Noncompete Agreements: Frequently Asked Questions

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Q. I've been told I have to sign a noncompete agreement to keep my job. What is it?

A. A noncompete (or noncompetition) agreement is an agreement between one employer ("Acme") and an employee ("Mary Jones") that the employee will not work for another employer ("Chesapeake") that competes with Acme, or will not do work for customers of Acme, for a specific period of time.

There are a lot of possible variations:

(a) Some agreements apply to only current employees of Acme. In these situations, employees are free to go work for a competitor.

(b) Some agreements apply to former employees of Acme, and may or may not discuss current employment. It would be very risky for an employee to moonlight for a competitor while still working for Acme, unless Acme consents. Hint: Make the request in writing and get the approval in writing.

(c) Some agreements apply to customers of Acme, and are limited to doing the same kind of work for those customers that Acme does. In these situations, employees are free to work for competing Employer B but have to avoid any tasks involving competing work for customers of Acme.

(d) Some agreements have a nationwide scope for a period of time, and others may involve a metropolitan area or a radius of a particular number of miles from the former employee's work site, or Acme's locations.

Q. Are these agreements enforceable?

A. Yes, they can be enforced—and Mary Jones can be ordered to stop working for Chesapeake and Chesapeake can be ordered to fire Ms. Jones, unless there is a defense or a work-around.

Defenses and work-arounds are discussed below.

Q. How are they enforced?

A. If Acme thinks there is a violation, it may contact Mary Jones or Chesapeake and make a demand that Mary Jones stop working in violation of the agreement, and that Chesapeake fire Mary Jones.

- If Mary Jones has not told Chesapeake about the restriction, Chesapeake is likely to be upset and could fire Ms. Jones for not being candid.

- If Chesapeake is anxious to keep Mary Jones, Chesapeake may pay for defending Mary Jones and itself.

Acme may go into court and file a lawsuit against Mary Jones and Chesapeake, asking the court for a preliminary and permanent injunction to stop the employee from breaking the agreement, and to stop Chesapeake from continuing to let Ms. Jones work for it.

Q. How Fast Can This Happen?

A. Possibly very fast.

Because injunctions can take time to get, Acme can ask a court to enter a Temporary Restraining Order ("TRO") to prevent Ms. Jones from working for Chesapeake until a factual hearing with witnesses and evidence can be held on Acme's request for a preliminary injunction. The TRO may be limited to a certain number of days, but it can be extended at regular times until a factual hearing is held.

Q. Are You Saying Ms. Jones Can Be Thrown Out of Her New Job?

A. Yes.

Q. Without a trial?

A. In the short term, without a trial. In the long term, after a trial.

Q. Is there any way to stop that?

A. Yes, if there is a good defense.

Q. So what's an example of a good defense?

A. Work in California. California basically forbids noncompete agreements.

Q. Very helpful. I'm on the East Coast.

A. Work as a lawyer. Many States bar noncompete agreements for lawyers, because restricting the practice of lawyers interferes with the ability of clients to choose their lawyers.

Q. Does the same thing apply to other professionals, like doctors and accountants?

A. Usually not.

Q. Just as helpful as before. Anything else for regular people?

A. Sure. One very important limit is that a noncompete agreement is a type of contract, and no contract is enforceable unless these is what the courts call "consideration."

"Consideration" is usually defined as something of value exchanged for a promise to do something or for not doing something.

Q. Give me examples.

A. Sure. Here are a couple:

1. Mary Jones signed a noncompete agreement when she applied for a job or had a job offer with a requirement that she sign the agreement. Acme's consideration of her application, or giving her a job, is clearly "consideration." In most States, the noncompete agreement meets this test.

2. Mary Jones signed a noncompete agreement when she was already working, as a condition of keeping her same job at her same rate of pay, a job from which Acme could fire her at any time for any reason that does not break a specific law. (This is the usual "at will" type of employment.) There is a question whether there was consideration for the agreement, and the answer may be different in different States because they all have their own laws.

3. Mary Jones gives her two-week notice, and is asked to sign a noncompete agreement as she is leaving. Acme does not give her anything, or promise her anything, in return for the agreement. Most state courts would find there was no consideration, so the agreement did not bind her and Acme will lose its case.

Q. What if a noncompete agreement makes it impossible to earn a living?

A. If a noncompete agreement makes it impossible for an employee to earn a living, that will cause a lot of concern to the court, and the court may not enforce the agreement.

Temporary restraining orders and injunctions are "equitable" relief. That means they are subject to the discretion and good judgment of the courts.

Q. That sounds like a loophole you can drive a truck through.

A. Not really, because extreme claims—like being deprived of the ability to earn a living—require extreme proof.

If Ms. Jones wants to claim she cannot earn a living because of the noncompete, she will have to prove there are no jobs at all that fit her qualifications, in a reasonable area. Acme can defeat that claim if it can show available jobs Ms. Jones can fill.

These claims are easy to make, but hard to prove.

And if Ms. Jones blows her credibility on a claim like this where she does not have the evidence, she may not be believed as to issues she might have won if she had taken more reasonable positions.

Q. Can the kind of job make a difference?

A. Most States have rules as to whether a noncompete agreement is appropriate for the job in question.

Most jobs are not the kinds for which a noncompete agreement is reasonable. Ordinary factory workers, clerical employees, groundskeepers, janitors, messengers, bank tellers, workers in jobs without requirements of advanced education, persons who have not been given extensive training by their employers, etc., have always been able to change jobs when they get a better offer, without any consideration whether Acme competes with Chesapeake.

At the other end of the spectrum, high-level managers and sales professionals, persons familiar with an employer's business plans, persons who have been extensively been trained by their employers, persons who work with customer lists, and the like, are fairly routinely required to comply with their noncompete agreements.

The type of job is also considered in combination with other factors, and might help tip the balance one way of another.

Q. What about the geographic scope of the restriction?

A. The narrower the geographic area, the easier it is for Acme to enforce the agreement.

The larger the geographic area, the harder it is for Acme to enforce the agreement.

One thing to look at is the geographic scope of the recruitment area for a vacancy. If there is national recruiting for a job, it will be easier for Acme to enforce a nationwide noncompete agreement for a period of time.

On the other hand, if Acme recruits for a job only locally, it will be harder for it to enforce a regional or Statewide or nationwide restriction.

Geographic scope is often considered in relation to the type of job and the duration of the restriction.

Q. Can these restrictions last forever?

A. No.

Q. Again, very helpful. Explain.

A. The shorter the duration of the restriction, the easier it is for Acme to enforce the restriction.

The longer the duration of the restriction, the harder it will be for Acme to enforce the restriction.

The simpler the job, the harder it will be for Acme to enforce a longer duration for the restriction. The more complicated the job and the more confidential the information to which the employee had access, the easier it will be for Acme to enforce a longer duration.

Geographic scope also affects the reasonableness of the duration. In general, the broader the geographic scope, the shorter the duration an agreement has to have in order to be considered reasonable and enforceable.

Q. Please give some examples.

A. Six-month restrictions are short enough that they may make some other problem factors, such as a broad geographic area, look more reasonable.

It is fairly common to see one-year restrictions upheld.

Two-year restrictions are upheld with some frequency, but the courts tend to look more closely at the other factors when looking at the reasonableness of an agreement with a two-year duration.

Q. This sounds pretty harsh, if Mary Jones was laid off and did not choose to leave.

A. Many courts agree, and have held that noncompete agreements cannot be enforced when an employer fires an employee without cause.

If Mary Jones signs a severance agreement that contains a noncompete agreement or refers to it as still applying to the employee, and if she receives consideration—usually, extra money, sometimes help with a placement service, and the like—then the noncompete agreement will usually be enforced if it meets the other standards.

Q. What if Ms. Jones was fired for serious misconduct?

Many courts will enforce noncompete agreements against employees fired for serious misconduct.

Q. Why do you keep saying "in many States" or "many courts" instead of giving the real answer?

A. That **is** the real answer. Different States have different legislation, and different rules developed by the courts.

Just one of the legal references in my office is a three-volume treatise on noncompete agreements, published by the American Bar Association's Section of Labor anfad Employment Law through Bloomberg BNA. It is in three volumes, and is around 6,000 pages long.

Lawyers are useful in sorting this out.

Q. What if Mary Jones forgot she signed the agreement?

A. If she forgot she signed an agreement but does not violate its terms, there is no problem.

If she does violate the noncompete agreement, forgetting it will not be an excuse.

Q. What should Mary Jones do when she wants to leave one job for another?

A. If Ms. Jones is at the stage when she has not yet burned her bridges with her present job, but is at the stage when she needs to give notice, she should contact Human Resources in writing first and ask if she has any noncompete obligations. She should do it in writing so that she gets an answer in writing.

Q. When do noncompete agreements frequently come up?

A. Many about-to-be-former employees first see a noncompete agreement when they are presented with a draft severance agreement. Click on the phrase to go to the page discussing severance agreements.

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