Blue Penciling

Hope for Unreasonable or Overbroad Non-Competes?

By Ryan B. Frazier

Covenants not to compete are fairly common in employment agreements, especially where an employee may have access to confidential information or possess specialized, unique skills. Noncompete covenants are designed to ensure that employees do not directly compete with the employer when the employment relationship ends. Employers are particularly concerned about an employee's departure when that employee has access to or control over client relationships, customer lists, confidential information, or trade secrets. Such could be exploited in competing with the former employer. An employer is entitled to the goodwill employees develop through direct client contact, but sometimes when employees leave, they see previously developed customer relationships as low-hanging fruit to steal away from the former employer.

Courts Do Not Agree

Lawmakers and courts, however, do not seem to share an employer's enthusiasm for noncompete covenants. Any agreement with the potential to prevent an individual from earning a living will be viewed with skepticism, and noncompete covenants can preclude someone from pursuing a chosen occupation, trade, or vocation. An employee's training or education may be limited to the particular field covered by the noncompete clause, thereby blocking any possibility of future employment. Naturally, the concern is whether an employee effectively would be prevented from supporting himself or herself and any dependents.

Some also believe that an employee enters the employer-employee relationship at a great bargaining disadvantage: Employees are often seen having little choice but to acquiesce to the restriction on future employment to procure immediate employment. Moreover, such provisions are seen as restraints on trade. Courts are reluctant to enforce a provision believed to artificially manipulate the employment market.

Consequently, noncompete covenants are disfavored under the law. In a couple states, covenants not to compete will not be enforced at all. Virtually all other states enforce them only after exacting scrutiny. Rigorous tests have been promulgated and incorporated into the law for determining a noncompete provision's validity and enforceability. The tradition has been for courts to void unreasonably broad restrictions.

Specific Requirements

Although the specific requirements vary from state to state, generally noncompete covenants will be enforced only when they are: 1) necessary to the employer's legitimate, narrowly-defined business interests; 2) negotiated in good faith; 3) reasonable in terms of the geographic area covered by and the duration (length of time) of such covenants; and 4) supported by adequate consideration. A restrictive covenant failing to measure up to any one of these requirements is subject to being invalidated.

Legitimate business interests justifying a noncompete provision include protecting the employer's goodwill, safeguarding trade secrets or confidential business information, and preserving existing and prospective clients. Further, the restriction in terms of geographic area and time must be no greater than is required to protect the employer's business interests. A restriction that covers too much geography or is in place for longer than necessary likely will not be enforced. Indeed, the traditional rule has been to void an entire covenant if any part of it is overbroad.

Although the requirements are well-known, there is no reliable litmus test for what ultimately will be determined to be enforceable. Whether particular restrictions are ruled unreasonable usually depends on whether they are narrowly tailored to achieve the employer's business purposes. Unsurprisingly, this determination is subjective and unpredictable. No noncompete covenant is guaranteed to survive scrutiny.

Saving the Unreasonable And Overbroad: Blue Penciling

Although noncompete covenants are disfavored, many courts also abhor completely discarding a bargained-for provision. By and large, the practice of completely invalidating overbroad restrictions has been abandoned. Courts recognize that striking down an entire covenant does not give effect to the parties' intentions, *e.g.*, to restrict the employee's ability to compete with the employer post-employment. Instead of invalidating the entire covenant, some courts have started to change, amend, or revise unreasonable terms in noncompete agreements to render them enforceable. This practice has become generally described as "Blue Penciling."

There is no universally accepted view as to how Blue Penciling should be applied. The most conservative approach to Blue Penciling involves striking out — or running a "blue pencil through — only the unreasonable and problematic language of the covenant. The rest of the provision is left to be enforced as originally written. In these jurisdictions, language cannot be added or modified to salvage the provision.

Under this approach, a court should be careful to give effect to the parties' intentions when removing any clauses or language. Simply crossing out clauses or words can sometimes be as harmful as adding or modifying terms. Striking a single phrase can alter the meaning of the remaining language. The answer for some courts has been to strike out only language that is grammatically severable. *See continued on page 8*

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Fearnow v. Ridenour, Swenson, Cleere & Evans, P.C., 138 P.3d 723, 731 (Ariz. 2006); *Solari Indus., Inc. v. Malady*, 264 A.2d 53, 56 (N.J. 1970). The provision's meaning must survive after the unreasonable clause is excised. If the meaning is lost, then the provision, if severable, is completely eliminated. In these cases, which language, if any, a court might strike is difficult to predict. Lawyers and contracting parties are left struggling to anticipate whether a court will excise language from their noncompete provision or whether it will be nullified altogether.

In contrast, many courts across the nation support the conclusion that a court may judicially reform an overbroad covenant not to compete. *See Kegel v. Tillotson*, 297 S.W.3d 908, 913 (Ky. Ct. App. 2009); *Pactiv Corp. v. Menasha Corp.*, 261 F.Supp.2d 1009, 1015 (N.D.Ill. 2003); *Peggy Rose Revocable Trust v. Eppich.*, 640 N.W.2d 601, 609 n. 11 (Minn. 2002). Modification, alteration, amendment and revision are permitted in these states. In modifying or revising an overbroad provision, the courts attempt to redefine the contours of the nature and scope of the restriction. For example, a court may reduce a covenant's duration from three years to one year to render it reasonable. Likewise, a covenant's geographic area may be decreased from a 30-mile radius to a more reasonable 15-mile radius. These modifications, amendments or reformations are intended to save an otherwise unenforceable provision. Reluctant to substitute its own judgment for that of the parties, some courts will only make such modifications when specifically requested by a party.

In addition, some legislatures have codified this form of Blue Penciling. The Georgia General Assembly enacted legislation stating that "a court may modify a covenant [in a contract entered into on or after May 11, 2011] that is otherwise void and unenforceable so long as the modification does not render the covenant more restrictive with regard to the employee than as originally drafted by the parties." GA. CODE ANN. § 13 8 53(d). A few other legislatures have done likewise.

What the Critics Say

Critics of this form of Blue Penciling argue that an employer might intentionally include an overbroad restriction relying on a court to pare it down. On the other hand, if a restriction is too broad, an employee is more likely to bring a legal challenge. The cost of litigation may dissuade employers from drafting a restriction that is too burdensome.

Other courts have flatly refused to employ Blue Penciling. For example, Virginia will not save an unenforceable noncompete clause. *Pitchford v. Oakwood Mobile Homes, Inc.*, 124 F.Supp.2d 958, 965 (W.D.Va. 2000). In these states, an unreasonable covenant simply will not be enforced; the court will do nothing to rescue the provision. Courts in these jurisdictions believe judicial meddling should not be used to save the parties from their failure to craft a reasonable provision.

Attempting to Take the Reins: The Savings Clause

When an employer is crafting a noncompete agreement, inevitably the question arises: Is there anything that can be done to ensure a noncompete provision is not invalidated? Unfortunately, no particular language is bullet-proof. Anticipating the possibility that a noncompete clause may be found to be overbroad, employers and attorneys have started to include language in their agreements expressly authorizing "Blue Penciling." Often, these provisions permit modification or revision. Employers would prefer a restriction be trimmed rather than completely eviscerated.

Some lawyers have gone further by attempting to steer the court's modification of a noncompete clause. This is done by expressly defining in the contract the downward steps the court could adopt. For example, a contract may provide that if the three-year duration of a noncompete restriction is determined to be unreasonable, then the term of such restriction shall be for two years. In fact, the contract could delineate more than one downward step. The intent of such a provision is to maximize the permissible scope, duration or geographic area a court would permit. In theory, the parties' prior agreement to the steps mitigates the courts' concern that it would be substituting its own terms for the parties' agreement.

Of course, there is a danger that including defined steps in the contract could backfire. There may be a tendency for a court to adopt the least restrictive time period or geographic area. An employee who appreciates this fact may be tempted to challenge the scope, hoping to have it trimmed down to the least restrictive scope.

Moreover, courts do not always give effect to such provisions. Arizona courts, for example, have declined to give effect to a provision allowing modification where such provision was inconsistent with Arizona's "non-modification rule." *Varsity Gold, Inc. v. Porzio*, 45 P.3d 352, 355 (Ariz. Ct. App. 2002). In fact, some Virginia courts have held that "Blue Pencil" provisions are contrary to public policy and render an agreement unenforceable. *See Better Living Components, Inc. v. Coleman*, 67 Va. Cir. 221, 226 (Albermarle County Cir. Ct. 2005).

Conclusion

All told, regardless of the jurisdiction and whether Blue Penciling is allowed, employers and their attorneys must draft noncompete covenants as carefully and meticulously as possible. Although it may be likely in some jurisdictions, employers should not rely on a court to save an unreasonable, overbroad restriction. Consideration should be given to whether contract provisions authorizing Blue Penciling should be included. While there are no guarantees any noncompete will survive scrutiny, crafting a restriction as narrowly as possible is the best bet for enforceability.

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