Five Things Every Lawyer Should Know about Non-Compete Agreements

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In August 2012, the Wall Street Journal reported that "[t]he number of published U.S. court decisions involving noncompete agreements rose 61 percent since 2002." Ruth Simon & Angus Loten, Litigation Over Noncompete Clauses Is Rising, Wall St. J., Aug. 15, 2012, at B1. To draft an enforceable non-compete agreement, counsel must consider the following:

1. Purpose
An employer has the right to protect business information with non-compete agreements, provided the agreement "is supported by valuable consideration and is otherwise reasonable in its scope and duration." NRS 613.200(4). If a non-compete agreement is unreasonably restrictive, ambiguous, or punitive, then courts may construe the agreement against the employer or void the agreement as against public policy.

2. Consideration
In certain situations, consideration for non-compete agreements "may include continued employment after the employee's agreement to the covenant." Traffic Control Servs. v. United Rentals Northwest, Inc., 120 Nev. 168, 87 P.3d 1054, 1059 (2004). Consideration may also include promotions, benefits, training, entrusting the employee with proprietary information, or "garden leave," which is an English concept whereby the employer pays the employee during the period in which the employee is restrained from competing. See Greg T. Lembrich, Garden Leave: A Possible Solution to the Uncertain Enforceability of Restrictive Employment Covenants, 102 Colum. L. Rev. 2291 (2002).

3. Duration
The time in which the employee is restrained from competing must be reasonably limited in light of the particular circumstances of the employment. See Ellis v. McDaniel, 95 Nev. 455, 596 P.2d 222, 224 (1979). A non-compete agreement is "unreasonable . . . if it is greater than is required for the protection of the [employer] . . . or imposes undue hardship upon the person restricted." Hansen v. Edwards, 83 Nev. 189, 426 P.2d 792, 793 (1967). Factors in determining reasonableness may include the employee's livelihood, harm to the employer, consideration, public interest in promoting business competition, the employee's age, and market demand for the employee.

4. Scope
While courts often discuss the scope of a non-compete agreement in terms of geographic restrictions, whether an agreement is reasonable in scope also depends on the type of business or activity. "[W]hen an employer's business is national in scope, an unlimited geographical scope may be reasonable so long as the field is sufficiently limited." Accelerated Care Plus Corp. v. Diversicare Mgmt. Serv. Co., No. 3:11-cv-00585-RCJ-RAM, 2011 WL 367879, *4 (D. Nev. Aug. 22, 2011) ("In this Information Age, a per se rule against broad geographic restrictions would seem hopelessly antiquated."). Restrictions as to the scope are reasonable if consistent with the scope of the employee's duties and limited to where the employee has established contacts and good will.

5. Waiver
Although Nevada courts have not yet published opinions on these issues, non-compete agreements should include affirmations of the consideration and reasonableness, as well as waivers of the employee's ability to challenge the consideration and reasonableness. See Joe Virene, Ten Drafting Tips For Covenants Not To Compete, http://www.jdsupra.com/legalnews/ten-drafting-tips-for-covenants-not-to-c-17328/ (Aug. 26, 2013). To satisfy waiver requirements, employers should include a space for signatures that specifically authorizes the waiver provision.