



Non-Compete Clauses: Are they Fair?

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Whether you believe non-compete clauses in broadcast employment contracts are fair depends on your point of view. From management's perspective, of course, these clauses are fair. The station hires talent for a period of time and devotes significant resources in training and promotion to warrant an exclusive commitment. From talent's perspective, these clauses are unfair. These clauses are often unreasonably restrictive and are not negotiated when a position is discussed and ultimately accepted.

So who's right? Even more interesting, does the dynamic of the broadcasting industry make these non-compete clauses more acceptable or less acceptable? As with most complex issues with competing interests, the answer is: IT DEPENDS

Recent Trends

Increasingly, broadcasting employers incorporate non-compete clauses in employment contracts. In fact, this trend crosses over into behind-the-scenes talent such as producers, associate producers and editors where, traditionally, these clauses were seen as unnecessary.

What makes these clauses particularly troubling is when the clauses are not brought to light until after talent accepts the offer, informs his/her current employer of their decision to leave, and in many cases, relocates to a new market. Even worse is the scenario where talent is terminated by the employer and is prevented from working based on a non-compete clause.

This alarming trend requires a basic understanding of employee rights when faced with a non-compete clause in an employment agreement.

Legal Enforceability

Employment non-compete clauses restrict an employee from working for competitors. Traditionally, courts disfavored non-compete clauses because they were viewed as preventing an individual from earning a living by using his craft. More recently, courts enforce these clauses where the restraints are reasonable and allow an individual to practice his craft in some respect.

While states differ on how they determine whether to enforce non-compete clauses; generally, non-compete clauses must be (1) a part of a valid contract; (2) necessary to protect an employer's legitimate business interest; and (3) reasonable in scope. A court charged with evaluating the enforceability of a non-compete clause will carefully balance these competing interests before ruling on a clause's validity.

The first requirement - ancillary to a valid contract - means that the clause must be supported by sufficient consideration (usually in the form of an employment opportunity, salary, etc.). Usually, employers easily meet this requirement when the clause is part of the employment arrangement from the beginning; or later made part of the employment arrangement after a promotion or substantial pay raise is awarded. However, when an employer attempts to impose these clauses sometime after an employee has been employed (often accompanied by a threat of loss of employment if there is noncompliance), compliance with this requirement is not so clear and some states require additional consideration.

The second requirement - necessary to protect an employer's legitimate business interest - means that the employer must have a valid proprietary interest to protect. It does not mean that the restriction can be used solely to prevent competition. While the definition of "valid proprietary interest" varies from state to state; generally, it includes customer relationships, trade secrets, and costs of specialized employee training, development, and

promotion. However, an employer cannot simply list these interests and expect a court to conclude they are "valid" or "legitimate." Rather, an employer must demonstrate the validity of each interest and show how it is tailored to the restriction being sought.

The third requirement - reasonable in scope - means that the restriction must be reasonable in terms of the type of activity restricted, the duration of the restriction, and the geographic area from which an employee is precluded from working. Reasonableness requires that the restriction be tailored to protect the legitimate business interests of the employer. Employers cannot simply impose a broader restriction than is necessary to protect their interest.

Whenever a court balances competing interests and makes a determination as to the validity of a contract clause, the process is often fraught with uncertainty and unpredictability. Balancing these interests is highly fact-sensitive and requires careful consideration.

Uniqueness of the Broadcast Industry

Contrary to popular belief, most on-air and behind-the-scenes talent do not make a lot of money. That fact, coupled with fierce competition and the often volatile, unpredictable, and insecure nature of the business, makes most contract negotiations between talent and management virtually non-existent. As a result, talent often sign the contract without either truly appreciating the consequences or ignoring them.

Only when faced with a better offer of employment do most talent realize their non-compete predicament. Without the blessing of an employer, talent are faced with either staying where they are until their contract period expires, moving to another area outside the restrictions, or fighting the validity of the non-compete clause. Neither option is appealing and each is fraught with negative consequences.

The fact that talent have little control over their careers makes this scenario particularly troubling; and, unlike other professionals, talent cannot simply move and practice their trade elsewhere or in a different manner. However, if the non-compete restrictions are truly unfair, and the prospect of better employment is strong, fighting the validity of the clause may be a reasonable option.

Fortunately for talent, states are beginning to appreciate the uniqueness of the broadcast industry when determining the validity of non-compete clauses. Some states invalidate non-compete agreements altogether in the broadcasting context. Others have bills pending that offer similar protections. Moreover, courts around the country are recognizing the uniqueness of the broadcast industry and are balancing the competing factors with an eye towards the nature of the industry.

Conclusions

The uniqueness of the broadcast industry coupled with the disparate bargaining power between talent and employer

may lead to an unfair and unenforceable non-compete restriction. Knowing your rights is the first step in making an informed decision.

This article is written to provide readers with a very general overview of the topic discussed. The information contained herein should not be construed as providing legal advice and it should not be relied on for that purpose. If you have specific legal questions, the author suggests seeking the advice of a qualified attorney.

About the Author

Fernando M. Pinguelo is a trial lawyer licensed to practice law in New York, New Jersey, and Washington, D.C. He devotes his practice to entertainment law, complex litigation, and employment matters. Fernando has extensive experience in all facets of litigation in both the federal and state courts. In the area of entertainment law, Fernando counsels a host of diverse talent. He also serves as a regular article contributor for the National Association of Television Arts and Sciences (New York Chapter), *TVSpy*, *Next Generation TV*, and *Shop Talk*. Fernando has published several articles and lectures on a variety of topics including copyright, contracts, entertainment, employment law, and information technology. He has appeared on television several times as a legal commentator on various high-profile trials, and has been quoted in many newspapers and magazines, and on radio and television broadcasts regarding high-impact cases he has handled.

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