NEW DEVELOPMENTS IN NON-COMPETE AGREEMENTS

Non-compete agreements (sometimes called restrictive covenants) have bedeviled businesses and the legal system as long as anyone can remember. No business owner wants to train an employee to be a great salesman or a brilliant plant supervisor, only to have that person leave to compete by calling on the same customers or opening up their own business. On the other hand, no employee wants to limit his or her future opportunities by being tied forever to a job in which he or she is underpaid and underappreciated.

As business lawyers, one of our hardest jobs is to provide helpful and far sighted counsel with regard to agreements like these.

Providing advice is made especially difficult because non-compete agreements have always troubled the judicial system. Judges are aware that competition is literally what made the country great and what keeps prices low. Two conflicting notions are brought into sharp contract--free competition is good for everyone (i.e. non-compete agreements are bad) and people should live up to promises they make, especially if done in writing (i.e. non-compete agreements are good). And, the business owner who gets an employee to sign a non-compete is not unworthy of sympathy. After all, a business owner who expends the time and money to teach employees what may genuinely be secret or unique methods should be able to avoid having a disloyal employee turn against them and "steal" their confidential information.

Publications aimed at Illinois lawyers have recently contained a great deal of commentary about the Illinois Supreme Court's recent change in the rules regarding non-compete agreements in a case named *Reliable Fire Equipment Company v. Arredondo*. The court adopted an approach that avoids rigid rules or standards on non-compete agreements. Rather, whenever there is a dispute about a non-compete agreement, the scope of a trial judge's inquiry is to be expansive enough to include an evaluation of the "totality of the facts and circumstances of the individual case."

This should be import to two types of readers – those who own or manage a business for which could be damaged if some key employees left to go into competition, and employees who have signed, or will be asked to sign, non-compete agreements that could materially impact their future opportunities.

In a broad sense, the Illinois Supreme Court may be encouraging trial courts to evaluate the enforceability of noncompete agreements based upon whether the employer has a "legitimate business interest" to protect as opposed to merely trying to avoid honest competition. Years ago, we handled a matter involving an agreement preventing truck drivers who delivered food to grocery stores from competing. The employees had no special knowledge and no special training that the employer legitimately needed to protect. Rather, the employer simply wanted to reduce competition.

We have also seen that some employers that have a legitimate business interest to protect, do so in far too heavy handed a way. Ultimately, the restriction on the employees continues to

need to be reasonable in terms of time and scope. Certainly, if a salesperson deals only with customers in the Chicago Metropolitan Area, a restriction that prevents that person from selling in Waukegan or Rockford would be difficult to justify. A salesman's contacts and good will may vanish after 9 months of being out of the market, yet some employers may want a restriction of 3 years.

Ultimately, this recent Supreme Court decision may turn out to be favorable to employers by allowing for an expansion of the types of business interests eligible for protection. However, the uncertainty as to how courts will decide these issues of legitimacy and reasonableness will continue to make the enforceability of non-compete agreements unpredictable.

Yet, even in the face of this unpredictability, there are things that a business owner should do:

- If you have valuable secret information, you should treat it as such. Business owners know not to leave cash lying around. Neither should they leave valuable information openly accessible to those who do not require it. Employees cannot steal your trade secrets if they don't know them.

- A business owner who either has or is contemplating having valued employees sign non-compete agreements will benefit by having them reviewed by a lawyer familiar with these developments and with their business, so that they can be better focused on meeting the criteria of the law. This is not an area where you want to find a form on the internet or borrow one from your neighbor.

- Employees who have access to valuable secret information should be asked to sign an agreement that recognizes the confidentiality of the information they have and clearly defines it. While it is difficult to prove that an employee or former employee has disclosed confidential information, agreements such as these generally inhibit disclosure both during employment and afterward, reduce the risk of inadvertent disclosure and clarify to employees the importance of maintaining confidentiality.