WORKING

Noncompete agreements now harder to get around

By L.M. SIXEL Copyright 2006 Houston Chronicle

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Pay a little more attention the next time the boss wants you to sign a noncompete agreement.

A recent Texas Supreme Court decision makes it more difficult for everyone from medical sales people to geologists to TV personalities to wiggle out from under the agreements that restrict their ability to work for competitors.

In a decision that has the legal and corporate recruiting community in Texas talking, the court eliminated a technical loophole that many departing employees — and their lawyers — used to get out of their noncompete agreements.

"I used to tell most people who brought in their noncompetes that I don't think they'll be able to use this to prevent you from getting another job," said Rex Burch, an employment lawyer with Bruckner Burch.

But with the Sheshunoff ruling, which refers to the Texas financial consulting company that sued a former employee over a noncompete contract, Burch can't be so confident.

In the past, Burch and other employment lawyers could win a case simply by proving confidential information was not provided at the time the deal was signed.

But since Oct. 20, when confidential information is given isn't a factor. That is leaving lawyers to argue over whether the deal was too restrictive — or unreasonable.

And that will be harder to do, Burch said, because everyone has a different idea of what's reasonable.

So now, before taking on a case, Burch will have to ask whether, for example, a court will view it as reasonable for a salesman who works just in Houston to have to abide by a noncompete agreement that forbids him from competing in Dallas or El Paso.

"Does he have to move to Chicago?" Burch asked. "Is Chicago far enough away?"

Increasingly popular

Noncompete contracts have become increasingly popular as companies have tried to come up with ways to protect their trade secrets and confidential information.

Companies particularly want to protect investments in research and development or customer relationships that were established over time, said Mark Temple, an employment lawyer with Jones Day in Houston who has written many noncompete agreements for companies.

It's not fair if an employee walks out the door and uses confidential information at another company that hadn't spent the money to develop it, he said.

"You want to encourage companies to spend the money it takes to develop a product or service, but they won't do that if they feel they can't protect what they're investing in," Temple said.

Some far too broad

But some of the agreements, which are typically required as a condition of employment, are way too broad, virtually prohibiting employees from changing jobs, Burch said.

He said he routinely sees contracts that say, "You will not work in this industry."

Depending on which side you're on, the so-called "Footnote No. 6" was either a burden or a blessing.

It was that obscure footnote in a noncompete case from 1994 that led Texas courts to conclude that an employer has to provide the confidential information at the exact time the noncompete contract is signed for the agreement to be binding.

A day or a week later is too late, said Scott McLaughlin, an employment lawyer with Shook, Hardy & Bacon who has handled noncompete cases involving such diverse employers as trash hauling and door-to-door dry-cleaning companies.

Often, a new employee would sign the agreement and start working a week later, making the agreement unenforceable, McLaughlin said.

For 12 years, lawyers struggled with that hyper-technical interpretation, he said. Like many employment lawyers, McLaughlin knows both sides well because he is alternately hired by business clients to both enforce the agreements and break them.

To satisfy the requirement to immediately provide confidential information, some employers provided the employee with a packet of secrets at the time of the signing, Temple said.

The new ruling makes much more sense, he said. Now employers can provide confidential information as it's needed during the course of employment.

Now the effort to enforce — or break — the noncompete agreements will rest primarily on the reasonableness of the restrictions.

For example, it would be unreasonable to be restrained from doing a job you didn't do at your former company, McLaughlin said.

Doesn't apply to lawyers

Lawyers are exempt from noncompete agreements. Under Texas ethics rules, clients must be able to choose their own lawyers.

Without that rule, it would be very hard for lawyers to change law firms, McLaughlin said.

Houston energy industry recruiter David Preng of Preng & Associates isn't forecasting much trouble with the new ruling.

Noncompetes rarely come up when he's trying to recruit a job candidate, and when they do, Preng has learned to work around them.

In one case, Preng recruited an employee whose noncompete required him to reimburse the company for any bonuses and stock options gains received during the past 24 months if he went to work for a competitor within 12 months.

It's a significant six-figure number, Preng said, and it doesn't start with a one or a two.

So Preng worked it out so that the employee spent 2006 working as a consultant and will go to work for his new employer on Jan. 1. And he'll get to keep those bonuses and stock options from his old company.

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