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Non-Competition Agreements — Are They Enforceable in This Job Market?

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The recession has prompted companies to work harder to maintain their competitive advantage by securing their customer base. So, it's not surprising that attorneys are seeing more legal activity related to non-competition agreements, both from employers trying to enforce them, and from ex-employees trying to defend their new employment.

According to urban myth, non-competition agreements are unenforceable, but this is not necessarily the case. The general rule is that a court will uphold a non-competition agreement that is limited in duration and geographic scope and is narrowly tailored to protect a company's legitimate business interests – mainly their customers and trade secrets. The courts are hostile toward agreements that go too far and are viewed as mere restraints on legitimate competition.

For example, a company based in St. Louis who hired a salesperson that sells products only in Missouri will try to prevent the ex-salesperson from selling a similar product nationwide. Overly broad clauses as these are frowned on by judges as excessively restrictive. It's better to limit the geographical area to the salesperson's sales territory. The company will inevitably argue that the ex-employee is sharing its trade secrets with the new company. The standard of proof of a "trade secret" is high, but depending on the industry and the level of secrecy that the company maintained before the employee left, this can be a winning argument. It is still imperative when drafting non-competition agreements that a company not be too greedy – if it's overly broad it will be seen as anti-competitive and it will be difficult to enforce. Instead, the contract should be customized to the greatest extent possible.

Once the ex-employee and company find themselves in court both parties will quickly discover that battling over the enforceability of a non-competition agreement is costly and unpredictable. Emotions are usually involved, causing one side or both to dig in their heels even further as they justify their arguments. Predicting how a judge will rule on a non-compete case is impossible. It's a pretty safe bet that a contract that is narrowly written and does not impose excessive restrictions on employees will be viewed in a more favorable light. Ultimately, however, the "losing" side will have to live with the judge's decision, as well as deal with court costs and legal fees.

The most cost effective solution to non-competition disputes is to prevent the dispute. New employees should look for a fair balance before they sign an agreement, and companies should strive to provide a fair balance. Also, a surprising number of people have no recollection of ever signing such an agreement. So, companies should conduct an exit interview when the employee

leaves and provide them with a copy of the agreement, and advise them that it will be enforced. Lastly, companies, both former and prospective, and exiting and newly hired employees should have an employment attorney review the agreement in question and obtain advice on their legal rights before the final hiring decision is made.