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Non-Compete Agreements

Non-compete agreements (NCAs) are designed to prevent individuals from leaving a company with valuable information and then using that information in a new job with a competitor of the company to the detriment of that original company/employer.

Sounds reasonable on its face. On the other side, what if you are the employee that with no malicious intent whatsoever, elects to change jobs and move on to bigger and better things? You should be free to do so, right? If on exiting your current job you are presented with the NCA that you signed when starting (and may have forgotten or misplaced) and you are a valuable developer, your soon-to-be former employer may be dropping more than a subtle hint in your lap.

So what is fair and reasonable in light of the two justifiable yet opposing positions?

This is the essence of the determination that courts must make in cases involving NCAs. In general terms, in order for an NCA to be "reasonable" it must protect an employer's legitimate business interests while not unduly restricting the employee's ability to work elsewhere. Other key considerations are length of time and geographical area (historically). The first part, protecting legitimate business interests, is satisfied if the employee involved had access to trade secrets of the former employer. Further, if the employer uses NCAs for only certain employees that have access to confidential material or trade secrets, they strengthen greatly their likelihood of support from the courts. As for length of time, six months to two years depending on the situation, is usually found to be acceptable. Anything longer than that would require a stiffer business reason for the restriction. Finally, geographic scope is considered. In the technology industry however, geographical area could include the entire US market. There has been some relaxing of the geographical scope restriction, which is why I used the parenthetical "historically" above.

Note that the NCA is a contract. All contracts must have "consideration", or something of value, offered by each party and consequently accepted by the other party in order for the contract to be valid. If the NCA was a condition of employment at the point of hiring, then the promise of a job fills the consideration requirement. Introducing the NCA in an existing employer/employee relationship is different. Some courts have held that *continued* employment is sufficient consideration. In other cases, the execution of the NCA in conjunction with a raise or promotion has served to establish that sufficient consideration is present to enforce the NCA. An employee faced with the new (post-hiring) NCA requirement may not have any reasonable opportunity of negotiation. Some may however. If the employee is a valued software scientist, then ideally that individual could seek a severance package, providing an amount of money sufficient to offset the period of time in which they are prevented (by the NCA) from working in the same field for a competitor. As a general statement, the employee should always review the NCA carefully, even seek legal advice, in order to determine the restrictions imposed and the reasonableness of those restrictions.

The employer should make sure it is seeking to protect a legitimate business interest, and NOT just that it does not want competition. Lack of a justifiable business reason could be argued in the case of an employer having all employees sign an NCA, regardless of position, from receptionist to software engineer. Limited duration and geographical area are also helpful. An NCA of unlimited duration, where the employee can never work for a competitor, would work against the employer. In short, if the employer is careful to make the NCA as tight in scope as possible, in order to make the burden on the employee as little as possible, then they are in much better shape if the NCA is contested. If an NCA is too broad and lacks a sound business reason, its enforceability is strongly suspect.

Where a valid NCA exists, the new employer may also be susceptible to legal action by the former employer. Employers that lose key personnel to competitors often bring action against both the former employee (for violation of the NCA) and the new employer (for tortious interference with the prior relationship evidenced by the NCA). It is not unheard of for a new employer (that lures the key employee away) to belly up and take care of the employee's anticipated defense, legal bills, and settlements with the former employer. I am not trying to scare people, but it should be understood that if an NCA is valid and you breach it, you are potentially liable for damages to your former employer. In addition, the former employer could seek an injunction preventing you from working for the new employer while the case is decided. Finally, if everything goes the former employer's way, you could still be prevented from working for the competitor into the future. If you are the employee considering a job change and you asked directly if you signed and NCA, then obviously you must reveal the fact. If not asked and you do not volunteer the information, and the former employer sues the new employer, then the easiest way for the new employer to reduce its exposure is to terminate you. Not a welcome thought.

An interesting twist to consider is the situation where the employer terminates the employment relationship. Assuming that the NCA is valid and reasonable (see above), and would probably be upheld if the employee were the one terminating the relationship, then the issue really comes down to a restriction on the employee's ability to make a living when the employer terminates employment *other than for cause*. Keeping in mind that we started with the assumption of a valid NCA, then strictly speaking, the employee is not free to ignore the NCA and the former employer could sue the employee, but then the court would have to look at the fact that the employee did not leave voluntarily and determine the reasonableness of limiting that individuals livelihood. My point is that being "let go" does not nullify the NCA, but enforcement by the former employer will be more difficult than if the employee left on their own.

Note that NCAs should not be feared, but they must be understood. In the HIT industry companies invent things and they try to sell more of these things to the industry than their competitors. They have a right to protect their inventions, know-how, trade secrets and customer bases. Anyone seeking to join such a company really should understand this going in. That said, it is not reasonable to expect a person to work for only one company in a given industry for their entire career. Some do, most do not. There is also the consideration of the type of work that the employee performs. The software scientist should have far more expectation of restriction on the ability to switch to a competitor than an administrative staff member.

Final Comments:

NCAs are not bad. If a company has something worth protecting, something essential to its business that if shared with a competitor would be damaging to its business, then they should be able to protect it. I don't know how an employee would consider it "OK" to take

that information elsewhere. I know it happens, but that does not make it right. Separately, we are all free to work wherever we choose. Absent the malicious factor, people should not be restricted from working for a competitor.

The problem is that you cannot unlock the brain of a software scientist, extract all they have learned at your company, then let them go on their way. Knowledge is retained and there is nothing we can do about that. I once saw it referred to by a BIG hardware/consulting company as "intellectual capital" (and I knew it was time to put that file down for the day). So even if nothing is physically removed, the secrets go right out the door in the scientist's gray matter. Keeping them from using that knowledge to a competitor's advantage is fair. Keeping them from earning a living doing what they like is unfair. It is a balancing act, a weighing of the consequences to each side, and a determination of fairness that the courts must perform when ruling on NCAs.

Please understand that even though I expound on valid or enforceable NCAs above, you must note that certain states basically do not permit NCAs (like California), others do but only in limited circumstances (New York and Virginia), while in others enforceability depends on the circumstances. This article has focused mainly on the individuals involved in the technology aspect of healthcare. Many states (like Massachusetts) clearly prohibit by law NCAs for physicians and nurses due to the fact that such agreements restrict a medical professional's right to practice and also limit the patients' right to choose their caregivers.

The NCA issue is heating up. Legislation has been proposed here in Massachusetts that would dramatically restrict NCAs by instituting strict guidelines, brightline determinations (clear "black & white" language) as well as safe harbor provisions. One very interesting aspect of the proposed legislation is that it would protect the employee *residing* in Massachusetts, even if the employer is not located in Massachusetts. I am watching closely as the bill winds its way through the legislature.

Finally, if you are faced with a situation involving an NCA and have serious concerns, please consult with an attorney or your local US Department of Labor office.

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