The 7 Most Common Mistakes Employers Make as to Non-Competes

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Employers often cling to misconceptions about non-compete agreements that can prevent them from effectively using these powerful tools or render such agreements unenforceable. Here are the seven most common reasons why this happens.

1. **Failing To Understand What Non-Competes Are**
   In the common vernacular, a non-compete is an umbrella term for contractually prohibiting an employee (or independent contractor, buyer of a business, or even a vendor) from working for a competitor or otherwise restricting that employee's subsequent employment. However, a non-compete is one of several tools available to impose restrictions on an employee leaving their employer called "restrictive covenants." A non-compete, which is just one type of restrictive covenant, limits a former employee or independent contractor from working for a competitor for a particular time period in a specific geographic area. A non-solicit agreement is another type of restrictive covenant, which allows an ex-employee to work for any employer they want without any geographic restriction but prohibits them from seeking business from their former employer's customers for a period of time. Another variation of a non-solicit prohibits that ex-employee from hiring away or encouraging their former colleagues to leave their employment with their former employer. These are sometimes known as anti-piracy provisions. The distinctions between these various types of restrictive covenants are important. For instance, courts are generally more willing to enforce non-solicitation provisions than non-competes. Employers have to decide which, if not all, of these restrictive covenants work best for their business.
2. **Assuming That Non-Competes Are Unenforceable**
   A significant number of employers, as well as employees, incorrectly believe that restrictive covenants such as non-competes are categorically unenforceable. While this can be true for certain classes of employees (as discussed below), this misconception cannot be further from the truth. This mistaken belief is often fueled by employees who see their employer's refusal or unwillingness to enforce them when their colleagues subject to these agreements depart without consequence. Additionally, restrictive covenants over the last two years received a lot of publicity with the Federal Trade Commission's efforts during the last administration to effectively outlaw them, but that effort has been abandoned. As a result, unless a state has passed a law prohibiting or significantly restricting the use of non-compete agreements, courts in most states continue to enforce non-competes and other restrictive covenants every day – provided that they are properly drafted and effectively prosecuted.
3. **Not Understanding the Need for A Well-Drafted Non-Compete Agreement**
   A restrictive covenant agreement must be drafted to meet the unique needs of each employer. Such an agreement must be the product of a collaborative effort with an experienced attorney who understands the employer's business. There is no downloadable form from the internet that meets every employer's requirements. For instance, if the employer has employees working in multiple states, multiple versions of the agreements may be needed to address each state's unique restrictive covenant laws. As explained below, different agreements may be needed for new employees versus existing employees whom the employer seeks to restrict. An employer's agreements must also be periodically updated to address developments in the law.
4. **Not Supporting Restrictive Covenants With Adequate Consideration**
   An enforceable restrictive covenant agreement must be supported by "adequate consideration." Consideration is an exchange of value between two parties necessary to make a contract binding. It is the "price" each party pays in exchange for the other party's promise. What constitutes "adequate" consideration for non-competes can vary by state. For instance, nearly all states recognize that new employment is sufficient consideration to support such agreements. In other words, the employee's "price" for getting a new job is agreeing to the restrictive covenants.

However, states take different views as to whether **continued** employment is adequate consideration. For instance, Ohio deems that an already existing employee signing a non-compete has been given sufficient consideration because that employee gets to keep their job. But Pennsylvania says that for an existing employee to sign an enforceable non-compete, mere continuation of employment is **not** sufficient consideration. Instead, that Pennsylvania employee must be given some type of additional consideration – like a one-time bonus or additional benefits they would not otherwise be entitled to, or even a promotion. That is why Pennsylvania employers may have to use two versions of their non-compete agreements – one for new hires and another for existing employees. To navigate this issue, employers should always consult with counsel.

5. **Not Understanding What Protectible Interests Are**
   For a restrictive covenant agreement to be enforceable, an employer must have legitimate protectible interests. Essentially, this means that the law recognizes that certain employer property, both tangible and intangible, can be protected by restrictive covenants to prevent those interests from ending up in the hands of a competitor. This includes the company's proprietary information, trade secrets and customer goodwill. However, the law says that only those employees who have access to those trade secrets or who are responsible for cultivating and maintaining that goodwill (such as sales people) can be subject to such agreements. That is why these agreements are not typically enforceable against receptionists, secretaries, mail clerks, or janitors. So, employers must be selective as to **whom** they require such agreements from and be able to justify **how** their protectible interests will be harmed by those employees failing to honor those agreements. This also requires employers to justify why their non-compete agreements need to extend for a particular length of time and geographic region without being overbroad, which courts dislike. Again, these are issues that employers must hash out with their counsel who draft these agreements.
6. **Failing to Incorporate Non-Competes into Employee On-Boarding and Off-Boarding**
   Employers must create a culture where their employees understand not only what their restrictive covenants are, but also that they must comply with them. Educating an employee about their post-employment obligations should start **before** that employee begins work. Employers should issue offer letters that clearly state that employment is contingent upon agreeing to the restrictive covenants. A copy of the non-compete agreement should be provided for the employee to sign prior to their first day of employment so that the employee cannot later argue that they did not know the type of post-employment restrictions they were agreeing to when they accepted their position. Simply put, no employee should start work before signing their agreement. Similarly, employees must be reminded of their post-employment obligations during their exit interviews upon giving notice and should be given a hard copy of the agreement at that time. Employers should also ask their departing employees point blank (a) who their new employer is; (b) what their duties will be; and (c) whether they have given their new employer a copy of the agreement. An employee refusing an exit interview or refusing to answer any of these questions should set off an alarm resulting in a consultation with counsel. If no exit interview is held, employers should still make clear in writing that they expect the employee to honor their agreement and also make sure to provide that employee with a copy, whether by mail, hand delivery, or email to a personal email address.
7. **Failing to Enforce A Non-Compete Through Litigation**
   While filing suit to enforce a non-compete can be both expensive and time consuming, failing to do so can be even worse in the long run. Those employers who do not enforce restrictive covenant agreements lose credibility among their employees and any deterrent effect that strong, enforceable agreements typically create. An employer who avoids the missteps above and places themselves in the best possible position to enforce these agreements protects their most valuable business interests. Likewise, an employer willing to enforce these agreements sends an unmistakable message to remaining employees that the employer expects them to honor their restrictive covenants and that they will pay a high price for not doing so. This often requires employers to make it abundantly clear that they are willing to do what is necessary to enforce their agreements. That message is often enough to dissuade the next departing employee from violating their post-employment obligations.

Dispelling these misconceptions is the first step in adopting and enforcing effective restrictive covenants to protect an employer's most valuable assets.

For more than 30 years, Steve Silverman has built a career around this area of law—successfully enforcing non-compete agreements on behalf of his clients against former employees, while also defeating enforcement efforts on behalf of departing employees and their new employers.

If you have questions about the use of non-competes under existing state law or how to properly enforce them, please contact Steve at 412-253-8818 or ssilverman@babstcalland.com.