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MARK SHOFFNER AND TOM CASE LOOK AT MISCONCEPTIONS SURROUNDING LEGALITY AND ENFORCEABILITY OF NON-COMPETES IN TEXAS

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Attorneys Mark A. Shoffner and Thomas L. Case authored the article titled, "Are non-compete agreements enforceable in a right-to-work state?" featured in the *Dallas Business Journal*. As Texas is a "right-to-work" state, the authors note that the question of whether non-compete agreements are legal is often misunderstood, with the assumption being that they are not. The authors point out, however, that "right-to-work" laws govern whether an employee can be required to join a union or pay dues as a condition of employment, and have no impact on the enforceability of non-competes, which are legal and widely upheld by Texas courts. Shoffner and Case detail that the real issue for employers with respect to non-compete agreements is whether the specific terms contained in the documents will stand up in a court of law, with two important elements to consider: 1) if the agreement imposes reasonable restrictions that protect legitimate interests of the employer; and 2) if the agreement provides sufficient consideration to the employee. They add the caveat that terms such as "reasonable restrictions" and "legitimate business interests" are subjective and often form the basis for a dispute, before breaking down each enforceability factor in greater detail. Shoffner and Case end with a note to employers, "The key is to take special care to draft reasonable terms that a court will be persuaded to enforce."

Full text of the article is below, and can be viewed on the *Dallas Business Journal*'s website by clicking here.

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Are non-compete agreements enforceable in a right-to-work state?

Confusion abounds in the business world on whether non-compete agreements are enforceable in Texas. One common misconception is that because Texas is a "right-to-work" state that non-competes are illegal and unenforceable. That's just not the case, however, and it conflates two separate and distinct issues.

"Right-to-work" statutes govern whether an employee can be required to join a union or pay dues as a condition of employment. These laws have no bearing on the enforceability of non-compete agreements and have limited impact in Texas given the dearth of unionized workers.

On the other hand, non-compete agreements are widely used in the Lone Star State. Texas law does permit such agreements, and Texas courts regularly enforce them. So, the question is not whether non-competes are legal. It is whether what you've drafted – or what you've signed – will be enforced by a court.

The two keys to drafting an enforceable non-compete agreement are:

- *Impose reasonable restrictions that protect legitimate interests of the employer.*
- *Provide sufficient consideration to the employee.*

Although this seems straightforward, the subjective nature of terms like "reasonable restrictions" and "legitimate business interests" are often a matter of such strong disagreement that it takes a court to resolve the dispute.

Reasonable restrictions that protect legitimate business interests

Texas law provides that an employer should not impose a restraint greater than is necessary to protect its business. The idea is that a company can deploy a non-compete to prevent unfair competition and protect important business interests but not to stifle all competition. Protectable business interests include: trade secrets, confidential information, goodwill, relationships with current or prospective customers, relationships with employees, specialized training or referral sources.

A non-compete should contain reasonable restrictions regarding:

- *The scope of activity to be restrained.*
- *The geographic area or customers covered.*
- *The temporal duration.*

First, the prohibited activity should be limited to the job the employee performed for the employer. For example, courts have refused to enforce overbroad restrictions that would prohibit a salesman at one company from working as a janitor at a competitor.

Second, a geographic restraint should be limited to the area where the employee works, and it must be clearly identified in the non-compete, like specific counties or a mileage radius, not an ill-defined area such as a "metropolitan area." Instead of a geographic restraint, a customer or client restraint may be used and should be limited to the customers and prospects with whom the employee has substantial involvement. A non-compete can also prohibit the employee from soliciting other employees of the employer, but the restriction should be limited to those employees with whom the employee worked.

Third, the non-compete must be reasonable in temporal duration – periods up to two years are often found to be reasonable. However the time restraint should focus on the period that is reasonably necessary to protect the employer's confidential information, goodwill or other interests.

Confidential information usually has a shelf life, and the duration of a non-compete protecting it should be no longer than its shelf life. The lifespan of a non-compete for an executive with knowledge of a company's critical secrets can be longer than for a salesperson whose knowledge is limited to matters such as pricing and customer needs.

If the covenant is designed to protect goodwill, then the restraint should last long enough that the relationship between the departing employee and his customers will have little effect on where the customer sends its business.

Adequate consideration to support the restriction

Although often overlooked until it is too late, employers must provide employees with consideration to make a non-compete binding. And Texas has an interesting and somewhat unique twist on what does not constitute adequate consideration. In many states, employers can provide consideration through continued employment, a bonus or a lump sum cash payment. That simply will not work in Texas.

Consideration that supports a non-compete in the state includes:

- *Confidential information, which must be information worthy of protection and of value in the hands of a competitor, such as pricing.*
- *Highly specialized training.*
- *Stock options that align the interest of the employee with those of the shareholders.*

The agreement should specify that the employee will have access to confidential information and impose non-disclosure obligations and, if applicable, state the employee will receive specialized training. The obstacles to providing adequate consideration aren't all that high, but attention to detail is needed in Texas to create a valid restriction.

Enforceable non-competes are valuable to Texas businesses

A non-compete agreement is an effective way for an employer to protect its legitimate business interests. In Texas, they are valid and legal and there is no need to be concerned that the state is a "right-to-work" state. The key is to take special care to draft reasonable terms that a court will be persuaded to enforce.

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