

The Dilemma of Using Non-Compete Agreements in Multiple Jurisdictions

By Lisa A. Amato

August 24, 2011

Most states enforce non-compete agreements despite their general disfavor. Non-compete agreements are viewed as a restraint of trade and they are therefore evaluated against a standard of reasonableness as opposed to strict contract construction standards. Their enforceability comes down to an inquiry balancing the employer's legitimate interest in protecting its property against the public policy against restraints of trade.

While some states such as California, Montana, and Oklahoma have legislation prohibiting non-compete agreements, the company may have reasonable alternatives that would still afford some protection, such as non-solicitation, confidentiality, and non-disclosure agreements. Most states, including Alabama, Colorado, Louisiana, Oregon, South Dakota and Texas limit the use of non-compete agreements.

In these competitive times companies want to protect their innovative products, confidential information, efficient workforce, and critical customer lists and keep them out of their competitor's hands. In a national and global market, a standard non-compete agreement for all employees, regardless of where they work, is not advised.

Non-compete agreements, like other restrictive employment covenants, are scrutinized differently depending on the jurisdiction. One standard non-compete enforceable in one state may simply not be enforceable in another state, even with a choice of law provision. Its enforceability will hinge on where the employee works rather than corporate headquarters or choice of law provision.

A company's goal is to maximize the likelihood of enforceability of the non-compete agreement across multiple jurisdictions. There are many issues to consider, some of which are set forth below.

1. Typical Legitimate Protectable Employer Interests

States differ as to what it may define as legitimate protectable interests. Most states generally find the following interests to be protectable:

- a. The use and disclosure of trade secrets;
- b. The use and disclosure of confidential customer information; and
- c. Harm to the employer due to the unique nature of the employee's position and service, including unique or unusual training.

2. Typical Factors Affecting Reasonableness

a. The geographic scope and duration of the non competition agreement

Enforceability will likely depend on whether the terms of the agreement at issue are reasonable in geographic scope and duration. What is reasonable in one state may not be reasonable in another. In most states the analysis will be fact-specific. In other states, it may be a matter of statute. A state may limit the duration to a period of time such that a non-compete agreement that exceeds that time is presumptively unenforceable, or it may not be enforceable beyond the statutorily defined time. Some states require that the non-compete agreement specifically identify the geographic limitation.

b. Presentation of the non-compete agreement to the employee

Some states have specific requirements as to when and how a non-compete agreement must be presented to an employee. In some states, an employer may be required to present the agreement at the time the offer is extended, or prior to the commencement of employment. An otherwise enforceable agreement can be rendered unenforceable in these states unless it is presented to an employee at the right time and in the right manner.

c. Adequate consideration for the non-compete agreement

A non-compete agreement must be supported by consideration to be enforceable. If a state allows a non-compete agreement to be signed after employment begins, it must be supported by new and independent consideration. What constitutes adequate consideration varies from state to state. In some states a bona fide promotion or a raise can be adequate consideration. If non-compete agreements are being given to employees after employment has begun, the company should be aware of the law in the relevant jurisdictions and determine whether new consideration is necessary to create an enforceable agreement.

d. Type of employee signing the non-compete agreement

It is a relatively common practice for a court to inquire whether the non-compete agreement is necessarily designed to protect one or more of an employer's legitimate interests. Commonly recognized legitimate interests include confidential information, customer relationships, and unique or unusual training. It is critical to consider the types of employees who will be signing the non-compete agreement and to think about what interest the company seeks to protect.

3. Assignment of the non-compete agreement

Corporate acquisitions and mergers can raise issues about the enforceability of a non-compete agreement. Some states permit assignment of the agreement to the purchaser as a

matter of course regardless of whether the employee consents to the assignment. Other states do not, or may require the employee's express consent. Depending on the jurisdiction, adding an assignment provision in the non-compete agreement may prove useful.

4. Court "modification" or "blue-penciling" of overly broad agreements

If the non-compete agreement is overly broad, jurisdictions vary on whether any part of the contract can be enforced. Some states permit courts to revise overly broad agreements to make them enforceable. Other states follow a strict "blue pencil" approach prohibiting courts in those jurisdictions from rewriting an entire contract if it is too broad and therefore the agreement will simply not be enforced. In other "blue pencil" states, if certain provisions of the entire contract are separable and one part is reasonable, the court may be permitted to enforce the reasonable provisions. If a jurisdiction will not modify an agreement, or will strike unenforceable provisions, it is important to scrutinize every portion of the non-compete agreement and any contract which contains a non-compete agreement to ensure that each provision is enforceable as written.

5. Enforceability if the employee is terminated

Some states will not permit the enforcement of a non-compete agreement if an employee is terminated by his or her employer. Other states will examine whether the termination was conducted arbitrarily or in bad faith.

Summary

While the law varies, sometimes significantly, from jurisdiction to jurisdiction, a non-compete agreement for each state is not necessary. A few agreements should be sufficient to address jurisdictional differences; however, it is extremely important to know the jurisdictional differences and to address those differences both in the language used in the non-compete and in the manner in which it is presented to the employee.

A non-compete agreement may not be necessary in every instance. If the company desires to protect itself from a former employee exploiting its customer relationships, a non-solicitation agreement may be sufficient.

© 2011 Lisa Amato

DISCLAIMER *This summary provides general information and should not be construed as legal advice or a legal opinion on any specific facts or circumstances. If you have specific legal questions, please contact Lisa Amato at Wyse Kadish LLP, 503.228.8448, or laa@wysekadish.com*

LISA A. AMATO

Advises clients in employment law, represents employers and management in employment litigation, and assists federal contractors with affirmative action and compliance.

621 SW Morrison, Suite 1300
Portland, Oregon 97205
laa@wysekadish.com

—
Wyse Kadish LLP, formally known as Meyer & Wyse LLP, was formed in 1985 with the mission of providing high quality legal services to businesses and individuals in a collegial small firm atmosphere.

Our areas of expertise include employment law, business planning, real estate, architectural and construction law, estate planning and administration, family law, general and complex civil litigation, mediation and alternative dispute resolution.