

Complete Your Non-Compete Agreement: Helpful Drafting Tips, cont.

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[Earlier this week](#), I discussed the importance of tailoring non-compete agreements to ensure enforceability and provided some factors to consider when drafting. Below are four more factors that should help you create a strong non-compete agreement.

3) The history of the employment relationship

Know who you are dealing with. Is the subject employee a lifelong, key member of the business? Or, was his employment fairly short-term, after the business was established? Did you train the employee so that he would be invaluable, or are his skills a dime a dozen? These things may be hard to predict at the start of one's employment. Keep in mind that a non-compete agreement is a bargained-for document. In the event that an employee changes positions or gets in on a top-secret project, consider possible revisions to his non-compete agreement. Always think about not only what an employee can do to help your business, but also what he could do to *hurt* your business in the event he no longer works there. ***Lesson – keep the agreement fresh.***

4) The interests the employer can reasonably expect to protect by the execution of the non-competition agreement

If the employee is hired by a competitor, what effect will it have on your business? What do you stand to lose? When drafting a non-compete, do it in a manner that affords the necessary protection to your business, but does not do more than reasonably necessary. Sure, driving out all competition would be nice, but such is not the purpose of a non-compete. ***Lesson – identify clearly what you are attempting to protect and only include those matters that really need protection and explain why.***

5) The degree of hardship the agreement imposes upon the employee

The goal of a successful non-compete agreement is *not* to punish the employee who is leaving. If the employee abides by the restrictions in the agreement, will he be able to find gainful employment? Or, will he be forced to start his career over and depart from his education, training, and experience? ***Lesson – include language whereby employee acknowledges and accepts***

hardships.

6) The effect the agreement has on the public

In a free market, the principle that competition is beneficial to society is highly regarded. If an agreement hinders services or goods so that the public suffers, the court will likely find it unenforceable. ***Lesson – make clear in your agreement that neither party intends to inhibit commerce and that neither believe the agreement will inhibit commerce.***

If an employee challenges the enforceability of their non-compete agreement, a Kentucky employer may fare far better than employers in other states. Some states follow a strict “no-modification” approach, so that an agreement must be “all-or-nothing”; enforceable or disregarded. Luckily, in Kentucky, if non-compete provisions are overly-broad, courts will modify or reform the unreasonable covenants. Of course, doing so will require court involvement and expenses. Avoid this by keeping the above six principles in mind each and every time you pull a non-compete agreement from the HR files.

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