Covenants not to compete

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Covenants not to compete, non-solicitation agreements, and confidentiality agreements are the subject of numerous Hotline calls. The simple question "Are they legal?" is met with the simple answer of "It depends." They can be. Covenants not to compete, in particular, are disfavored by the law. Any agreement that limits a person's right to earn a livelihood will be suspect and for that reason Pennsylvania provides that covenants that are too broad will not be enforced. What is "too broad?"

A covenant not to compete may be too broad in the geographical limitations imposed. In other words, what physical area is off limits to the employee subject to the covenant. Broadness also applies to the length of the restriction in terms of months or years. Courts will also look to the nature of the employment restricted by the agreement and what other employment opportunities may be available.

Many of the reported cases are from the beauty industry. Barbers and beauticians are frequently hired with the expectation that their faithful clientele follow them from one shop to another. When a salon owner requires the barber to sign a covenant not to compete, what is she to do if he or she seeks to take a job with another salon? If the geographic region covered by the covenant includes an entire town or business district, moving elsewhere is not a practical solution. Further, given the training and work experience of most in that industry, there are few alternatives; thus, a covenant not to compete prevents employees from seeking positions in the field with other employers.

Given all these factors, courts have become hesitant to enforce these covenants. They have articulated in well-reasoned opinions that these types of employees, with limited vocational skills, should not be subjected to the ranks of the unemployed because of lopsided covenants not to compete.

Yet, covenants may be lawful. The likelihood that a court will enforce a covenant not to compete will depend upon the industry, its uniqueness, what skills the employer provided to the employee, and the potential damage caused by employee termination. Covenants are more likely to be enforced when the employer provided unique training and experience that inures not only to the benefit of the employer, but also the employee. As one might reason, if I assist you in developing a special set of skills, you should be loyal, at least to a point. Again, courts will consider the geographic range and the temporal duration of the covenant not to compete.

In the real estate industry, covenants are generally disfavored. Again this is not to say that they are illegal. Without knowing the specifics it is impossible to predict an outcome or make a boilerplate provision that will suffice for every situation. It might be reasonable to restrict an office manager from competing employment for a short duration following termination and within a short geographic range, especially if it is limited to the employee's future role as a manager with a competitor. Successful covenants may allow a manager to take employment

post-termination but only as a salesperson and with that restriction lasting for months or perhaps more.

Courts will never rewrite a covenant not to compete to make it lawful. By that I mean that if the terms of a covenant are challenged and, if the court finds the terms to be excessive, the covenant is deemed unenforceable in every respect.

The court will not shrink the geographic range or the temporal period to make it lawful. While covenants restricting the future work of a salesperson are particularly disfavored, that is not the case when it comes to the enforcement of confidentiality agreements or non-solicitation agreements. It is absolutely appropriate that a broker limit a salesperson's ability to solicit from within the broker's ranks following the salesperson's termination. Such a restriction does not impose a limitation on the salesperson's ability to earn a living. It is also appropriate for a broker to seek substantial limitations on what an employee/agent may share with a future employing broker.

A few other thoughts for consideration. Any covenant, non-solicitation or confidentiality agreement must be supported by consideration. What does that mean? The agreement will be unenforceable unless it is supported by an exchange of value. In exchange for the broker's agreement to engage an agent, the agent agrees to specific terms including those of covenant or non-solicitation agreement, etc. If, however, after the relationship is established, a broker demands that an agent signs such a covenant, it will not be enforceable unless it is exchanged for value. That value can take the form of an increased commission split or any other exchange that has more than a nominal value. A covenant not supported by an exchange is unenforceable.

Brokers who hire licensees subject to covenants and non-solicitation agreements should beware. Having the licensee do anything that runs afoul of the agreement/covenant could result in a civil action labeled intentional interference with contractual relations. Brokers who seek to hire such licensees should advise those licensees to consult counsel to determine the binding effect of the covenant and/or agreement.

If you intend to impose covenants and/or agreements of the nature discussed in this article, consult counsel. If you are asked to sign such a document, consult counsel. If you are a broker considering hiring a licensee subject to such a covenant and/or agreement, consult counsel. And lastly, consult counsel.