DRAFTING ENFORCEABLE NON-COMPETE AGREEMENTS: A PRIMER FOR CHIROPRACTORS

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With the increased frequency with which workers move from job-to-job and the substantial downturn in the economy over the last couple years, more and more businesses have turned to non-compete agreements as a tool to protect their valuable assets and investments. Businesses associated with the chiropractic profession have not been immune from this continuing trend. Restrictive covenants, such as non-compete agreements, allow employers to protect precious trade secrets and confidential information (including customer lists and databases, cost and pricing information, developed customer relationships and goodwill) should an employee leave the company's employ. Restrictive covenants are also used to prohibit valuable employees from accepting employment opportunities with competitors for a reasonable period of time after the employee leaves his or her employment.

If a business is considering having its employees sign a non-compete agreement, it should be aware that courts universally disfavor agreements which restrict an individual's right to make a living. Such agreements arguably run contrary to the American ethos that a person should not be prevented from making the most of his or her opportunities. However, most courts, including Ohio courts, acknowledge a person's right to bargain away certain freedoms, including the freedom to make a living, and will enforce such agreements to the extent they are reasonable. Under Ohio law, a non-compete agreement is considered reasonable if: (1) it goes no further than necessary to protect the legitimate competitive interests of the employer; (2) it does not impose undue hardships on the employee; and (3) it is not injurious to the public. Most litigation concerning the reasonableness of a non-compete agreement centers on whether the agreement is reasonable in temporal and geographic scope.

Right about now, if you are an employer, you may be asking yourself whether it is possible to guarantee that your non-compete agreements are reasonable and, therefore, enforceable. The short answer is no. Non-compete agreements are judged on a case-by-case basis for reasonableness. That is, that which may be reasonable under one set of circumstances may not be reasonable under another. The only true way to test the enforceability of a non-compete agreement is in a court of law. Although it is impossible to determine whether a non-compete agreement will hold up to scrutiny, there are some general rules to follow that will make it more likely that a court will find your non-compete agreement enforceable according to its terms.

With respect to whether a non-compete agreement is reasonable in temporal duration, Ohio courts have generally held that non-compete agreements that restrict a former employee's ability to compete with the employer for up to two years are reasonable. With that said, in these trying economic times where many people are struggling to find work, a court could very well conclude that restricting a person's ability to compete for two full years is unduly burdensome and the court may reduce such a restriction as it sees fit. Any attempt to restrict an employee's ability to compete for more than two years after his or her employment has ended will assuredly face close scrutiny.

A traditional non-compete agreement will usually define a geographical radius in which an employee is prohibited from competing with his or her former employer. For example, a traditional non-compete agreement may state that upon the termination of the employee's relationship with the employer, the employee may not work for a competitor, open a

competing business, or service customers or prospective customers within 5, 10, 50 or 100 miles of the former employer. Courts will generally refuse to enforce such arbitrary restrictions unless the employer can show that doing so is necessary to protect its legitimate competitive interests. Instead of preventing former employees from competing in arbitrarily defined areas, Ohio courts will inquire as to whether a particular geographic area has been serviced by an employee in the past or whether the employer "reasonably anticipated" a protected interest in a particular geographic area when the agreement was signed. If the court determines that the employer had a protectable competitive interest in a certain geographic interest, it may craft its own restrictive boundaries that the parties must abide by.

Chiropractic businesses should also be highly aware of the fact that ethical rules, including the Ohio State Chiropractic Association's Members' Code of Ethics, limit their ability to restrict chiropractors from serving particular patients once a chiropractor leaves the business's employ. The idea is that patients should be free to choose any chiropractor they wish to provide services to them. While such rules prevent a chiropractic business from declaring that chiropractors it employs cannot service patients of the business if and when the particular chiropractor is no longer employed by the business, such rules do not prevent a chiropractic business from requiring that its employees promise not to open a competing chiropractic businesses within a reasonable vicinity of the employer.

In sum, there are many nuanced issues surrounding non-compete agreements in general. Such agreements should be carefully tailored for the particular factual circumstances and the particular industry. Businesses should not assume that a boilerplate non-compete agreement sufficiently protects all its protectable interests. Most savvy business owners will contact a trusted and knowledgeable attorney if they are contemplating requiring employees to enter such agreements. A well thought out and carefully crafted non-compete agreement could be invaluable to protecting your business's most valuable assets when an employee leaves the organization.