

Consider Using Noncompetition Agreements to Protect Your Business

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If you own your own business, there are three legal concerns you should have in the forefront of your mind to protect your business assets and your family: (1) How do I best provide for my family in the event of my death? (2) What is my succession plan so that the business continues to thrive when I am no longer interested in, or capable of, working the way I do? (3) How do I protect my business assets from competition from my own employees, who may leave with valuable business information to go to an existing competitor or to start up a competing business? This article will briefly discuss the third legal concern. We recommend that you consult with your Murtha Cullina attorney to discuss implementing or modifying your particular approach to dealing with this issue.

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Noncompetition Agreements Aren't Enforceable, or Are They?

It is a common misconception among business owners that noncompetition agreements are not enforceable. In fact, Connecticut courts

have been scrutinizing noncompetition agreements for over 125 years. In 1879, the Connecticut Supreme Court upheld a covenant in a buy-sell agreement restricting the seller from practicing dentistry within 10 miles of Litchfield. Later, but still nearly 100 years ago, the Court balanced “the necessity of preserving inviolable the agreements of men so far as they be reasonable” with “maintaining the freedom of individuals to pursue their ordinary vocations” in favor of an older physician who had engaged a young physician under a contract restricting the young physician from locating an office in New Britain.

Little has changed in the last century. Our modern Connecticut Supreme Court recognizes that “[b]y definition, covenants by employees not to compete with their employers after termination of their employment restrain trade in a free market.” *Deming v. Nationwide Mut. Ins. Co.*, 279 Conn. 745, 761 (2006). Therefore, they are enforceable “only if their imposed restraint is reasonable,” which requires an assessment of competing interests. *Id.* Massachusetts also follows this “rule of reasonableness” in enforcing noncompetition agreements. See *Boulanger v. Dunkin’ Donuts, Inc.*, 442 Mass. 635 (2004).

Types of Agreements

There are several types of employee covenants:

1. A general covenant not to compete with the former employer for a fixed period.
2. A non-solicitation covenant in which the employee promises not to contact customers or prospective customers of the former employer.
3. An “anti-piracy” covenant in which the employee promises for a fixed period not to attempt to hire away the former employer’s work force.
4. A confidentiality agreement by which the employee promises not to disclose secret or proprietary information

belonging to the former employer.

Restrictive covenants are frequently found in three types of contracts:

1. Contracts between an employer and employee where the employer is seeking to protect against: (a) disclosure of information that if disclosed by a former employee would cause the employer disadvantage in the workplace, i.e., its customer lists; and/or (b) the loss of the employer’s investment in the employee that would occur if the employee were allowed to immediately take training and knowledge acquired while working for the employer to a subsequent employer.
2. Contracts between a buyer and a seller where the buyer of a business is purchasing a business and its goodwill.
3. Contracts between a business and its vendor where the business is seeking to prevent the vendor from using confidential or proprietary information acquired during the vendor relationship to the competitive disadvantage of the business.

Contracts between buyers and sellers of businesses have traditionally been given greater latitude than those between employers and employees because goodwill is viewed as a legitimate, protectable interest purchased by the buyer, for which the seller has already received consideration. Such agreements also benefit from the presumption of enforceability afforded agreements between parties of equal bargaining power.

While restrictive covenants contained in employment contracts have not been afforded the same degree of indulgence as those between buyers and sellers of a business, courts, especially in Connecticut, will enforce “reasonable” agreements. We have recently handled a number of cases in which courts either have enforced the terms of such agreements or sug-



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gested that they would enforce such agreements should the matter go to trial, which has allowed our firm to achieve favorable settlements on behalf of clients seeking to enforce such agreements.

Covenants Not To Compete: Balancing Open Competition with Unfair Trade

The factors that Connecticut courts consider in evaluating the reasonableness of restrictive covenants are: (1) the geographical area covered by the agreement; (2) the length of time the covenant operates; (3) whether the covenant is fair in its protection of the interests of the employer; (4) whether the covenant unnecessarily hinders an employee’s ability to work; and (5) whether the covenant interferes with the rights of the public.

Though fairly simple in theory, the reasonableness standard offers less than satisfying predictability because of its fact-dependent nature. Therefore, it is critical that you not simply pull an agreement “off the shelf” or off the computer. An analysis needs to be performed to determine your particular “protectable business interests” under the law and then to craft a restrictive covenant agreement that is reasonable in light of those interests. Properly done, these agreements can be very effective in protecting your business from employees who leave to compete with you. For this reason, you should seek legal advice to assure your agreement will be enforceable.