Enjoining Nick Saban: Non-Compete Agreements and College Football Coaches

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In the realm of examining whether non-compete provisions should be used in particular professions, this article by Clay Travis asks an interesting question: why don't college football coaches have non-competes? It is a timely question in January as every sports media outlet is full of headlines about coaches unexpectedly moving between schools, a recent example being the abrupt move of Todd Graham from Pitt to Arizona State. It's difficult to answer Travis's question, but here are a few potential explanations:

1. Non-compete restrictions have to be limited. Generally speaking, a non-compete provision has to be limited to protecting an employer's legitimate interests. The most common legitimate interests are exposure to confidential information, customer relationships, and goodwill. It is possible to see these interests show up in college football. For instance, the contents of a playbook or a team-specific game plan could be confidential information. Contacts with recruits could function as protectable relationships. An advertising campaign built around a certain coach could be evidence of goodwill.

The problem in terms of enforcing a restriction would be the geographic scope. Take the example of Graham. Pitt would have a hard time establishing that Graham coaching Arizona State poses a competitive threat because: (a) the teams do not play one another, so Graham would not have the opportunity to use his knowledge of Pitt's schemes against them (plus, those schemes would change under a new coach, so the shelf life of that confidential information is limited); (b) it is unlikely that Pitt and Arizona State compete for specific players because they have different recruiting bases; and (c) Pitt and Arizona State do not compete for fans, i.e. there is no hypothetical consumer who will decide to buy season tickets for Arizona State instead of Pitt based on a hypothetical advertising campaign by Pitt featuring Graham.

In fact, a notable example of a college coach who does indeed have a non-compete restriction - Arkansas' Bobby Petrino – establishes the limits of the approach. The non-compete provision in Petrino's original contract with Arkansas prevented him from leaving Arkansas to coach another team in the Razorbacks' division: the SEC West. When Petrino signed a new agreement with Arkansas in January 2010, the scope of the non-compete expanded to cover every team in Arkansas' conference, i.e. from a five-competitor non-compete to an eleven-competitor restriction. It would be very difficult to fashion a non-compete restriction to prevent coaches from making most coaching moves because the universe of competitors is limited by geography and conference affiliation.

2. In a word, leverage. When addressing the usage of non-compete restrictions, it's always important to consider the industry at issue. College football coaches ply their trade in a very unique set of circumstances. College football generates a tremendous amount of revenue for the schools with major programs. However, those schools are forbidden by NCAA rules from paying the players who generate that revenue (except through the form of athletic scholarships). Without being able to direct revenue to the players who make the biggest difference between winning and losing (and thus being in the red or black, financially speaking), schools have to direct that money to other sources. Thus, successful college football coaches become a more valuable commodity and have significant bargaining power. They can use that bargaining power to avoid restrictive covenants.

Again, consider the example of Pitt and Todd Graham. There is a small pool of potential head coaches who could be the difference between Pitt going 6-6 while drawing 50,000 per game and going 9-3 while selling out Heinz Field every week. The members of that pool, knowing that they are rare, might have leverage to prevent the institution of a non-compete restriction. Moreover, Pitt might think twice about seeking to enforce a non-compete restriction in court because of the deterrent effect that the suit would have on potential replacements. In short, college football is a unique industry where enforcement of restrictive covenants might face hurdles.

3. The contracts at issue already contain remedies. Most college football coaches have significant buy-out clauses in their agreements. In one notable example, Michigan and Rich Rodriguez had to pay $4,000,000 to West Virginia when Rodriguez left Morgantown before the expiration of his contract. It could be hard to pair buy-out provisions with non-compete restrictions because the former could be construed as an estimate of the potential damage that a coach would cause by leaving before the end of the contractual term. Thus, a college football program seeking to enforce a non-compete restriction by obtaining an injunction would face an argument from its former coach that the agreement specifies the remedy. The program would have to meet its obligation of showing irreparable injury – a showing that is required to obtain an injunction – because the buy-out clause can be argued to address the injury. To speculate for a moment, schools with major college football programs may have decided that they would rather get money from buy-out clauses than attempt to use a non-compete restriction that can only cover the program's conference rivals.

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