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ASK THE LAWYERS

The Finer Print: To Compete Or Not Compete

by Anne Marie Bowler and Sari Gabay-Rafiy

Before you accept a job offer, presumably you've worked out the most important term to you – your salary. But when asked to "sign here" on a stack of documents, take a few minutes to review what you are signing before you put pen to paper. In the end, salary may not be the only term you want to bargain for.

Your employer may require you to sign a "non-compete" agreement (aka non-competition agreement, covenant not to compete, or restrictive covenant). Such an agreement may appear in a separate document or tucked within your employment agreement. A typical non-compete provides that you promise that during your employment, and for a specified period thereafter, you agree not to directly or indirectly interfere with your employer's business in any manner, in a specified geographic region.

At first glance, such a restriction may appear harsh to an employee. If you are a hair stylist in the West Village and leave your current salon, does this mean you may not open your own salon down the block, or go to work for the salon around the corner, ever? As with much in the law, it depends.

New York courts typically disfavor non-competition agreements because they restrict a person's ability to earn a living. But if the restrictions are reasonable in several respects, the agreement will be enforced. California, on the other hand, outright forbids non-competition agreements. (Some may argue that such a policy promotes a free exchange of ideas – especially in this technology age – and has prompted and promoted the development of Silicon Valley.)

In New York, courts scrutinize whether the restrictions imposed by the employer are no greater than is required to protect the employer's legitimate interest. Typically, an employer may require an employee to sign a non-compete to protect trade secrets, confidential information, strategy, logistics, confidential client lists or customer good will. For the employer, misuse or exploitation of such information by an employee may result in immediate irreparable injury.

Balancing the competing employer-employee interests, courts also evaluate whether the restrictions impose an undue hardship on the employee, whether the restraint on competition would injure the public, and whether the employee's skills are unique or extraordinary so as to be irreplaceable. The agreement must be appropriately limited temporally and geographically and, if the employee's services are not unique, then it is less likely a court will find the restrictions reasonable.

Presumably, a ten year restriction on a stylist's ability to compete in the same industry within the entire State of New York is unreasonable and unduly harsh. On the other hand, a one year limitation restricting a voice instructor from providing vocal lessons to her former employer's students in a ten-mile radius may be reasonable.

Whether the non-compete in your employment agreement is enforceable in New York depends on the facts and circumstances of your specific situation. Knowing what you are "signing up" for ahead of time is an important first step to understanding your potential exposure.

To suggest topics of discussion for this column, please email us at info@gabaybowler.com. This article is designed only to give general information and is not intended to provide legal advice or give a legal opinion.