



Non-Compete Issues in a Multi-State Environment

Insights

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Many employers with offices or employees located in multiple states use the same non-compete/confidentiality agreement in each state in which they do business. Typically, the form of the non-compete/confidentiality agreement originated in the employer's home state, and the employer went on to use this same agreement wherever the employer does business. However, these employers may find out too late that a non-compete/confidentiality agreement enforceable in their home state may not be enforceable in another state.

State law on the enforceability and interpretation of non-compete/confidentiality agreements differs from state to state, and what is entirely reasonable in one state may be viewed as entirely unreasonable—and unenforceable—in another state. If you do business in multiple states and want to effectively protect your customer good will and confidential and proprietary information, we recommend that you review the enforceability of various provisions of your non-compete/confidentiality agreements under the laws of each of the relevant states.

There are many ways in which relevant laws, and courts' views, differ in various states on the enforceability and interpretation of non-compete/confidentiality agreements. Some of the more important variables include—but are not limited to—what constitutes adequate consideration, whether the court will edit or amend an overbroad agreement to bring it within permissible state law restrictions, the extent to which an employer may enforce an agreement against an employee terminated without cause, and whether the court will grant injunctive relief in addition to liquidated damages.

Consideration: All agreements must have adequate legal consideration to be enforceable. Courts in some states hold that consideration for a non-compete/confidentiality agreement does not exist—and therefore that the agreement is not enforceable—unless the employer provided separate monetary compensation or the parties entered into the agreement at or near the inception of employment. On the other hand, courts in other states hold that continued employment by itself (even without separate monetary compensation) is an adequate form of consideration that will support enforcement of a non-compete/confidentiality agreement.

Editing an overbroad agreement: Courts in some states will amend or edit an overly broad non-compete/confidentiality agreement to bring it into compliance with state reasonableness requirements, while courts in other states will not. The approach can vary from state to state, with courts in some states following a strict blue pencil approach like striking unenforceable

courts in some states following a strict blue pencil approach (i.e., striking unenforceable, severable language), while other states permit courts to exercise their equitable discretion to modify covenants. Still yet, courts in other states may decline to enforce the entire agreement even if only one term or provision is slightly overbroad (e.g., geographic scope).

Termination without cause: State law—and court temperament—varies on the issue of enforceability when an employer terminates an employee’s employment without cause. Courts in some states refuse to enforce restrictive covenants against employees who have been separated from employment through no fault of the employee.

Injunctive Relief/Liquidated Damages: Many non-compete/confidentiality agreements contain both liquidated damage and injunctive relief provisions. Courts in some states will not grant injunctive relief if the agreement also contains an enforceable liquidated damages provision. In this view, an adequate “legal” remedy exists in the form of monetary damages, and therefore equitable relief in the form of an injunction is not be available.

If you have employees in multiple states, and you want to effectively protect your legitimate business interests against employee defections to competitors, you should take steps to tailor your non-compete/confidentiality agreements to ensure that they will be enforceable to the greatest extent permitted in each state in which you do business.