

THE BASICS OF NON-COMPETE CLAUSES

Exploring the restrictions in employment agreements



BY PETER CHRISTENSEN, JD

Most right of way service firms, big or small, wisely use written employment agreements with their staff members. The agreements spell out details regarding such things as work expectations, compensation, work place rules and confidentiality protocols; they also often contain some type of non-compete clause.

As a general matter, the purpose of a non-compete clause is to prohibit an employee from competing against their employer after the employee ceases work. A right of way firm may utilize a non-compete clause because they are understandably concerned about protecting the firm from future competition by a staff member, especially after the firm has spent time and money educating and developing the employee and exposed that employee to the firm's clients. Other times, however, the purpose behind a clause may simply be to stifle any competition at all.

Whether you are an employee, contractor or owner of a right of way firm, it's important to have a basic understanding of the limitations and problems relating to such provisions. They are, indeed, one of the most frequent sources of litigation between firms and their former professional employees.



An Unforeseen Restriction

In 2007, a land services professional and expert in geotechnical engineering (let's call her Susan) began work with a firm that provided a broad array of right of way services and other land services to government agencies and to oil, gas and mineral businesses. After several years of hard work and perseverance, Susan was promoted to a management position, and she worked closely with some of the firm's top clients.

After five years at the firm, Susan yearned to start her own business and to be her "own boss." She wanted to capitalize on her recognized expertise in the field and offer her skills directly to the same types of government and oil/gas/mineral companies she was

presently serving at the firm. After deciding to pursue that dream, one of the first things she did before leaving her current job was talk with a lawyer. As they discussed the details, the topic of current employment agreements came up. She located the agreement she had signed a few years before with her current firm and sent it to her attorney.

Her heart sank as she read through several provisions that she hadn't given much thought to when she signed the agreement. The agreement aimed to restrict her ability to work in the same industry as her current employer. In pertinent part, the agreement stated:

NON-COMPETITION BY EMPLOYEE. Employee hereby agrees that employee will not, during the term of employment, or for a period of eighteen (18) months after the termination thereof, engage directly or indirectly in a business similar to Employer's business, nor associate therewith in such related business capacity either as an individual or a member of a firm or a shareholder.

INJUNCTIVE RELIEF. In the event of a breach of any provision herein, the Employer shall be entitled, in addition to injunctive relief provided for herein, attorney's fees and liquidated damages in the sum of \$25,000.00 per breach.

Susan's head was spinning. Do these sections really mean what they say? Will her current firm be able to stop her from working at all in the right of way/land services business for 18 months after she leaves? And if she does go forward with starting her own firm anyway, will her firm really be able to sue her for \$25,000 in

"liquidated damages" for every breach? Is her dream of being her own boss really a nightmare?

Susan met with her lawyer. He assured her that in her particular state, the firm would not be able to enforce the non-compete against her. Based on that assurance, she went forward with her plan, gave notice to the firm and promptly started her own business—very much competing against her old firm. When Susan's old employer saw that her business was succeeding, the firm sued her. Was her attorney right? Who won the issue in court?

Considerations

To better understand Susan's predicament, let's consider some of the relevant law. For instance, there's the fact that reasonable non-compete clauses can be enforced in most states (with the exception of a few, such as California, Oklahoma and North Dakota). It is true, however, that they are "disfavored" by the courts—meaning that they are construed very strictly and are subject to key limitations. The chief reasons for disfavor of non-compete clauses are that they may restrict trade and limit free competition and can make it difficult or impossible for former employees to earn a living. As a result, under the laws of most states, non-compete clauses will only be enforced when: (1) they protect legitimate interests of the employer, (2) they are reasonable in scope, duration and geographic area and (3) they are supported by "consideration." Any ambiguity will be construed in favor of the employee.

(1) Clauses Must Protect Legitimate Interests of the Employer. A court must usually find that a clause protects legitimate interests of the employer before the court will enforce it. For example, a court might consider whether

the employee was a key employee or the "firm's face" with clients. Did the employee possess significant confidential information belonging to the firm? Did the firm invest significant expense or resources in providing special education or training to the employee? When such factors are in evidence, a court will be more likely to enforce a non-compete clause as protecting legitimate interests. These are the kinds of things that employers need to be able to show when justifying that a clause serves to protect legitimate interests rather than simply stifle any competition.

(2) **Clauses Must Be Reasonable in Scope, Duration and Geographic Area.** Courts generally will not enforce agreements that are unreasonable in the scope of their restrictions, duration or geographic area. In making this determination, courts consider factors such as how long the restriction will last against the former employee, whether the restriction is limited in geographic area, whether the clause will prevent the employee from engaging at all in his or her profession, whether the employee can find other employment and whether the restriction on competition will hurt the public (perhaps by depriving the public of needed expertise). The determination of what is "reasonable" depends on the factual circumstances in each case, which is part of the reason why non-compete clauses can lead to expensive courtroom arguments.

Most states do not have any specific period of restriction that will automatically be found reasonable, but most courts will consider a one-year non-compete as within the realm of reason, while a three-year period often crosses the line. Similarly, most courts will not enforce a clause when it imposes a nationwide restriction on competition by the employee or bars competition where the employer has no clients or business interests. Enforceable clauses need to be drafted with all of these variables in mind and with attention to the law in the particular states where the restrictions will apply.

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(3) **Clauses Must Be Supported by Consideration.** In general, for a non-compete clause to be enforceable against the employee, the employee must have received something of value in exchange for committing to the non-compete obligation. In some states, that value can be simply the continuation of the employee's employment. In other states, it needs to be something more substantial. For example, to be considered supported by consideration in Minnesota, a non-compete clause generally must be agreed to at the beginning of the employment relationship. If not, then the employee must actually have received an increased benefit (like an increase in pay) in exchange for the non-compete.

The Result

What happened in Susan's case? She won. Her attorney was right, but it cost her a lot of money in attorney's fees to win. After two years of litigation in federal court, the court ruled that the non-compete restriction against her was unenforceable because it too broadly restricted her ability to work. It was too long in length, barred competition in every state and aimed to restrict her ability to work in any "similar" field as her former employer.

While we now understand the general basics of non-compete clauses, perhaps the most important thing to understand about them is the need to get legal advice. While nearly every article about a legal topic comes with a standard admonition that the reader should consult with his or her own

legal counsel, the admonition is not crying wolf when it comes to non-compete clauses. For all the points discussed in this article and because there is so little uniformity between the states, if a right of way firm hopes to have an enforceable non-compete agreement, the firm needs the wording to be developed by a lawyer who is knowledgeable about the law in those states where the clauses will apply. From the employee's perspective, on the other hand, the evaluation of a non-compete clause is probably more straightforward. An employee who takes the time to read and think about the terms of his or her employment generally will recognize that a non-compete clause is not in their self-interest, unless the employee is receiving a commensurate benefit. ☼



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