Workforce
June 2015
Business, Strategy and Management

Legal

Noncompete on the Hot Seat

Though laws on noncompete agreements vary by state, they are no longer confined to highly specialized industries.

By Michelle V. Rafter

What do athletic shoe designers, sandwich-makers and summer camp counselors have in common?

Over the past several years, all of them have been the subjects of lawsuits involving noncompete agreements.

One of the most recent involves three shoe designers for Nike Inc. The Beaverton, Oregon-based footwear and apparel giant claims the trio broke yearlong noncompete agreements after they quit in the fall of 2014 and announced plans to start a design group for rival Adidas. The designers countersued in March, claiming parts of the noncompete are unenforceable under Oregon law.

Once used almost exclusively in employment contracts with highly skilled workers and top executives, noncompete agreements have become commonplace for all types of employees, including those in minimum-wage jobs and at companies of all sizes and industries.

The increase has seen a related rise in lawsuits. In 2012, noncompete agreements were at the center of 760 published U.S. court decisions, a 61 percent increase from the previous decade, according to research that Boston-based law firm Beck Reed Riden conducted for The Wall Street Journal.

Employment law experts disagree on the advantages that noncompetes provide. Some maintain the agreements are essential for companies to remain competitive and protect trade secrets. Others believe the agreements stifle innovation and entrepreneurship.

"Everyone understands winning the talent war is what gives companies their competitive edge," said Orly Lobel, a lawyer and University of San Diego employment law professor. But "when we reduce mobility, moving from one job to another, we're reducing knowledge flows in an industry, and the whole industry develops and grows at a slower pace."

The debate hasn't kept companies from adopting noncompetes as part of the normal course of doing business. With employers who use them, it falls to the human resources departments to make sure agreements are integrated into their people management practices, including recruiting and onboarding.

State Laws Differ

State laws governing noncompetes vary. Employers in states such as Louisiana, Oregon and South Dakota can, in certain circumstances, legally bar ex-employees from joining a competitor in a specified geographic area for up to two years, according to a 2013 Beck Reed Riden survey. By contrast, four states — California, Montana, North Dakota and Oklahoma — have either severely restricted noncompete agreements or banned them outright, according to the survey.

Depending on the state, companies may need to notify prospective employees of noncompete agreements in an engagement letter or employment contract. In states such as Oregon, employers must also provide two weeks' notice of a noncompete agreement before a new hire's start date or in advance of a promotion.

In certain situations, companies may include noncompete language in a job application to protect themselves from a prospective employee sharing trade secrets or other information from a previous employer, according to Dan Forman, an employment lawyer and partner with Carothers DiSante & Freudenberger in Los Angeles.

Whatever companies choose, it's important to make employees aware of policies and provide HR and managers with mandatory training on a regular basis on policies and how they should be enforced, Forman said.

Noncompete agreements have become so common, the Society for Human Resource Management is conducting a survey to learn more about how member companies use them. SHRM public affairs manager Kate Kennedy said results would be available later this year.

States with noncompete agreements generally have three "reasonableness" standards covering length of time, distance from a previous employer and the type of work an ex-employee is prohibited from doing. States' interpretations of what constitutes reasonableness differ. "I remember before 2008 seeing covenants that basically identified the known universe as the geographical region. I doubt any court would hold that as reasonable," Forman said.

Employees at fast-food sandwich chain Jimmy John's pushed back over what they claim are overly broad and "oppressive" restrictions in the noncompete agreement. The agreement prevents employees who quit from working for any business deriving more than 10 percent of its revenue from selling subs or other "wrapped or rolled sandwiches" located within 3 miles of a Jimmy John's shop for two years.

In September 2014, Jimmy John's workers filed a class-action lawsuit over the agreement. A lawyer representing the workers told Huffington Post that because the chain has 2,000 locations, the noncompete agreement effectively covers 6,000 square miles in 44 states. In October 2014, Congress asked the U.S. Labor Department and Federal Trade Commission to investigate. The company has filed a motion to dismiss the case.

Companies such as Jimmy John's may ask low-skilled, low-wage workers to sign noncompetes as a way to protect trade secrets such as recipes or sandwich-making methods

NONCOMPETE continued on page 49

Legal Briefings

THE DOCTOR IS BACK IN

Dr. Donald Golden brought a lawsuit against the California Emergency Physicians Medical Group claiming racial discrimination. The parties agreed on the record to a settlement of the dispute, which included a clause providing that Golden would never again work for the medical group. The settlement agreement also provided that if it ever acquired a company that employed Golden, the medical group would have the right to terminate Golden's employment without further consequence.

Golden subsequently sought to back out of the settlement agreement, claiming that the "no employment" provision violated a California business and professions code, which provides that "[e]xcept as provided in this chapter, every contract by which anyone is restrained from engaging in a lawful profession, trade or business of any kind is to that extent void." Golden claimed that his entire settlement agreement had to be voided because the "no employment" restrained his ability to pursue his lawful profession.

The trial court found the settlement agreement enforceable, but the 9th Circuit Court of Appeals reversed the decision, finding that a "no employment" term in a settlement agreement could potentially violate the code if it "substantially limited" a party's ability to pursue their profession. *Golden v. Cal. Emergency Physicians Med. Group, 2015 BL 99256, 9th Cir., No. 12-16514* (April 8, 2015)

IMPACT: Employers must be careful in drafting settlement agreements that involve "no employment" or "no re-employment" provisions to be sure they do not substantially restrict the former employee's ability to work.

COURT DELIVERS PREGNANCY DISCRIMINATION RULING

Peggy Young, a part-time driver for UPS Inc., became pregnant and was advised not to lift more than 20 pounds. Because UPS required drivers to lift up to 70 pounds, Young was told she could not work and stayed home without pay. Young filed a lawsuit in the U.S. District Court for the District of Maryland (see *Workforce* April 2013, p. 14) alleging that UPS's failure to accommodate her pregnancy-related lifting restriction was discriminatory.

Both the District of Maryland and the 4th Circuit Court of Appeals held that Young's claim failed because her alleged comparators were too different from her to show discrimination.

The U.S. Supreme Court reversed, explaining that the Pregnancy Discrimination Act "requires courts to consider the extent to which an employer's policy treats pregnant workers less favorably than it treats nonpregnant workers similar in their ability or inability to work" and that "[u]ltimately, the court must determine whether the nature of the employer's policy and the way in which it burdens pregnant women shows that the employer has engaged in intentional discrimination." *Young v. United Parcel Service Inc., Case No. 12-1226* (March 25, 2015).

IMPACT: Employer policies that provide for accommodations under certain conditions, but not for pregnancy-related accommodations, may be discriminatory in their application.

Mark T. Kobata and **Marty Denis** are partners in the law firm Barlow, Kobata and Denis, which has offices in Beverly Hills, California, and Chicago. To comment, email editors@workforce.com.

NONCOMPETE continued from page 21

"using all the means they have," Forman said.

Legal experts say some employers shifted to using trade secret agreements to achieve the same effect as noncompete agreements, especially in states that restrict noncompetes. Trade secret agreements generally prohibit ex-employees from sharing trade secrets they learned on the job with a future employer.

Lobel said her research on noncompete agreements has shown that employees who are bound by them feel unmotivated and view their career trajectories as limited. Her research also has shown the agreements have the unintended consequence of leading the least desirable employees to stay "because they don't see external options." More desirable employees "sought after and fought after, they'll leave and be indemnified," with a new employer paying for a breach of noncompete agreement as part of the cost of doing business, she said.

That appears to be what's happening in the Nike Inc. case against its three former design employees, whom the company claims breached their contracts and took trade secrets and "a treasure-trove of Nike product designs, research information and business plans." Nike's lawsuit alleges that the ex-designers showed Adidas copies of their noncompete agreements and that Adidas promised to "pay an outside law firm to help manage the situation" and represent them in any lawsuit.

Nike is seeking $10 million in damages and back pay. An attorney for the company declined to comment, and a Nike spokeswoman did not reply to a request for comment. Matt Levin, a trial lawyer with Markowitz Herbold PC in Portland, Oregon, representing the designers declined to discuss the case while litigation is pending, adding: "We have done our best to state our position in the documents we have filed with the court." A trial is slated for late June. *wf*

Michelle V. Rafter is a *Workforce* contributing editor. To comment, email editors@workforce.com.