PUBLICATION

Non-Enforcement of Non-Competes: What's an Employer to Do?

August 29, 2018

In 2018, there is a growing trend to invalidate non-compete and non-solicitation agreements. State and federal courts, as well as state legislatures, are pushing for enhanced scrutiny of the "reasonableness" of these agreements. Employers should review and revise their employee non-compete/non-solicitation agreements to decrease the risk that a court holds such agreements to be unenforceable.

For example, in March of this year, the South Dakota Supreme Court held that an insurance company could not enjoin its former agent from selling to the insurance company's customers. Although the court agreed that the employee could not solicit business directly from the former employer's customers, it disagreed with the employer's position that the employee could be restrained from selling to those customers at all. The court determined that restricting the former agent from selling to the former employer's customers – when the former agent did not solicit those customers – was an invalid restraint of trade under state law.

Similarly, the Wisconsin Supreme Court addressed whether a sweeping non-solicitation clause that prohibited a former employee from soliciting any of the former employer's 13,000 worldwide employees from working for his new employer was an illegal restraint of trade under Wisconsin law. The Supreme Court affirmed the appellate court's reversal of the trial court's decision in favor of the employer. It determined the provision sought to prevent the employer's competitor from competing fully in the labor pool and discouraged the mobility of workers. The court found that the former employer had not shown a protectable business interest for such a broad non-solicitation provision.

And in April of this year, the U.S. District Court for the Northern District of Illinois dismissed a lawsuit filed by an employer seeking to enforce a broad non-compete agreement against a former employee. The former employee argued that the scope of the non-compete provision was so expansive that it effectively prevented him from working with any competitor in any capacity at all, even as a janitor. Although far-fetched, the district court agreed that, as written, the non-compete provision was so all-encompassing that the former employer sought to ban the former employee from working for any competitor in any capacity, even a non-competing capacity. The court further declined the company's request that it "blue pencil" the agreement to rewrite it to be enforceable, concluding that it had no obligation to rewrite a covenant not-to-compete that was unenforceable on its face.

Courts are not alone in their heightened scrutiny of non-competes. State legislatures have also been limiting the restraints placed upon former employees competing with their former employers. Under a new law enacted in Utah in March of this year, companies employing workers in the broadcast industry cannot require non-exempt employees to enter into non-compete agreements. In addition, employers asking employees to sign non-compete agreements after May 10, 2016 cannot extend the terms of the non-compete agreement beyond one year from the date of the employee's termination with only limited exceptions. In Idaho, a new law enacted in July of this year requires that non-compete agreements for key employees or key independent contractors be no greater than 18 months in duration unless the key employee or independent contractor is provided with additional consideration beyond continued employment. And in April of this year, a Colorado law went into effect providing that physicians who treat patients with rare disorders could share their contact information with those patients when leaving a former employer without being liable to the former employer for damages for the loss of those patients.

Given the increased scrutiny by courts and legislatures on non-compete agreements, what is an employer to do? First, companies should review their standard non-compete and non-solicitation agreements for the reasonableness of the restrictions. Consider what kind of investment, training, resources, and consideration beyond continued employment the company is providing to employees who enter into such agreements. Companies should further consider whether the restrictions can be tied to legitimate protectable business interests and use language in the agreement tying the restrictions to that business interest. By keeping abreast of changes in the law in the states in which they operate and reviewing their non-compete agreements regularly, employers stand a stronger chance of enforcing those agreements in court if the need arises.

For assistance in reviewing your company's non-compete agreements, please contact any member of Baker Donelson's Labor & Employment Group.