Clearing the courts

How to draft enforceable noncompetition agreements

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Employers often have their employees sign "noncompetition" agreements as a condition of their employment. These agreements are generally intended to prevent employees from going to work for a competitor and from taking other employees or customers with them. A well-crafted, narrowly tailored noncompetition agreement can achieve these goals.

However, it's often the case that such agreements are too ambitious. They may be overbroad and declared unenforceable if the employee or a subsequent employer challenges them in litigation.

Shelby L. Drury, of counsel at Novack and Macey LLP, says, "Review your standard noncompetition agreements and make sure they do not contain provisions that have already been declared to be overbroad and unenforceable by Illinois courts."

Smart Business spoke with Drury about common provisions that courts have held unenforceable and how to draft them better.

Do Illinois courts typically enforce noncompetition agreements?

The courts enforce these agreements only if they are no broader than necessary. Because they operate as partial restraints on trade, Illinois courts carefully examine noncompetition provisions and resolve any doubts as to their validity against enforcing them. The Illinois Supreme Court has held that a noncompetition provision is reasonable only if it is:

- No greater than necessary to protect the employer's legitimate business interest.
- Does not impose undue hardship on the employee.
- Is not injurious to the public.

Even where there is no dispute regarding an employer's legitimate business interest, a noncompetition provision that is broader than necessary to protect such an interest will be declared invalid.

What are some provisions that Illinois courts have found to be unenforceable?

Illinois courts tend to hold invalid provisions that purport to prohibit an employee from working for a competitor in 'any capacity.' Such provisions forbid an employee from becoming an employee of any business that competes with the former employer without regard to the nature of the employee's new job. Thus, these provisions prevent an employee from working for a competitor even in a noncompetitive capacity. For example, such provisions, interpreted literally would prohibit an executive from going to work for a competitor as a janitor. Courts tend to declare such provisions invalid, even if, under the particular facts of a case, the employee actually was hired in a competitive position. Courts look to the language of the agreement to determine its validity regardless of the particular facts.

Illinois courts are also unlikely to enforce provisions that prohibit an employee from soliciting customers with whom the employee had no direct contact or relationship. While recognizing that employers have a legitimate interest in preventing employees from soliciting customers that the employee developed or formed a relationship with while working for the employer, Illinois courts tend to invalidate provisions that prohibit an employee from soliciting customers without regard to the degree of contact the employee had with such customers during the employment.

Courts also will look at whether the time period and geographic restrictions in a noncompetition agreement are reasonable. Courts are reluctant to enforce provisions that are temporally excessive or extend to geographic locations in which the employer did not do business or that were not actually serviced by the employee.

Won't the court just enforce a narrower version of the objectionable provision?

Not usually. Courts tend to avoid rewriting overbroad noncompetition provisions. Typically, courts view their job as interpreting the agreement as written, and not rewriting it. This is true even where the agreement says that a court may modify it.

How are these common pitfalls avoided?

The key is to draft provisions that prohibit actual competitive activity. Limit nonsolicitation provisions to customers that the employee had direct contact with or developed during the employment, and make sure that the time and geographic location restrictions are reasonable under the circumstances. ●