

## Non-Competition Agreements From a Different Perspective

With the recent surge in employment related legal blogs and online newsletters, it seems most employers have become fairly well-versed on the topic of non-compete agreements. Not surprisingly, the literature is generally focused on the enforceability of non-competes and how they act to limit certain conduct of an individual after employment is terminated. Though, I find it odd these articles rarely address the impact of a non-compete on the terminated person's new employer.

When viewing a non-compete through the eyes of the new employer, the chief concern is whether the new hire subject to a non-compete will be prohibited from retaining or even contacting clients developed while working for the former employer. Obviously, if there is such a prohibition, the new employer's expectation of obtaining business from the employee's contacts could be directly impacted. Though, many employers have been able to sidestep this dilemma by simply inquiring whether the potential hire is subject to a non-compete during the application and interview process. If the new employer fails to take that precautionary step and hires an individual subject to a non-compete, the new employer risks being dragged into litigation instituted by the former employer over the non-compete, often through a claim that the new employer caused the individual to violate the non-compete agreement – in particular, a claim for tortious interference with contract. While an inquiry regarding the existence of a non-compete during the hiring process is generally thought to provide adequate protection against hiring employees subject to non-competes, there are other considerations that often go overlooked.

One situation that has become increasingly common involves the new employer discovering its recent hire is subject to a non-compete only *after the fact*, due to a confidentiality provision in the non-compete agreement. This often happens when the non-compete is part of a confidential partnership agreement or confidential termination agreement. Setting aside for the moment whether a non-compete in a termination agreement is even enforceable, the fact that the agreement is confidential prevents the new hire from disclosing the existence of the non-compete during the application and interview process. In this situation, the new employer often has no clue that the employee was subject to a non-compete until served with a lawsuit by the former employer. While this circumstance occurs more often than many expect, Texas Courts have yet to comment on the impact of such a confidential non-compete provision.

Fortunately, there might be a silver lining for the new employer when this unusual circumstance arises. The fact that the non-compete was confidential could bode well for the new employer in litigation over the non-compete between the new hire, former employer, and new employer. As mentioned, the new employer is often brought into any litigation between the employee and the former employer for breach of the non-compete. The fact that the non-compete was part of a confidential agreement would seemingly give rise to a defense that the new employer could not have interfered with the non-compete because it was not even aware of the agreement. It follows that the defense could be bolstered by evidence from the new employer showing that it specifically inquired whether the new hire was subject to a non-compete (i.e. through an employment questionnaire). Unfortunately, as common sense as this defense sounds, Texas Courts have yet to comment on its validity. Nonetheless, taking the simple step of inquiring

regarding potential non-compete agreements during the hiring process – as well as documenting any such inquiry – could help to curtail future litigation related to the non-compete.

The foregoing represents but just one of the potential issues that face an employer hiring an individual subject to a non-compete agreement. And while there remains significant uncertainty regarding the impact of a non-compete on the new employer, general knowledge of a non-compete's far reaching influence should, at a minimum, underscore the importance of discovering whether a potential hire is subject to a non-compete agreement during the early stages of the hiring process. Further, given the risk an employer faces when hiring an individual subject to a non-compete, it is strongly encouraged that you consult legal counsel before considering any candidate that has entered into a non-compete with a former employer.

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