



Non-Competes: Proper Parameters are Essential

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PRACTICE AREAS

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As the economy remains volatile and technology advances often faster than governing law or management can respond, employers should be aware of variables that affect the enforceability of employee non-compete agreements. A non-compete should be tailored to reflect each employer's specific business information and protection needs. In general, the non-compete agreement will be judged based on whether it is reasonable to enforce against the particular employee governed by the agreement. For example, the geographic restrictions that are proper, reasonable and enforceable for a medical practice's non-compete agreement with a physician may differ greatly from one used to cover a sales person or research scientist.

MICHIGAN NON-COMPETE LAW

While non-competes are clearly permissible and enforceable under the proper circumstances, they still are "disfavored as restraints on commerce and are only enforceable to the extent they are reasonable." The Michigan Antitrust Reform Act (MARA) provides that:

An employer may obtain from an employee an agreement or covenant which protects an employer's reasonable competitive business interests and expressly prohibits an employee from engaging in employment or a line of business after termination of employment if the agreement or covenant is reasonable as to its duration, geographical area, and the type of employment or line of business. To the extent any such agreement or covenant is found to be unreasonable in any respect, a court may limit the agreement in order to render it reasonable in light of the circumstances in which it was made and specifically enforce the agreement as limited.

Note that in evaluating whether the restrictive covenant is "reasonable in light of the circumstances in which it was made, "a court will typically consider the following: (1) reasonableness of the restriction related to the high level or other status of the employee, (2) reasonableness of the consideration provided for the restrictions on the



employee's ability to compete, (3) whether there is legitimate confidential or competitive information to protect (not just the employee's own general knowledge and skill), (4) if the restriction is focused on the competitive risk of the former employee to the employer's business, (5) the timing of the execution of the non-compete agreement (to prove adequate consideration for the agreement), (6) whether the severance from employment is voluntary or involuntary, and (7) in appropriate circumstances, whether the enforcement of the covenant would "injure the public."

REMEDIES FOR BREACH

Historically, the primary tool for preventing breach of a non-compete agreement was the threat of an injunction preventing a former employee from starting a new job in violation of the agreement, or from starting a directly competing business. Obtaining financial compensation for losses related to the breach were often hard to prove and took significant time to recover. Since 2006, employers also have been able, in appropriate circumstances, to provide for liquidated damages within the text of a non-compete agreement. A Michigan court has approved the use of the liquidated damages provision. The court stated that because damages or "injury" for breach of a non-compete of this kind were hard to quantify, the parties' pre-determined and contractually agreed to amount arrived at before the breach avoided the complexity of the court trying to determine a firm figure.

PRACTICAL POINTERS:

- In deciding how to frame a non-compete, employers should consider:
- any generally recognized restrictions used for employees in their line of business;
- what information they are trying to protect -- sales records, customer lists, research materials, patentable discoveries, or various types of confidential information;
- in what arena -- their local neighborhood, across the U.S., or globally;
- the type and level of employee whose employability is being limited; and
- the availability of evidence supporting their position that the parameters of the agreement are reasonable, given the former employee's position within the organization, knowledge of confidential business information, and the potential harm to the employer's legitimate business interests should the former employee be permitted to compete.