Drafting An Enforceable Non-Compete Agreement

By David McElhinney

A Non-Compete Agreement (sometimes used interchangeably with the term "Covenant Not to Compete") is an agreement wherein one party (usually the employee) agrees not to seek a similar occupation or trade or share confidential information that is likely to cause damage to or compete against the second party (usually the employer). The key to drafting a successful and enforceable Non-Compete Agreement, like the key to so many things in life, is finding the proper balance. It is the art of drafting the agreement in such a fashion that it adequately protects the employer's business interest while at the same time not unnecessarily interfering with or intruding upon the employee's right to earn a living.

Why as an employer should you care? Why not draft as strong a non-compete agreement as you possibly can in order to protect your business and to heck with balance. Here's why: Nevada state law provides that a person who willfully does anything that is intended to prevent any person who has left or been discharged from his or her employment from obtaining employment elsewhere in this state is guilty of a gross misdemeanor with the following exception: One is not prohibited from negotiating, executing and enforcing an agreement with an employee which, upon termination of the employment prohibits the employee from (1) pursuing a similar vocation in competition with or becoming employed by a competitor of the employer or (2) Disclosing any trade secrets, business methods, customer lists, secret formulas or confidential information learned or obtained during the course of his or her employment with the employer. Nevada law goes on to provide that any such non-compete agreement must be "reasonable in its scope and duration" (This is where the balancing comes into play.) and supported by valuable consideration. [NRS 613.200]. What does the term "reasonable in its scope and duration" mean? The term is not defined by statute and what is regarded as reasonable will vary on a case by case basis.

Courts across the nation have deemed non-compete agreements to be legally binding so long as the agreement sets forth reasonable limitations as to the geographical area and time period in which an employee of the company cannot compete. If it is deemed unnecessarily broad as to either then the court may refuse to enforce it as constituting a violation of public policy that says an individual cannot be barred from carrying out a trade in which he or she has been trained except to the extent necessary to protect the employer.

In order to find the proper balance, ask yourself the following questions when drafting your next non-compete agreement:

1. Are you protecting a legitimate business interest by restricting your employee's right to compete against you? (By way of example, does your business really have any trade secrets, customer lists, or other sensitive proprietary information, that if revealed to your competition would be a devasting blow to your business and if so, did this employee have access to this information?);
2. Is the restriction you are imposing on the employee (in terms of the geographical area and time period) no greater than is necessary to protect your business? (The geographic limits of the agreement should not be so broad as to restrict employees from working in other geographic areas that

will not affect you as an employer [i.e. outside of the market area that encompasses the majority of your customers.]) Additionally, the time period for the non-competition agreement must not be excessive in its duration.; and,

3. Is the agreement supported by consideration, meaning that the employee received something of value in exchange for agreeing not to compete? (The most common example is an employee agreeing to the clause in exchange for employment.)

Anything that is viewed as unnecessarily restraining free trade, a corner stone of our free enterprise system, is going to be disfavored by our courts. Understand that should litigation occur over the enforceability of a non-compete agreement it will be examined closely by a court to make sure that it is narrowly tailored to protect the employer's business interests. If the agreement is regarded as unduly restricting the employee from other opportunities, it will usually be struck down or modified by the Court to be more reasonable.

A good non-compete agreement provides the employer with protection in three key areas: (1) It prohibits a former employee from working with a competitor; (2) It prohibits a former employee from soliciting former coworkers to be employed in his or her new company; and (3) It prohibits a former employee from soliciting or disclosing confidential information, such as customer lists, price lists, market strategies or other proprietary confidential information. The agreement should also contain language that allows you as the employer to seek and obtain injunctive relief, compensatory and punitive damages and reimbursement for attorneys' fees and costs to the prevailing party in the event you are forced to seek enforcement of the agreement.

One more word of caution: It is important to know if potential new hires have a non-compete agreement with a former employer. In some cases, the new employer can be liable to the former employer if hiring the employee would put him or her in violation of the non-compete agreement.

Should you decide that your business needs to use a non-compete agreement for some or all of your employees it is best to tailor the agreement to match your particular business and employees. Do not just copy a form you find on the internet. It may be too restrictive or not restrictive enough for your particular needs. As you examine the finished product consider the wisdom in William Penn's words, "To hazard much to get much has more of avarice than wisdom." Balance is the key.