CMS WiRE

Will A Non-Compete Ruin My Life?

By Erika Morphy | *Jul 6, 2015*

It's happened. You, an IT worker, with solid skills, credentials and a good 10 year's worth of experience on your resume — not to mention an expensive college education that's still not quite paid for — have been asked to sign a non-compete agreement.

Or at least that is what you think it is. It's a few graphs included in your offer letter in which you, the prospective job recipient, promises not to work in a related capacity for a full year after you leave the company in question.

Sign here, the letter invites, and the job is yours.

It's that easy — and that hard.

What to Do?

With a background in IT and not, say employment law or human resources management, you're unsure what to do.

You vaguely know that if this were California — and unfortunately it is not — your prospective employer probably wouldn't have bothered to include the troublesome clause. Various court ruling in the state over the past several years have rendered these agreements largely, but not entirely, moot.

You do read the newspapers though and have seen that several states, such as Massachusetts, Rhode Island and Washington are working on implementing an approach similar to California's.

Legislators in these states are no dummies — they have witnessed Silicon Valley's meteoric rise in the tech world. They have duly taken note of the high incomes paid to tech workers, and no doubt silently done the math on how they translate into state income taxes.

A New Movement

"Non-compete agreements are gaining momentum — and commentators and legislators are noticing," Thomas Muccifori, founder and chair of Archer & Greiner's Trade Secret Protection and Non-Compete Practice Group, told CMSWire.

In addition to the state developments, the Senate has introduced a measure banning these agreements for low-wage workers in response to reports that certain fast food restaurants had required their workers to sign them, he noted.

Unfortunately, you, IT worker, lost the geographic lottery again. You are not living in any of these states.

So now what?

What The Law Says

First of all, employees should always investigate state law concerning non-compete agreements, as these can vary widely in wording and enforcement.

That said there are certain baselines to follow.

The good news, as Muccifori explained, is that non-competes are enforceable only in certain cases, namely when they are reasonably necessary to protect a legitimate business interest of an employer.

"In most cases, the interest that employers seek to protect as legitimate are interests in customer relationships and interests in protecting against the disclosure or use of trade secrets or other confidential information."

The bad news is that this definition can easily be used to cover a lot of tech worker positions, including lower level ones such as contact center reps and tech desk support.

If the call center or tech center employer can establish these legitimate interests are relevant to the job in question, it is possible that a non-compete agreement presented to a call center or tech center employee is enforceable, Muccifori said.

However, "the employer would still need to also show that the geographic and temporal scope of the covenant is reasonably tailored and that the covenant imposes no undue hardship on the employee," he continued.

In short, "there are many hurdles employer has to overcome to enforce it."

What the Law Means

There is hope for our IT worker, in other words. But before we get to that we need to do a deeper dive into what is considered "relevant" for the employer.

Also, a quick look at "non-compete" in general would be warranted.

"People say non-compete, but they are using that term too loosely," Mike Greco, a partner in the Denver office of labor and employment law firm, Fisher & Phillips, told CMSWire.

"Restrictive covenant is the word I use and these come in all shapes and sizes. Non competes are just one type of restrictive covenant."

There are three scenarios that would warrant the use of a restrictive covenant under the law, he said: If the employee has access and uses confidential information in his job or is involved in customer relationships or receives an extensive and valuable course of training.

Then a second layer of analysis must be applied, Greco continued. "The courts will say that the employer must develop a restrictive covenant that is no more broad than absolutely necessary." In other words, the employer can't stretch the covenant to cover more than is absolutely necessary under the law.

It is here that Greco encourages workers to consider the employer's point of view. "This company may have invested money, a significant amount, in establishing a company, in obtaining or developing proprietary information or processes. It is entitled to protect this investment as it can under the law."

True.

But.

Employers don't always stay within the lines, so to speak, when crafting these statements — a point with which Greco agreed.

"There is room for some abuse," he said. "I certainly can see a situation in which an employee is asked to sign a non-compete that may not fit the requirements of the law and then is afraid to take a new job because he doesn't have the $75,000 it might cost in legal fees to challenge it." That employee could well win in court, he said -- but he probably wouldn't want to gamble his life savings to find out.

"That's not fair," Greco agreed.

I asked Greco, what such an employee could do, then -- especially if it is after the fact. Let's say this person has signed a non-compete and has come to realize that the language is too broad, or at least broad enough, that it could be challenged in court.

This is what Greco explained:

"First of all, there is risk in everything I have to suggest. If you push at your employer, no matter how gently, you might not like the results.

Also, obviously, the best scenario of all is one in which someone is able to consult their own attorney. All that said, an employee in the circumstance you describe should:

Be forthright with the employer. Tell your manager, 'I am thinking about leaving and this is why I think it will be okay from your perspective.' Then explain all the ways in which the employer's confidential information will be protected. Tell him all of your duties and responsibilities. Explain how you will avoid soliciting their employees. Address the company's legitimate interests.

Don't, under any circumstances, bad mouth the company on the way out. "The unfortunate reality is that a lot of litigation is driven by emotion of the employer. Either they feel betrayed or the employee said or did something that really angered him."

A Few Other Things

Don't do anything weird.

"Don't come in at 6 am to collect your things before you give notice," Greco said. "People will notice this and later assume you were riffling through the files. Be above board about everything. Tell management, after you've given notice, that you want to collect your personal belongings and how should you proceed."

Make sure you are devoting your best efforts to the job right up to the minute you leave. "You don't want to be accused of slacking off in order to benefit the competition that you are about to join."

Don’t take anything from the office that isn't yours — and that includes records that have to do with pending commissions. This trips up a lot of people, especially in sales, Greco said.

"If you want to track your commissions that haven't closed, make copies of the relevant records and give those to your manager. Tell her, 'this has to do with the XYZ deals that are still pending. Can you keep this for reference when the time comes to calculate my commission?' "

No sabotaging of records or assignments, obviously.

The Employer Pushes Back

Of course, some employers will push back. Perhaps they don't agree with the employee's assessment that its interests aren't being violated or protected. Perhaps they do and they don’t care — they want to either keep the employee or keep her from joining the competition and aren't above threatening litigation to accomplish that.

That's when the soul searching — and a bit of financial analysis — comes in.

It's your career, Greco said — and your bank account. "Only you know if this career move is worth the risk and if you can afford protracted litigation."

It might not come to that, of course. Perhaps the employer will back off if it gets a firmly worded letter from the employee's counsel. Perhaps not.

Another possibility is to see if the new employer would be willing to foot the legal bill, Greco said. "If it comes to this, then all of the above steps the employee has taken — being forthright, not being sneaky — will go a long way to helping the case."

Another moving part to consider: perhaps the employee has misjudged what its employers' legitimate interests really are, and his departure to a competitor does indeed violate them, at least in the eyes of the law.

And no self-deception or rationalization allowed, Greco said. "If you want your employer to play fair with you then you play fair with it."

In the end, though, Greco is of the opinion that most employers will not sue if they have some kind of reasonable assurance their secrets aren't slipping out the door.

Sign on the Dotted Line?

Now what about that IT worker at the beginning of this piece — the one pondering whether to sign a non-compete?

Much of this analysis applies to him as well. He should read the agreement carefully to see if actually applies to his job description. Often, Greco said, companies will insert boilerplate language in offer letters to cover all the bases and the non-compete could well not apply in that particular job. In that case, it doesn't hurt to gently point that out during the interview process.

Conversely, it could be well worth a trip to an attorney to have him or her read the contract to see if it is applicable.

If it is applicable, then the employee has all the information she needs to decide whether to commit or not.

"You have to weigh the advantages of the job and all that comes with it -- new contacts, networking, training, the salary, the benefits — against a commitment not to work for a competitor or in a field for a certain amount of time in the future," Greco said.

A Legislative Hail Mary

And who knows, by the time the employee is ready to leave the company, maybe the thinking tossed around in the Massachusetts state government corridors might make its way to your part of the country.

Archer & Greiner's Muccifori explained that Massachusetts reasons that California's Silicon Valley has been able to flourish in part because the California legislature invalidated non-competes to some degree.

He is not the only one. Andy Palmer, co-founder of the Cambridge, Mass.-based Tamr recently wrote in a blog post that "in Massachusetts, we've seen the deleterious consequences of non-competes in our local startup ecosystem, including frustration and even alienation of top intellectual talent who want to find the right 'home' for their life's work. This results in a corresponding reduction of entrepreneurial energy and economic productivity within the startup ecosystem's most valuable contributors."

"Non-competes as enforced in our home state of Massachusetts undercut this very culture of innovation, squelching professional growth opportunities that depend on a certain amount of talent movement within our industry."