

INSIGHT
Guest Perspective



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A short primer on non-compete agreements

When do these agreements stick in the eyes of the courts?

An issue that frequently arises in my practice is the enforceability of restrictive covenants, also known as non-compete clauses. In this article I will give you a quick overview of some factors courts consider when deciding whether to enforce these provisions, and provide some pointers for dealing with some common practical issues that arise.

Non-compete clauses are contrary to free competition. Accordingly, the deference courts typically give to private contracts does not apply. Instead, courts scrutinize these provisions to determine whether the party seeking to enforce them has a "protectable interest."

If such an interest exists, the analysis shifts to whether the restriction is reasonably tailored to protect it.

Cases in Which Protectable Interest Applies

One category of protectable interest is a near-permanent customer relationship. This exists where the relationship existed before the employee was hired, or where customer loyalty is with the company, not the employee.

The other main category of protectable interest is confidential or proprietary information. This is information that is not known outside the company, that has been kept confidential, and that has value as a result. Examples include pricing formulas, customer profiles and product designs.

If a protectable interest exists, the analysis shifts to whether the restriction is reasonable as to duration, geographic area, and scope of prohibited activity. In terms of time, studies indicate that courts hesitate to enforce covenants beyond two years.

Each Case is Different in the Court's Eyes

While the foregoing may seem simple enough, in practice each case presents unique issues.

For example, a departed salesperson could solicit a long-standing customer of his former employer, yet do so without using any confidential information. Is there a protectable interest? It could be argued both ways.

Another variable is the profession involved. Physicians, for example, frequently are subject to restrictive covenants. Although such covenants can be enforced against doctors, it is not uncommon for courts to decline emergency attempts to enforce them because judges are not comfortable disrupting the doctor-patient relationship.

GLASS TO GIVE LABOR LAW UPDATES

Jeffrey Glass, Smith Amundsen, LLC, will be the featured speaker for the Rockford Chamber's April 7, 2010 Breakfast Buzz from 7:30 to 9 a.m., at Rock Valley College, Woodward Technology Center, will focus on **Current Labor & Employment Issues**.

Some Practical Tips

Now that you know the general guidelines, here are a few practical tips:

- If you want to enforce a non-compete, pay the departing employee any compensation to which he is legitimately entitled. You can forfeit the ability to enforce a valid restriction if you breach your obligations to the employee.

- Courts construe restrictive covenants against the drafter. They can refuse to enforce a draconian restriction. Therefore, resist the temptation to draft overly aggressive restrictions.

- A party seeking to enforce a non-compete can strengthen its case in advance by using password protected databases for customer data, and having the employee at the time of hire acknowledge in writing that he is being granted access to confidential information.

- If you are hiring an employee who has a non-compete agreement with his former employer, make sure he does not take any information with him. There was a case where a company hired a salesperson who had downloaded information from his former employer's sales database prior to his departure. Although the information was basically worthless, the case dragged on for years because the court assumed that he would not have taken it if it did not have value.

- If you are considering signing a contract with a restrictive covenant, take it seriously. Have your attorney review it and negotiate if it seems too restrictive. Some people have the perception that such clauses are unenforceable. That is incorrect.

- Independent contractors cannot be bound to restrictive covenants, because by definition an independent contractor has the right to perform similar services for others.

Jeffrey Glass is a lawyer with the Rockford office of SmithAmundsen LLC. The views expressed are those of Glass' and do not necessarily reflect those of the Rockford Chamber of Commerce.

Rockford building business relationships with Italy

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Exploring a Partnership for Belvidere Plant

Mark Williams, the executive director of Growth Dimensions, Boone County's economic development organization, also had the opportunity to visit Italy in November. Williams accompanied a delegation led by the Center for Automotive Research (CAR) to market our region and companies at an automotive conference attended by on and off road transportation manufacturers from across Europe.

While there, Williams also met with some of Fiat's top decision makers to discuss how Belvidere's assembly plant can play a key role in Fiat's future in the United States. Williams is optimistic that his meetings left Fiat and other key automotive companies with positive impressions of our region and capabilities.

Local Reception Honors Italian Business Leaders

In addition to traveling to Italy, we hosted a reception right here in Rockford in honor of some of Chicago's most prominent Italian business leaders: Fulvio Calcinardi of the Italian-American Chamber of Commerce and Charles Bernardini of Ungaretti & Harris LLP. Both Calcinardi and

"The Rockford area's visits to Italy and the partnerships we are developing will position the area as a key location for more wealth and job creation from Italian investment."

Bernardini have extensive networks in Chicago and Italy, including connections with Fiat.

Bernardini recently was appointed by Governor Pat Quinn's office as the chair of the Global Markets Committee of the State of Illinois Economic Recovery Commission, which will advise the state on developing its international trade practices and policies.

The RAEDC and the City of Rockford were invited to present to the Global Markets Committee on our international trade activities and how we would like to partner with the state on future initiatives. The RAEDC also continues to grow our relationships with Italian government officials by meeting with the Italian Consulate in Chicago to keep them aware of the Italian presence in our region. The Rockford area's visits to Italy and the partnerships we are developing will position the area as a key location for more wealth and job creation from Italian investment.

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