

ARE NONCOMPETES A NON-ISSUE?

Maybe Not.

By Thomas Metzger

When it comes to noncompetition agreements, the most commonly asked question by employers and employees alike is whether the agreement is really enforceable. The answer is often surprising. On the one hand, many people assume that noncompetition agreements, also known as covenants not to compete or restrictive covenants, have become the Rodney Dangerfield of contract law – they get no respect. On the other hand, many assume that a contract is, well, a contract, and that it should be enforced in all but the most unusual of circumstances, even if the deal struck between the employer and employee is not necessarily a balanced one.

These differing perspectives on noncompetition agreements are, in fact, entirely justified in many circumstances. Some employers have consistently tried to enforce noncompetition agreements that are far too broad – and, not surprisingly, these same companies have consistently been rejected after attempting to enforce their agreement in court. For example, employers who seek to impose multi-year restrictions that reach far beyond the company's actual market area on entry-level employees who do not work with customers, confidential information, trade secrets, or other information that can be protected will soon come to the conclusion that the agreement is given little respect in court. Unless such an agreement is made narrower, the company will continue to lose in its effort to enforce the agreement.

However, the fact that the courts will not enforce overly-broad agreements certainly does not mean that all noncompetition agreements are unenforceable. After all, not all noncompetition agreements are alike and neither are all employment relationships. Indeed, just last year the Supreme Court of Ohio emphasized that the Ohio courts have "long recognized the validity of agreements that restrict competition by an ex-employee."¹ Such agreements have continued to be enforced, and on a consistent basis, where they are supported by adequate consideration, where the agreements are designed to protect an employer's legitimate interests and the agreements are reasonable in the particular employment context.

The first requirement – that employers provide the employee with

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adequate consideration for agreement – is easily met under Ohio law. While there can be a lengthy discussion of the meaning of "consideration" when it comes to contracts, this requirement that the employer must give something in return for the agreement is very easily satisfied when it comes to noncompetition agreements. As a threshold matter, if an employer presents an at-will employee with a noncompetition agreement prior to or upon the commencement of employment, the agreement will be supported by adequate consideration. Moreover, in the recent Supreme Court of Ohio decision mentioned above, the Court explained that even where an employer presents an at-will employee with a noncompetition agreement after the employee has started work, no additional consideration other than continued employment is required.² Therefore, in this setting, it is now very difficult to have a circumstance under Ohio law where an at-will employee's noncompetition agreement would not be supported by adequate consideration.

As for the "legitimate interest"

requirement, Ohio courts have recognized that employers have a right to protect interests as broad as customer goodwill and confidential information. Let's take customer relationship as one example. While not every customer relationship can be protected, and while such relationships certainly cannot be protected from competition indefinitely, there are several factors that make it all the more likely that an employer can keep a former employee from immediately poaching those relationships. For example, key questions that a court will typically ask include: how long did it take the company to develop the customer relationship or its clientele; how much investment was required to develop and maintain the customer relationship; what is the duration of the customer relationship; and is the service that is provided to the customer of a specialized and/or personalized nature, or is it a more generic of a service?

While customer relationships represent just one type of "legitimate interest" that employers may protect through a noncompetition agreement, it is clear that the more specialized the service may be and the greater the time and investment that has been made in developing customers to whom the service will be provided, the more likely the employer will be able to demonstrate a legitimate interest worth protecting. Indeed, just as with the requirement for adequate consideration, Ohio courts rarely refuse to enforce a noncompetition agreement for failure to demonstrate some legitimate interest.

Therefore, most disputes over the enforcement of a noncompetition agreement under Ohio law center on the requirement that the agreement be "reasonable." Of course, what's "reasonable" depends a great deal on the actual employment context. Fortunately, the Ohio courts have defined a variety of factors that are to be



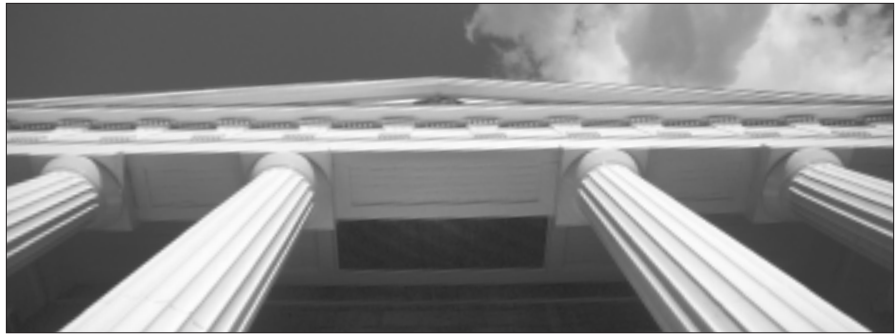
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used to scrutinize the reasonableness of a noncompetition agreement. Some of these factors include:

- Whether the employer has set limits on how long the restrictions last (for example, restrictions of six months to one year will generally be acceptable, assuming the other factors for enforcing the agreement are met, but restrictions that reach up to three years and longer will be scrutinized very carefully and may be rejected);
- Whether the employer has set a geographic limit on noncompetition (restrictions that apply within the territory actually served by the employee, where applicable, will generally be acceptable, and broad restrictions that cover a company's entire market or that even reach well beyond the company's own market, will be challenged to a far greater degree)
- Whether the agreement seeks to prevent the employee from using his inherent skill and experience or whether the agreement seeks to enforce a temporary restriction on the employee bringing to the marketplace a new set of skills that he gained based on the employer's investment and based on the employer's confidential information;
- Whether the restrictions sought by the employer operate as a bar to the employee's sole means of support; and
- Whether the benefit to the employer in gaining protection against unfair competition is disproportional to the detriment to the employee.

Of course, no single factor is determinative. However, as a practical matter, the Ohio courts tend to focus primarily upon the length of the noncompetition period and upon the geographic scope of the restrictions.³

Clearly, the particular facts matter. And that is precisely why a cookie-cutter approach to drafting and enforcing noncompetition agreements often leads to unsatisfactory results or unwelcome surprises. Agreements that are far too broad will be rejected, and the employer may be left with no protection against unfair competition or debilitating solicitation of key customers. Moreover, even if an agreement is found to be enforceable, an agreement that is too narrow may not go far enough to protect the employer from the very harm the company was seeking to prevent. In the end, a well-drafted agreement that is appropriately drawn to fit the particular employer's legitimate interests and the employee's work will provide the greatest likelihood of success, the greatest level of protection and will avoid many of the unwelcome surprises that some have discovered along the way in the arena of noncompetition agreements.



- ¹ *Lake Land Employer Group v. Columber*, 2004-Ohio-786.
- ² See, *Lake Land Employer Group v. Columber*.
- ³ See, e.g., *Raimonde v. Van Vlerah*, 42 Ohio St. 2d 21 (enforcing three-year restriction on competition within 30 mile radius in practice of veterinary medicine); *H.L.S. Bonding Co. v. Fox*, 2004-Ohio-547 (10th App. Dist. 2004) (modifying five-year, 75-mile restriction to three-year, 50-mile restriction); *James H. Washington Ins. Agency v. Nationwide Mut. Ins. Co.*, 95 Ohio App. 3d 577 (8th App. Dist. 1993) (enforcing one-year restriction on competition within 25-mile radius in insurance business); *American Bldg. Servs., Inc. v. Cohen*, 78 Ohio App. 3d 29 (12th App. Dist. 1992) (reducing two-year

restriction against employment with competitor anywhere former employer does business to restriction against disclosing, while employed by competitor, customer lists, sales information or techniques on current accounts in janitorial cleaning business); *Williams v. Hobbs*, 90 Ohio App. 3d 331 (10th App. Dist. 1983) (denying enforcement of restriction against practicing radiology within Franklin County for two years as greater than required for former employer's protection, imposing undue hardship and injurious to public).



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