not pay close attention—or perhaps none at all—to this provision when you first accepted employment at your current employer or when a separate document entitled "Noncompete" was circulated sometime after you were already hired and working at your current employer. No matter the circumstances of your signing this agreement, you are now worried about its impact on your new job search, your ability to obtain other suitable employment within a reasonable time after you resign or may be let go from your current job, and your own risk tolerance if you're tempted to simply ignore the language in your noncompete where your current employer threatens you and your new employer with a lawsuit for its violation.

What should you do if you find yourself in this position? How will you know if you have a good reason to worry whether your current employer can enforce the noncompete against you? When is it best for you to consider whether to hire experienced legal counsel to help you ferret out your options, i.e., ignore the restrictions in the provision, beat your current employer to the courthouse and seek a court declaration of unenforceability, contact your current employer to seek a partial or complete waiver of the restriction, or strictly adhere to its terms during the stated relevant period that it is enforceable?

The following discussion is intended to provide you as the employee subject to a noncompete, with a general outline of how to assess whether your noncompete is enforceable and when it might be advisable for you to seek experienced legal counsel to help you minimize your risk before making your move.

Three Factors Courts Generally Consider

At the outset it is important to emphasize that the laws governing the enforceability of noncompete provisions—whether embodied in a statute or developed by case law or perhaps from both--are not uniform. One court's decision about enforceability may be entirely at odds with that of another court—even among courts located within the same state—and even involving identical noncompete provisions. Some states are known to strictly uphold these provisions while others—notably California—and Massachusetts may soon join California— by statute prohibit their enforcement all together. Confusing? Perhaps. Notwithstanding this apparent confusion, there is a common set of factors that courts typically will look for and apply in their analysis of the specific facts involved. These factors are outlined below:

In general, courts address the enforceability of a noncompete provision using a 3-prong test that examines whether:

- the employer involved has a legitimate business interest that needs to be protected;
- enforcement of the noncompete as written will create an undue hardship on the employee; and
- the geographic and time period restrictions are reasonable.

Each of these factors is examined in the specific factual context of the employee and employer involved in the matter. Thus, there is no "magic language" that all employers may use which would establish the enforceability of the noncompete in all factual circumstances. However, in general, courts have suggested that the absence of one or more of these factors may be enough to render the noncompete

unenforceable.

#1. Does the Employer Have a Protectable Business Interest?

Whether the employer has a protectable business interest is determined by assessing whether the employee (you) gained "confidential" information through your employment such as trade secrets, customer lists, financial information that would otherwise not be available to the public and if disclosed to a competitor would endanger the employer's business position. In cases involving customer lists, Illinois courts have also examined whether the employer's relationships with its customers are nearly permanent. An employer who cannot affirmatively establish these criteria quite likely would have a difficult time proving that it has a legitimate business interest that needs to be protected by a noncompete.

#2. Will the Noncompete Pose an Undue Hardship for the Employee?

Even assuming a legitimate business interest, if the noncompete will virtually preclude the employee from earning a living through using his or her primary skills and experience in the workplace with other potential employers (all competitors), it is likely that most courts would find that the noncompete creates an undue hardship on the employee. In such a case, the noncompete would be considered unenforceable.

#3. Is the Scope of the Noncompete Reasonable?

This relates to the geographic reach and duration of the noncompete. What is acceptable in one industry may not be acceptable in another. Illinois courts, for example, have found 12 months to be a reasonable duration in many industries. However, in the tech industry 12 months may be a "lifetime" due to its fast paced nature of development, and thus such duration may be unenforceable. The geographic limits must also bear some semblance to where your current employer operates or is expected to operate in the foreseeable future. If your noncompete covers all of Illinois, for example, you should ask: Does the company do business throughout Illinois? Is it expected to establish business operations in other parts of the state sometime in the next few years? If

not, the geographic limit used may be inappropriate and therefore overly inclusive thus rendering the noncompete unenforceable.

Employees Can Take Advantage of a Poorly Drafted Provision

An unclear or vague noncompete provision may also be unenforceable. A noncompete is unclear or vague when the employer is unable to specifically identify: 1) which particular interest is being protected; and/or 2) who the competitors are from an industry wide viewpoint. In such cases courts are inclined to find that the employee should not be bound by the noncompete because the employer who drafted it in the first place did not give the employee sufficient information as to what his/her obligations were under the contract.

Employers Must Provide Adequate Consideration for an "At Will" Employee to Sign a Noncompete

Courts are increasingly scrutinizing the enforceability of noncompete provisions in new hire situations where the employee is "at will," i.e., can be fired at any time. Specifically, courts are questioning whether it is fair to jeopardize an employee's future employment opportunities by virtue of the noncompete if the employer reserves the right to terminate that employee at any time, including the right to terminate the worker's employment immediately after signing the noncompete.

Recent court decisions have trended in favor of the conclusion that the hire of an "at will" employee alone will not provide sufficient consideration (read: benefit) to the employee involved to justify enforcement of a noncompete, at least until a significant period of employment has passed. In Illinois, for example, the court has used the 2-year mark of continued employment as the probable line of demarcation where the noncompete would be recognized as thereafter enforceable.

Noncompetes Frequently Appear in Other Agreements

Often noncompete provisions will find their way into other employment related documents where additional benefits are being provided, such as a grant of employer stock or stock options. In such

cases, courts have generally upheld these agreements as enforceable without engaging in the same scrutiny as when an employee's continued livelihood is at stake because the violation of a noncompete in such cases simply results in a forfeiture of the employee's vested interest in the stock or stock options. Generally, as an employee you must be mindful of all agreements that you are subject to that contain a noncompete provision and be aware of the consequences of violating it. In cases where you have to forfeit benefits because you accept employment with a competitor, you want to negotiate a harder bargain with your new employer to make up for the anticipated loss involved in forfeiting appreciated stock grants.

In sum, an employee should always be aware and wary of anything an employer may want you to sign as there will always be legal consequences in doing so.

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