Non-Compete and Non-Solicitation Agreements: How to Read, Challenge, or Negotiate Them

December 6, 2017 • Legal Updates & Insights

You may have heard the term “non-compete” before, but many people do not know how such agreements work, or that employees can challenge them in court or even try to negotiate the terms with their employer. In recent years, more and more employers require that employees (including non-executives) sign non-compete or non-solicitation agreements, which prevent employees from working for a competing company or from contacting the employer’s customers for a certain length of time after leaving a job.[1] Employees are usually presented with these agreements when they start a new job or are paid a bonus or other compensation. Often called “restrictive covenants,” these agreements generally place limits on someone competing against his or her former employer for a certain length of time and within a defined region or industry.

If you are presented with or have signed a non-compete agreement (i.e. you can’t work for a competitor) or a non-solicitation agreement (i.e. you can’t try to take business from your previous employer), there are several factors that could determine whether the agreement is legally valid or would likely be enforced by a court, and whether the agreement can be negotiated with your employer so that it does not stop you from getting a new job.

What Do These Agreements Look Like, and Why Am I Being Asked to Sign One?

A non-compete or non-solicitation agreement can be given to employees as a separate document to sign, or they can be found within a longer employment agreement, or even as one small part of an employee handbook (though in that case it may not be enforceable if the handbook is not meant to be a mutual contract). These agreements are legally binding, and the extent of the restrictions on the employee will vary by employer. About one in five employees in the U.S. are bound by a non-compete or similar agreement, according to a recent study funded by the University of Michigan.[1]

Employers have workers sign restrictive covenants in an effort to protect their business interests, although they sometimes go farther than they need to. The primary purpose of restrictive covenants should be to prevent employees from taking confidential business information from the employer and bringing it to a competitor and/or using it to take business from the previous employer. Some examples of conduct that such agreements might prohibit include:

- An employee quits his or her job and then immediately discloses confidential or proprietary information, or “trade secrets,” to the employer’s direct competitor;
- An employee leaves a company and then contacts its clients in an attempt to persuade them to switch to a competitor; or

- An employee who leaves a company to start his or her own competing business.

State Laws May Limit Your Employer's Ability to Keep You from Working for a Competitor or Contacting Their Customers

In New York, restrictive covenants will often be enforced when they are reasonable in how long they last and/or the geographic area they cover (or which competitors or customers are covered). Generally, the restrictions on the employee must be necessary to protect the employer's legitimate business interests, not be unduly harmful to the general public, and should not be disproportionately burdensome to the former employee.[2] Recently proposed legislation in New York City targets non-compete agreements, and would prohibit them for workers making less than $900 a week who are not senior-level employees or professionals, and also would require employers to give notice to applicants that they could be required to sign a non-compete agreement as a condition of getting the job.[3]

California law, on the other hand, essentially bans non-compete agreements, and the laws of several other states (such as Florida, Michigan and Virginia) are also fairly skeptical of and even hostile towards restrictive covenants and non-compete agreements, making them difficult to enforce there. Regardless of whether a restrictive covenant seems to be enforceable, however, employees should not share an employer's trade secrets and/or confidential information with any unauthorized person, as confidentiality agreements forbidding employees from doing so are even more common and much more likely to be enforced with serious potential consequences for the employee.

New York courts have limited the "legitimate business interests" that can be used to justify a restriction on an employee's new employment to:

1. An employer's interest in protecting trade secrets;
2. An employer's interest in not competing with a former employee whose services are rare, unique, and/or extraordinary, which excludes employees who were merely valuable and/or good at a job;[4] and
3. An employer's interest in protecting client relationships that were cultivated while the person was employed by the employer.[5]

Therefore, if a restrictive covenant is not necessary to protect such interests and would restrict an employee's ability to find work, even when no threat to the former employer's interests exists, such an agreement might not stand up in court. Courts in New York and elsewhere have increasingly invalidated restrictive covenants, ruling that an employee should not be restricted to the extent that the agreement says, or even at all in certain situations.

Would My Non-Compete or Non-Solicit Agreement Be

Enforced by a Court – Or Does It Go Too Far?

The greater the restriction and burden placed on an employee—i.e. the more a restrictive covenant interferes with a person's ability to find new work—the greater the chance that a court could find the agreement to be overly broad and strike it down. For example, some restrictions that may be considered overly broad by a court include:

- Restrictive covenants that cover a period of time that is more than one year after an employee has left a job;[6]
- Restrictive covenants that restrict an employee across the world, or cover areas beyond where an employer actually does business;[7] or
- A non-compete agreement that prohibits an employee from working in the employer's entire industry, or for competitors (often only vaguely defined or not specifically identified) that would not harm or take business from the former employer.[8]

A non-solicitation agreement may be unenforceable as overly broad if it attempts to restrict an employee from soliciting:

1. Customers who the employee had a relationship with before working for the employer;
2. Customers who the employee knew for reasons separate from his/her work with, and without the aid of, the former employer; or
3. Customers who did not do business with the former employer while the employee worked there.[9]

An agreement that tries to stop a former employee from doing business with the former employer's entire client base (regardless of whether the employee had any contact with a particular customer while working there) could be found to be unenforceable, particularly if the restrictive covenant also covers mere "prospects," or customers who never worked with the former employer, or clients who came to the former employer because of the employee's preexisting relationship with them.[10] In fact, courts will often respect a customer's wishes regarding who he or she wants to do business with, and customer choice can be a powerful argument for limiting the restrictions of such agreements.

Is There Room to Negotiate with My Employer on These Agreements?

As discussed above, there are many different parts of these restrictive covenants, including how long they will be in effect after an employee leaves, the industry or geographic area to which it will apply, or even the specific named competitors or customers that the employee cannot work with after leaving the employer. **Each of these components can be negotiated**. For example, certain "competitors" covered by the agreement may not be direct competition or a real threat to the employer, but could be an obvious place for the employee to land after a layoff. Furthermore, certain customers might be much more important to the employee than to the employer, as a source of business or as a bargaining chip in finding a new job. In either case, an exception can be negotiated that allows the employee to work with or contact specific employers or clients. Employees can also point out to the employer where an

agreement is overbroad (in time or area, for instance) and likely not to be enforceable anyway, and can negotiate more narrow restrictions that do not hamper the employee's future job search, while making the agreement stronger and avoiding uncertainty for the employer (and heading off legal disputes that could harm business or customer relations on all sides).

Although many employers and managers will be reluctant to make changes to the form agreement that all current employees sign, some will be willing to do so, and employers commonly negotiate the terms of restrictive covenants with employees who have been terminated or are scheduled to leave the company.

Were You Let Go or Did You Quit Your Job? If You Were Fired, Your Restrictive Covenant May Not Be Enforceable

Courts also have begun to consider whether restrictive covenants should be enforced against employees who were let go from their jobs, particularly when an employee was terminated "without cause" (i.e. not for any misconduct). Recently, a New York appellate court found that non-compete agreements are unenforceable if the employer does not demonstrate "continued willingness to employ the party covenanting not to compete"—that is, if the employer is no longer willing to employ the person and has fired the employee for no fault of their own.[11] This court decision provides useful leverage to employees in negotiating legal disputes with former employers about a new job, and can also be used in negotiating the terms of a restrictive covenant to be included in a severance agreement.

Applicable law also generally requires that an employee get something from the employer in return for signing a restrictive covenant, rather than the employer just forcing an employee to sign it with no special compensation beyond what he or she would already get paid for working there. Although a company can require that a new employee sign a restrictive covenant in order to *start* working there, i.e. the new job is the reward for signing the agreement, an employee who is already working at a company must get something in addition to his or her regular pay, since the pay is owed to the employee anyway for his/her work. So, if an employee was forced to sign a non-compete or non-solicit agreement, but no additional compensation was given (for example, a discretionary bonus, a raise, a new benefit of some kind, additional paid time off, etc.), that restrictive covenant may be totally invalid.

If you have questions about a non-compete or similar agreement that a potential or current employer has presented to you, or an agreement that you believe might interfere with your finding a new job, you can speak to Lawrence M. Pearson or another attorney at Wigdor LLP by calling (212) 257-6800, or by sending us your question in the Contact Box below.

Lawrence M. Pearson
Partner
WIGDOR LLP
85 Fifth Avenue, New York, NY 10003
T: (212) 257-6800 | F: (212) 257-6845
lpearson@wigdorlaw.com
wigdorlaw.com

[1] Conor Dougherty, How Noncompete Clauses Keep Workers Locked In, THE NEW YORK TIMES (2017), https://www.nytimes.com/2017/05/13/business/noncompete-clauses.html (last visited Nov 27, 2017).

[2] Ashland Management Inc. v. Altair Investments NA, LLC, 869 N.Y.S.2d 465 (App. Div. 1st Dep't 2008); Ricca v. Ouzounian, 859 N.Y.S.2d 238 (2d Dep't 2008); Riedman Corp. v. Gallager, 852 N.Y.S.2d 510 (4th Dep't 2008); Zinter Handling, Inc. v. Britton, 847 N.Y.S.2d 271 (3d Dep't 2007); Prime Medical Associates, P.C. v. Ramani, 781 N.Y.S.2d 450 (Sup. Ct. 2004).

[3] Kenneth Sommer, Are Non-Compete Agreements Legal?, WIGDORLAW.COM (2017) https://www.wigdorlaw.com/non-compete-agreements-nyc/ (last visited Nov 27, 2017) (discussing N.Y.C., N.Y., CODE § 22-508 (Proposed Official Draft 2017)).

[4] Empire Farm Credit ACA v. Bailey, 657 N.Y.S.2d 211 (3d Dep't 1997).

[5] Johnson Controls, Inc. v. A.P.T. Critical Systems, Inc., 323 F. Supp. 2d 525 (S.D.N.Y. 2004).

[6] Courts in New York Will Enforce Non-Compete Clauses in Contracts Only If They Are Carefully Contoured, N.Y. St. B.J., OCTOBER 2000, at 27, 28 (restrictions of more than one to two years will probably be unreasonable in almost any context); see also B.O. Technology, L.L.C. v. Dray, 970 N.Y.S.2d 668, 674 (Sup 2013) (holding that a Non-competition and non-solicitation agreement for period of one and one-half years following termination of employee's employment, was unenforceable as unreasonably imposing restriction far broader than employer's legitimate interest).

[7] Good Energy, L.P. v. Kosachuk, 853 N.Y.S.2d 75 (1st Dep't 2008) (court held that a restrictive covenant is overly broad if it covers the entire United States when the employer only did business in eight states).

[8] Kelly Servs., Inc. v. Greene, 535 F. Supp. 2d 180 (D. Me. 2008) (holding that, former employer Kelly Services had not shown sufficient likelihood that a non-compete clause will be enforceable against its former employee because the former employee's current employer targets clients in different industries than the former employer. Therefore, the former employer had no legitimate interest in preventing their former employee from performing strictly clerical duties for an alleged competitor).

[9] Scott, Stackrow & Co., C.P.A.'s, P.C. v. Skavina, 780 N.Y.S.2d 675 (3d Dep't 2004).

[10] Good Energy, L.P. v. Kosachuk, 853 N.Y.S.2d 75 (1st Dep't 2008).

[11] Buchanan Capital Markets, LLC v. DeLucca, 41 N.Y.S.3d 229 (N.Y. App. Div. 2016).