

Noncompetition Provisions in Media Industry Contracts

By Peter M. Gould

Historically, covenants not to compete (noncompete agreements) have been a staple of media industry employment contracts, particularly in contracts with on-air talent. Over the past several years, the American Federation of Television and Radio Artists has campaigned to ban noncompete provisions in employment contracts.

Noncompete clauses are an important tool for media companies because these provisions offer a degree of protection for their substantial investment in on-air talent. But the legal landscape of noncompete provisions is rocky and uncertain, and employers need to be aware of the benefits that these provisions provide, as well as the ongoing efforts to eliminate them.

Covenants Not to Compete:

An Introduction

A covenant not to compete is a provision in a personal services contract whereby the employee agrees that, at the end of the employment relationship, he or she will not engage in the same type of work for a competitive entity for a specified period of time within a specific geographic area. Generally, noncompete clauses are included in contracts where an employer needs to protect trade or business secrets, including, for example, customer and sales lists; or where the employer has invested substantial resources to train and market the employee, such as with on-air broadcast talent. In either case, the concern is that the employee will leave to work for a competitor, and take the trade secrets, customers, or goodwill with them.

State law governs the use of noncompete agreements, and therefore enforceability varies considerably from state to state. Indeed, such covenants are not legal in all states. Generally speaking, in states where they are legal, a noncompete clause will be enforceable if, at a minimum, it is: 1) ancillary to another agreement; 2) designed to protect the employer's legitimate interests; 3) limited in geographical scope and time duration; and 4) not contrary to the public interest.

For instance, a noncompete clause can relate to a formal employment agreement, and time restrictions of less than one year are usually acceptable, but a general interest in restricting competition is not sufficient to support the need for the restrictive covenant. The public interest is an important factor because of the competing societal interests at play: free labor markets and a person's right to work in his or her chosen field versus the prevention of unethical business behavior such as the theft of trade secrets. These issues are reviewed by courts on a case-by-case basis when there is a legal dispute with regard to the application or enforceability of a noncompete clause.

Factors Affecting Enforceability

Several factors affect the application and enforcement of noncompete provisions. Some states follow the so-called "Blue Pencil" doctrine, whereby the courts can modify an overly broad noncompete clause to provide more reasonable time or geographic limitations. In these states, the court can take an unreasonable restriction and pare it back so that the noncompete agreement can be enforced. Therefore, a well-written noncompete provision will contain an explicit proviso that the clause is to be enforced to the greatest extent possible under the relevant state's laws.

Similarly, some states rely on severability provisions in the restrictive covenant to eliminate any overly broad geographic or time limitations. If a severability or "savings" clause is included in the noncompete agreement, then the court can revise an offensive term in the covenant. For instance, if the time or place restriction is unfair or commercially unreasonable, the court will strike only the offending provision and enforce the remainder of the noncompete agreement. The careful contract drafter, then, will include a severability clause in a noncompete provision because it tends to protect the enforceability of the overall restriction even if specific aspects of the covenant are unenforceable.

While noncompete clauses are usually enforceable so long as the scope of the restrictions are reasonable, courts do pay particular attention to the need for the restriction. In other words, courts will not enforce the covenant if the employer cannot demonstrate a particular and legitimate need for the restriction. Some examples of protectable interests that have passed judicial review include extensive training, trade secrets, financial information, management techniques, and the on-air personality of a broadcast employee who has been extensively advertised or promoted within a particular market.

It should also be noted that the circumstances surrounding the termination of employment could affect the enforceability of a noncompete provision. Improper termination by the employer that

constitutes a breach of the employment agreement may render the covenant not to compete unenforceable. Improper termination can also provide the dismissed employee with a defense against the enforcement of the covenant not to compete.

Media Industry Considerations

Covenants not to compete have been used in the media industry for years because employers invest substantial resources to recruit, train, market, and remunerate on-air talent. Media employers expend considerable time, money, and effort to create recognizable stars that drive performance and ratings. On-air talent often acquire a high level of recognition and popularity as a result of their employment and the related efforts by their employers to nurture and promote these talents. As a result, these employees are capable of siphoning audience if they are able to work for a direct competitor immediately following the employment term.

In recent years the American Federation of Television and Radio Artists (AFTRA) has challenged the use and enforceability of covenants not to compete, and has succeeded in campaigns to change state laws to restrict or eliminate the use of noncompetes in broadcast industry contracts. AFTRA is a national labor union that is affiliated with the AFL-CIO and represents its members in four primary areas: 1) news and broadcasting; 2) entertainment programming; 3) the recording business; and 4) commercials. AFTRA believes that noncompete provisions do not serve any legitimate interest and are not grounded upon a compelling business justification. Rather, they believe covenants not to compete are fundamentally unfair, restrain trade, and eliminate competition, particularly in the media industry.

WEB LINK: www.aftra.org

One way that AFTRA has addressed this issue is by including specific limitations on the scope of covenants not to compete in union contracts. Some AFTRA agreements provide that an employer must waive any noncompete provision if the employer declines to renew an employment contract or does not offer to renew the contract on terms at least as favorable to the employee as the terms of the prior agreement. But AFTRA has also adopted a resolution stating that it would seek and support legislation that would ban restrictive noncompete agreements, exclusive negotiating periods, and other provisions limiting the bargaining power of media employees.

Activity in the State Legislatures

In August of 1998, an AFTRA-sponsored bill banning covenants not to compete in broadcast industry employment contracts was signed into law in Massachusetts, with Maine following thereafter. The laws render void any provision in an employment agreement that restricts the right of an employee or individual in the broadcast industry from working in a specified geographic area or for a specified period of time regardless of whether the employment relationship is terminated by the employer, by mutual agreement, or by expiration of the contract.

AFTRA has sponsored or supported identical or similar bills in other states. In 2001, AFTRA lobbying spurred the enactment of a law banning noncompete provisions in Illinois. This year, the State of Arizona passed a law, actively supported by AFTRA, which makes it unlawful for a broadcast employer to require a current or prospective employee to agree to a noncompete agreement as a condition of employment. In an interesting twist, Arizona has made violation of the law a Class A misdemeanor. AFTRA-sponsored or supported legislation has also been introduced in Washington, Missouri, Iowa, and the District of Columbia.

Several state legislatures have considered the issue of noncompete agreements without prompting from AFTRA. Some states have previously banned or severely restricted the use of covenants not to compete without regard to the specific business of the employer. In other states such legislation has been proposed and rejected. But, any employer in the media industry must be aware of state law and monitor any efforts to change it.

Practical Effects of Noncompete Laws

Covenants not to compete are an important aspect of contract law that should be taken into account by any media company when drafting employment agreements. Protecting the investment in on-air talent can be critical to the financial success of many media enterprises. But the fluid nature of the legal landscape creates potential pitfalls in the use of noncompete agreements.

Therefore, skilled contract drafters need first to be acutely aware of the state of the law in their jurisdictions. This extends beyond the preliminary question of whether a noncompete agreement is legal in the state; it is also necessary to determine the scope of enforceability under state law. Second, given the constantly evolving nature of this subject, it is necessary to stay on top of legislative developments. Only then can the savvy employer craft a covenant not to compete that

will comply with the law and protect the employer's substantial interest and investment in on-air media talent.

Peter M. Gould is an associate with the law firm of Leventhal Senter and Lerman PLLC in Washington, D.C.; pgould@ls-law.com.