

Non-Compete Agreements – Enforceable or Not?

By Sarah O’Keefe

Non-compete clauses, also called restrictive covenants and covenants not to compete, prohibit employees from using an employer’s trade secrets, client relationships, proprietary material, and the like to unfairly compete with the employer. A standard non-compete clause typically defines specific parameters including duration, geography, and activities.

Without a non-compete clause, there is nothing prohibiting an employee from leaving his or her employer equipped with the tools needed to join forces with a competitor or start a competing business.

Creating an Enforceable Non-Compete Agreement

Non-compete clauses have long been the source of both scrutiny and debate. They can be very difficult to enforce. Historically, Arizona courts have maintained that covenants not to compete are disfavored. The reason is twofold. They restrict trade and tend to prevent an employee from pursuing a similar job.

By presenting reasonable restrictions, employers can create a non-compete clause with the potential to survive a challenge in court. The employer should implement restrictions that are reasonable and no more restrictive than necessary to protect the employer’s legitimate business interests. Typically, this includes preventing the use of information or relationships pertaining specifically to the employer that the employee acquired during his or her employment for some time after the employee has separated from the employer.

Courts disparage hollow non-compete clauses that serve solely to punish employees for quitting. To maximize the chance of enforceability, carefully define the time, geography, and job description of the non-compete clause.

Time

Indicate a duration of time for which the covenant will remain in place after employment ends. There is no “one-size-fits-all” rule to define how long a non-compete should last, but it must be reasonable.

Restrictive covenants are designed to allow an employer to overcome the loss of a skilled employee by preventing the employee from luring away the employer’s business before the employer has had a chance to secure a qualified replacement. By knowing approximately how long it takes to hire and train a new employee to carry out essential job functions, the employer can have a reasonable estimate to use for a reasonable non-compete clause.

Geography

A geographic restriction is a common inclusion for most non-compete clauses, and with good reason. A geographic ban prevents an employee from competing for business near the employer’s location. However, the geographic scope must be reasonable and not place undue limitations on the employee. For example, if your company is located in California, it would not be reasonable to prohibit an employee from working anywhere on the west coast.

Narrow geographic restrictions are key to bolstering the enforceability of a non-compete clause. If it is too broad, then the employer will have a hard time persuading a court that it is a reasonable restriction.

Specific Job Descriptions

Another important element of a sound non-compete clause is specifying the job description to avoid an unreasonable restraint of trade. In other words, the non-compete clause should not place unreasonable restrictions on the employee's ability to work in his or her chosen field. While the goal of the restrictive covenant is to protect the employer's confidential information and client relationships, it cannot be at the expense of infringing on an employee's ability to secure work based on his or her capabilities and skillset. In short, the restrictive covenant must not deny the employee the ability to earn a living.

An Unenforceable Non-Compete Agreement

There's a lot to digest when it comes to creating a reasonable non-compete clause. With the key components in mind, it is also prudent to examine what factors can render a non-compete clause unenforceable. A non-compete will be deemed unenforceable if:

1. the restraint is greater than necessary to protect the employer's legitimate interest; or
2. that interest is outweighed by the hardship to the employee and the likely injury to the public.

Remember, restrictive covenants cannot be used to prevent competition, nor can they be used to restrict an employee from working in his or her chosen occupation.

Transparency is Key

In addition to providing specifics in all aspects of the clause, transparency among your employees is also crucial to ensuring that your company's non-compete is legally binding and enforceable. It is necessary to include the policy in your employee handbook and obtain a signed employee acknowledgment form.

When skillfully designed, non-compete agreements can serve as a valuable safeguard against unscrupulous activity as long as they are specific, narrowed and reasonable.

About the Author



Sarah O'Keefe joined Burch & Cracchiolo in 2013 after completing an appellate clerkship for The Honorable Patricia K. Norris of Division One of the Arizona Court of Appeals. Sarah practices in labor and employment law. You can read more about Sarah on our [website](#).