The Ties That Bind

A Primer for Better Understanding Restrictive Employment Agreements

Restrictive covenant agreements are frequently relied upon by employers to restrict the future activities of former employees following their separation from employment. These agreements are sometimes generically referred to as a "non-compete," but there are three types of restrictive covenants that employers commonly use:

- non-competition (or "non-compete") agreements
- non-solicitation agreements
- non-disclosure agreements

Each of these types of agreements prohibits an employee from engaging in certain activities after his or her employment has ended. Restrictive covenant agreements were originally relied on in the business world to ensure that key employees with knowledge of the inner workings of their employers could not accept employment with a competitor, solicit fellow employees to leave the employer and/or disclose the employer's trade secrets to their new employer's advantage. Once limited to senior executives, restrictive covenants agreements are now being utilized by employers to bind employees at all levels.

In the condominium context, restrictive covenant agreements are becoming more commonplace between property management companies and property managers. Management companies want to cultivate experienced managers without risking the loss of those employees and their know-how, relationships and proprietary information to their competition. At the same time, management companies and community associations want the ability to hire experienced managers without the limitations commonly imposed by restrictive covenant agreements. Likewise, managers also resist any limitations placed on their options for future employment.

Is there a way to balance the competing interests of condominium associations, their managers and management companies? With the right restrictive covenant agreements in their legal toolbox, management companies can safeguard their proprietary information while imposing appropriate restrictions on their former employees. Before deciding what type (or combination) of restrictive covenant agreement is right for your situation, it is important to understand the basic differences among these types of agreements and how they are used in the context of condominium association management.

NON-COMPETE AGREEMENTS

The broadest form of restriction is the non-compete agreement. In simple terms, a non-compete limits what an employee can do, where he or she can do it and for whom an employee can work next. When drafted appropriately, a non-compete agreement prohibits a former employee from competing with his or her former employer in the same industry for a specific period of time, within a particular geographical area. When drafted too broadly, a non-compete can thwart an employee from leaving to take a better job opportunity, or it can prevent an employee from earning a living in his or her chosen trade altogether.

NON-SOLICITATION AGREEMENTS

Non-solicitation agreements are less restrictive than non-compete agreements. A non-solicitation agreement forbids a former employee from soliciting his or her former employer's clients and employees for a specific period of time. This prevents a former employee from poaching clients and talent from a former employer while not necessarily limiting the employee from working for another employer within the same industry. Since management companies rely heavily upon the talents of their individual managers to keep their association clients satisfied, a non-solicitation agreement can be a less onerous means of ensuring that former employees do not solicit their former clients for business or poach other talented managers away from their former employers. Enforceable non-solicitation agreements are typically limited to a specific period of time not exceeding two years in the management company context.

NON-DISCLOSURE AGREEMENTS

A non-disclosure, or confidentiality, agreement is the final type of agreement available in an employer's arsenal to protect its business investment. A non-disclosure agreement prohibits an employee from disclosing trade secrets, insider

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operations knowledge and proprietary information to third parties, such as a competing new employer. Non-disclosure agreements can be used by management companies to prevent their former employees from disclosing customer lists or technological operations to their competitors. There are practical difficulties in applying non-disclosure agreements to the property management profession, however. The problem-solving and people skills possessed by the top managers are typically accumulated talents rather than trade secrets. Accordingly, management companies may have difficulty identifying the proprietary information they are trying to protect.

BREAKING IT DOWN

Generally, courts consider the following factors when evaluating the enforceability of non-compete agreements:

- Is the duration of the restriction reasonable in time?
- Is the geographical scope of the restriction reasonable in location?
- Can the employer identify specific confidential information that warrants protection?
- Would enforcement of the agreement create an undue hardship for the employee?
- What were the circumstances surrounding the execution of the agreement?
- Was there a material change in the employment relationship that warranted the execution of a new agreement (and, if so, was there fresh consideration provided by the employer in exchange for the new agreement)?
- Is some form of severance provided during the period covered by the agreement?
- Is the agreement enforceable even if the employer terminates employment?
- Is the public interest detrimentally affected by the enforcement of the agreement?

WHAT IS THE IMPACT OF NON-COMPETES AND ARE THEY ENFORCEABLE?

In the sphere of community association management, an appropriate non-compete agreement is not one-size-fits-all. A regional management company might provide that upon the termination of employment, a property manager is prohibited from providing property management services to another condominium or management company within a 20-mile radius for the next two years. This type of restriction is probably valid in states that recognize non-competes because it would not prevent the former employee from working as a property manager, but it would prevent the manager from working for a competitor in the same general market as his or her former employer. However, if the same restriction were applied to the employee of a national management company and that employee were prohibited from working for competitors located within a 20-mile radius of any of its existing management offices, that manager might have few options for continuing in the profession, or might be forced to relocate a great distance. A court might find the same restriction valid in the former case and too restrictive in the latter example.

Courts determine the validity of each non-compete on a case-by-case basis. Most courts will not enforce a non-compete unless it meets the following criteria:

- The terms are tailored to protect only the employer's legitimate business interests.
- The agreement is supported by valid consideration.
- It was not signed under duress.
- It is reasonable as to scope, duration and geographical area.
- It is aligned with the public interest.

State laws vary on the enforceability of non-compete, non-solicitation and non-disclosure agreements. Most states, including Massachusetts, Connecticut, Rhode Island, Vermont, Maine and New Hampshire, recognize the validity of appropriately tailored agreements. Massachusetts courts are more inclined than some other states to void, selectively enforce or rewrite overly restrictive agreements.

While many non-compete, non-solicitation and non-disclosure agreements may not be legally enforceable, the cost of challenging an employer's enforcement action can be prohibitive. Some employers use the threat of a lawsuit to gain compliance by the former employee.

Non-competes are also used by employers to prevent competitors from hiring away employees in violation of a non-compete. This is particularly true where the new employer is made aware of the non-compete by the prior employer and continues to solicit the employee anyway. Employers often have better success pursuing the companies who are trying to hire their former employees

than suing an individual employee for breach of his or her non-compete.

The evolving body of law is trending away from the wholesale enforcement of non-competes. Management companies would be wise to consider utilizing narrower non-solicitation and non-disclosure agreements to protect their client bases rather than encumbering managers with overly broad and potentially unenforceable non-compete agreements. **FT**

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