

PROTECTING COMPANY SECRETS MORE BUSINESS OWNERS ARE FORCING THEIR NEW HIRES TO SIGN NONCOMPETES. SHOULD YOU?

ONCE RESERVED FOR job-hopping executives and high-tech gurus, non-compete agreements are becoming standard in an unexpected range of businesses. From engineering firms in Massachusetts to companies that paint lines on Virginia highways, businesses of all sorts are pushing new hires to sign noncompetes, which restrict them from working for competitors. Indeed, in a nationwide review of court records, Jay Shepherd, an employment lawyer with Shepherd Law Group, in Boston, found a 37 percent rise in published court decisions from 2004 to 2006 involving noncompetes, and an 85 percent jump in the past decade.

Should noncompetes be in the stack of paperwork your company puts in front of new hires? As economists like to say, it depends. Noncompetes can be a valuable tool, keeping your most important assets—your key employees—from taking their expertise to a competitor. But those that are too broad or too restrictive will probably be thrown out in court. And many companies use noncompetes when their less onerous brethren, confidentiality agreements and nonsolicitation agreements, will do. Whereas noncompetes restrict workers' job options, the other contracts just prevent them from taking company secrets or client relationships with them when they go. It's an important difference, because companies that reach too far with their noncompete agreements often find they end up with no protection at all. The laws regarding noncompetes vary from state to state (see "The Legal Landscape," next page), but many state laws are friendly to employees. "Courts generally don't like the idea of putting people out



Private Property

You don't want your employees to take what you have taught them to a new employer. But tread carefully when you use a noncompete.

of work," Shepherd says. "So you'd better have a pretty damn good reason for stopping someone from plying their trade."

For many companies, the value of a noncompete agreement lies in its psychological effect, not its enforceability. Andrey Tomkiw, an employment attorney with Tomkiw Dalton, in Royal Oak, Michigan, says some employers view noncompetes as a retention tool rather than a method of protecting intellectual property. Regardless of the document's legal standing, they hope it will deter employees from looking elsewhere for work. But a badly designed noncompete won't be enough to keep your best performers from leaving. Says Tomkiw: "If you only have a very low fence, people are going to hop over it."

You will have to tread carefully if you actually want your non-compete to do its job. Here are four things to keep in mind.

Keep it local

People have a right to make a living, even after they stop working for you. Instead of treating your employees like indentured servants, specify a geographic area in which they will agree not to work and give a reasonable time limit for the restrictions to expire—generally two years or less. Tomkiw recently had a client who was offered a sales job with an international manufacturing company. The catch: The noncompete agreement prohibited him from working in sales for any company *anywhere in the world* for two years if he left. Tomkiw doubted the agreement was fully enforceable, but he advised his client not to sign it. Eventually, the employer agreed to a confidentiality agreement instead.

Sometimes a judge will throw out an entire noncompete agreement if parts of it are too broad. Take the recent case of Spivey Pavement Markings, in Chesapeake, Virginia. Theodore Wood, a Spivey supervisor, left in April 2006 and soon started a foreman job at a similar company, Mid-Atlantic Pavement Markings. A year later, Spivey sued, trying to enforce its noncompete agreement, which was intended to prevent Wood from taking such a job. Spivey argued that Wood had received training in a specific method of painting road markings, and Spivey didn't want him bringing that technique to a competitor.

But the judge rejected Spivey's request, calling the agreement "overbroad, ambiguous, and vague." The noncompete banned Wood from doing any type of work for a competing company, says Timothy McConville, Wood's lawyer. "It would have precluded my client from working even as a janitor for Mid-Atlantic Pavement Markings," he says. Spivey's attorney, Christopher L. Spinelli of Kalfus & Nachman, in Norfolk, Virginia, acknowledges that the agreement was broad. "The best approach would be something tailored to the specific job duties of specific employees," Spinelli says. "If Spivey does that, there's no reason it wouldn't be enforceable."

By contrast, Alan Kroll uses a narrowly drawn noncompete. Kroll, president of Space Care Interiors, a \$15 million office furniture company, in Berkley, Michigan, wants to prevent members of his sales staff from switching jobs and taking Space Care clients with them. His noncompetes generally require employees to agree not to work for a competitor within a 50-mile radius for one or two years after leaving Space Care. Recently, Kroll threatened legal action against a former employee who violated the noncompete. The two parties negotiated a cash settlement.

Decide what to protect

Your noncompete will have a better chance of passing legal muster if it focuses on the information you're trying to protect rather than just proscribing the job options of your employees, says Tomkiw. Make sure your noncompete protects information that is truly proprietary. Do your employees use customized software? Have you trained workers in a unique manufacturing process that boosts productivity? Or are your client relationships your most important asset? "Ask yourself, What do we do or have that gives us a competitive advantage that no one else does or knows about?" says Tomkiw. "Then protect that."

Communicate with your employees

If your employees don't know that certain information is confidential, a judge is not likely to punish them for sharing it with a competitor. Make it clear to employees, in writing, what information is private. Whether it's a list of clients or code

for proprietary software, your important information should be password-secured, and only certain employees should have access to it. "You have to put the information in a box of some sort," says Jon Meer, who chairs the employment practice in the Los Angeles office of law firm DLA Piper. "If you can't define what you were trying to protect in a way the court can clearly understand, it's going to be thrown out."

Don't treat your secretary like a CFO

One standard noncompete for everyone from the mailroom guy to the CFO won't cut it. Instead, identify positions that have clear access to proprietary information or clients and then tailor an agreement for each of those jobs. And if you're requiring agree-

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For more on using non-compete agreements, tune in to a podcast with *Inc.* associate editor Hannah Clark Steiman at www.inc.com/keyword/feb08.

Resources

For more information on noncompete agreements, check out the website of the Alexander Hamilton Institute at ahipubs.com.

THE LEGAL LANDSCAPE

Some states are friendly to noncompetes; others aren't. Here's a rough guide.

Unlikely to enforce: California bans nearly all employee noncompetes; a company can be sued for forcing employees to sign one. Georgia's and Wisconsin's laws are nearly as strict—if a single item in an agreement is overbroad, the whole thing gets tossed. Other states in which noncompetes rarely fly include Colorado and Oregon; the latter passed restrictive legislation that went into effect January 1, 2008.

Reluctant to enforce: In most states, courts will enforce noncompetes—but only if the agreements are nar-

rowly drafted to protect trade secrets or customer relationships. Some states allow the courts to "blue pencil" the agreement, which means scratching out an unenforceable term. Other states allow the courts to revise an agreement to make it more reasonable. "Reluctant" states include New York, Massachusetts, and Illinois.

Likely to enforce: Florida law makes noncompetes presumptively enforceable. Other states more likely to enforce noncompetes include Texas, Michigan, and New Jersey. —S.W.

ments for your lower-level employees, you may want to reconsider. Noncompetes signed by blue-collar or administrative workers are hard to justify in court, since those workers usually don't know company secrets or develop customer relationships.

Last year, Integrated Process Technologies, an engineering firm in Devens, Massachusetts, claimed a pipefitter violated a noncompete agreement when he took a job with GMP Piping, in nearby Littleton. Shepherd's firm successfully argued that the worker hadn't stolen any trade secrets. "We kept saying, 'Come on, the guy's a \$29-an-hour pipefitter,'" Shepherd says. If you force all your low-level employees to sign noncompetes, Shepherd adds, it may be harder for a judge to take you seriously when there's a major breach. In short, you may want to require noncompete agreements for the guy selling pipes but not for the one welding them. —Scott Westcott