Is This Non-Compete Clause Enforceable – You Make the Call



Don’t use a non-compete when a non-solicitation clause will suffice.

Here’s an exercise to test your knowledge of the law governing non-compete clauses.

The Non-Compete Clause from Hell

Scenario: To ensure protection of its crucial client contacts, a Toronto-based insurance firm that does business in a limited niche market requires all of its marketing personnel to sign the following non-compete clause as part of their employment contract:

Employee Covenant Not to Compete: Employee acknowledges that during his employment relationship with the Company, Employee has and will have access to and the opportunity to foster special personal and business relationships with Company clients as well as proprietary information about these clients and how they do business. Employee also acknowledges that these client relationships and information are the essential and proprietary assets of Company and its affiliates.

Therefore, Employees covenants and agrees not to, directly or indirectly, whether individually or through any entity controlled, owned or employed by Employee, for any reason, whether or not for compensation, be employed by, own, operate, manage, control, engage in, invest in or participate in any insurance enterprise or business activity that is directly or indirectly in competition with Company or any of its affiliates that is located within the province of Ontario for a period that begins on the commencement of this Agreement and ends three years after the termination of this Agreement and/or Employee ceases to be employed by the Company.

What’s Wrong with This Clause?

There are at least 6 problems with this non-compete clause. How many can you spot?

1. Non-Compete Is Overkill

The first problem with the clause isn’t so much what it says as the fact that it even exists. That’s because non-compete clauses are considered to be a restraint on trade that courts will enforce only in extraordinary cases. One of the first rules is that a non-compete is unreasonable when a non-solicitation agreement will suffice. And

that’s the case in this scenario. Thus, while the firm has a legitimate interest in protecting its proprietary client relationships, it could and should have done so by having the employee sign a non-solicitation agreement.

2. Making All Marketing Personnel Sign

The other problem with the firm’s contracting strategy is requiring all marketing personnel to sign the non-compete. You should use restrictive covenants, including both non-competes and non-solicitations, only for top level employees that can do serious harm to your organization after they leave.

3. Restricted Activity Is Too Broad

As for the actual drafting, the first issue is the sheer broadness of the activities barred to the employee. Restrictive covenants should be drafted as narrowly as possible so as not to prevent employees from using their skills, experience and talents to make a living after they leave the organization. The phrase “any insurance enterprise” in this clause is particularly problematic given that the firm’s business is limited to a niche of that market. The phrase “any business activity that is directly or indirectly in competition with” the firm makes the over-broadness problem even worse.

4. Three Years Is Too Long

Non-competes and other restricted covenants should be of the shortest possible duration. While not official, any covenant longer than one year is likely to raise the red flag with judges. The non-compete in this case purports to run 3 years. And there seems to be no special justification for handcuffing the employee for that long.

5. Province-Wide Ban Is Too Wide

Non-competes must also be limited in geographic scope. Banning an employee from competing in an entire city or metropolitan area is extremely problematic, especially when that city is a market hub like Toronto. But the clause in this case goes even further and bans competition in the entire province of Ontario. It’s almost impossible to see how any court would enforce such a ban.