ALL THINGS HR BLOG

LOADED QUESTIONS: ARE NONCOMPETITION AND NONSOLICITATION CLAUSES REALLY ENFORCEABLE IN MICHIGAN?

by Christina McDonald and Jeremy Belanger

As an employment lawyer, there are a number of questions I frequently hear from clients and colleagues. One of the most common ones is, "I thought noncompetes weren't really enforceable. Is that true?" This question takes many forms. For example:

Employer Client: "*I don't want to prevent someone from working, so I just have my key employees sign a confidentiality agreement.*" (The lawyer breathes a sigh of relief.)

Employer Client: "*I have every one of my employees sign a noncompete and want to send them to jail if they trip up.*" (The lawyer prepares to have a hard discussion.)

Employee Client: "*I didn't think nonsolicit clauses were enforceable, so I called every customer and client I ever knew using my prior employer's client list.*" (The lawyer prepares to defend the lawsuit.)

The enforceability of any restrictive covenant[i] depends primarily on state law – where the employee works and lives, where the employer operates, and where the contract was signed matter a great deal.

Restrictive covenants can be excellent tools for employers to protect their business' reputation, competitiveness, and confidential information. And in Michigan, such covenants will generally be enforceable, provided that they are *reasonable*. Restrictive covenants are typically analyzed under the Michigan Antitrust Reform Act ("MARA").[ii] Specifically, MARA permits an employer to obtain contractual protections from its employees to protect its "reasonable competitive business interest," which might include prohibiting an employee from "engaging in employment or a line of business after termination of employment."[iii] In order to be considered "reasonable" and therefore enforceable, the restraint must be "reasonable as to its duration, geographical area, and the type of employment or line of business."[iv] To the extent a Michigan court determines the restriction to not be reasonable, it may modify or "blue pencil" the agreement or covenant to make the it reasonable, and thus enforceable.

So what is a "reasonable" noncompete or nonsolicit? The answer depends on the employer's business, the employee's role, and established case law. As the Hon. Christopher P. Yates recently summarized for the Michigan Bar Journal:

> As a general rule, any noncompetition obligation lasting for no more than one year is reasonable in terms of duration. Also, most noncompetition requirements that are limited to a 100-mile radius [or less] from an employer's place of business are reasonable in terms of geographical area. Finally, any noncompetition clause that simply prohibits an employee from working for competitors of the employer will likely pass muster under Michigan law. Noncompetition agreements that impose broader restrictions in terms of duration, geography, and type of work may run afoul of the reasonableness requirement imposed by [MARA].[v]

Nonsolicitation agreements are generally more tailored and do not impose a restraint on an employee's ability to use their knowledge and skill and support themselves. Thus, reasonable nonsolicitation agreements are generally upheld in Michigan, as are reasonable and customary nondisclosure agreements.

A few recent examples provide additional context. In *St. Clair Medical, P.C.*,[vi] the court upheld a noncompete clause binding an employee physician that contained a geographic restriction of seven miles from either of two practice locations for a term of "at least one (1) year." The court noted that "[i]n a medical setting, a restrictive covenant can protect against unfair competition by preventing the loss of patients to departing physicians, protecting an employer's investment in specialized training of a physician, or protecting an employer's confidential business information or patient lists."[vii] Notably, the court rejected the physician's argument that the restriction would be injurious to the public, stating "defendant can continue patient relationships by merely practicing outside a modest geographic restriction or by practicing within the restricted area and simply paying the liquidated damages provided for in the contract."[viii]

In contrast, in *Mid Michigan Medical Billing Service, Inc.*,[ix] the court held that a perpetual nonsolicitation of clients clause was unreasonable. The court found that it was unreasonable to permanently prohibit the former employee from pursuing employment opportunities with any current or previous client of business.[x] This restraint, as written was much broader than necessary to protect confidential information or the business interests of the employer.

Your company's noncompetition and nonsolicitation agreements may well be reasonable and enforceable. However, we encourage you to contact an attorney to help you draft such a clause or review your existing agreements to give you a better chance of having it enforced if needed down the road.

[i] *A "restrictive covenant" is a label for contractual agreements not to solicit employees, clients, customers or vendors, not to compete with a current or prior employer, and not to disclose confidential or proprietary information belonging to someone else. Restrictive covenants generally restrict an employee's actions following the end of their employment relationship for the benefit of the employer.*

[ii] *MCL 445.771 et seq.*

[iii] *MCL 445.774a(1).*

[iv] *Id.*

[v] *Hon. Christopher P. Yates, Restrictive Covenants: Burdens, Benefits, or Both?, Michigan Bar Journal, Sept. 2018.*

[vi] *St. Clair Med., P.C. v. Borgiel, 270 Mich. App. 260, 715 N.W.2d 914 (2006).*

[vii] *Id. at 266-67.*

[viii] *Id. at 270.*

[ix] *Mid Michigan Medical Billing Service, Inc. v. Williams, No. 323890, 2016 WL 682989 (Mich. Ct. App. Feb. 18, 2016) (quoting Borgiel, 715 N.W.2d. at 918–19).*

[x] *Id. at *5.*

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