Non-Compete Agreements: A Guide for Salespeople

Monica J. Favia
Bloomsburg University

David Sedlak
Bloomsburg University

ABSTRACT

Sales' education is largely silent on the issue of non-compete agreements. This results in graduating students entering their first sales job with little to no knowledge about what a non-compete agreement is, what effect it will have on their career and whether it is possible to negotiate the contract or any guidelines on negotiating the contract. The purpose of this paper is to provide a basic legal background for entry level salespeople concerning non-compete agreements, their enforceability, and pointers for negotiating the contract.

Keywords: Covenant not to compete, Non-compete agreements, salespeople employment, employment law

INTRODUCTION

A 2016 article in the *Wall Street Journal* related the situation of a relatively new reporter in her first job. She held that first job for two years and left to take what she considered to be a better job at another media company. Within weeks however, she was asked by her new employer to leave since she had signed a non-compete agreement with her original employer. That employer sent a letter to her new employer advising them of the contract. (Viswanatha, 2016) Another example of what has been viewed as the overreach in non-competes is Jimmy John's use of non-competes to restrict the movement of sandwich makers. (Spiggle, 2021)

Recently, a national survey of private businesses conducted by the Economic Policy Institute found that 49.4% of responding businesses indicated that at least some employees in their establishment were required to enter into a non-compete agreement (Shierholz and Colvin, 2019). The survey also showed that 31.8% of responding businesses indicated that *all* employees in their establishment were required to enter into a non-compete agreement, regardless of pay or job duties (Colvin and Shierholz, 2019).

It is safe to say that most new college graduates are totally unaware of these types of agreements and their implications. According to Viswantha (2016) citing a recent unpublished study from researchers at the University of Michigan, 40 percent of workers who sign non-compete agreements either read them quickly or not at all. In recent years non-competes also referred to as covenants not to compete are becoming commonplace for all types of workers from minimum wage workers to top executives, to sandwich shops (Rafter 2015, Greenhouse, 2014). In the years since 2016 there have been some changes but non-competes still are widely used and, in many states, courts are strongly enforcing them. (Legal Nature, n.d.). It is interesting to note that a non-compete can still be enforced even in the event an employee is laid off. This is particularly interesting in the wake of the COVID-19 pandemic.

Emphasis on determining if an employee would suffer *undue harm* if a non-compete is enforced received more attention due to the pandemic. According to *North Texas Legal News* (Nov. 2020) and *Bloomburg News* (Aug. 2020). The Eastern District Court of Pennsylvania concluded that when the employer tried to enforce a non-compete against a laid off salesman who had worked there for 31 years and then tried to keep him and other sales staff from taking new positions it resulted in the harm to the employee (North Texas Legal News, 2020, Bloomburg Law, 2020). The court found that the harm to the employee from the injunction would be greater than the harm to the employer if the injunction was denied (North Texas Legal News, 2020). However, in this instance the caveat was that in this case, the non-compete agreement was not enforceable because, according to the terms of the contract, it did not apply to employees who were terminated by the company without cause (North Texas Legal News, 2020).

Yet, in the Fall of 2020 according to *North Texas Legal News*, the Middle District Court of Florida granted an injunction against a laid-off sales employee of a company that manufactured and sold veterinary orthopedic devices when he went to work for a competitor with changes to the original contract (North Texas Legal News, 2020). The court changed the terms of the restrictive covenant saying there was no compelling rationale for a restriction of working for a competitor for two years in any capacity anywhere in the world and enforced an injunction of one year as a salesman in the U.S. and Australia (North Texas Legal News, 2020).

On July 9, 2021 U.S. President Joseph Biden signed an Executive Order directing the FTC to use its regulatory authority under the Federal Trade Commission Act to "curtail the

unfair use of non-compete clauses and other clauses or agreements that may unfairly limit worker mobility" (Spiggle, 2021). The language is somewhat vague, and it is unlikely that the FTC will issue a ban on all non-competes for all workers in all situations.

Salespeople in particular are frequently asked to sign a restrictive covenant as a condition of employment. While much has been written providing guidance to employers regarding the content of such covenants, little has been written giving guidance to potential employees (Hogan 2006). A review of the major texts on professional selling do not mention these agreements. In general salespeople are the most likely category of employee to find themselves faced with signing a restrictive covenant since they are the primary link between the selling and buying organization and have access to a wide variety of information about both parties. Holley (1998) noted in particular the growth of salespeople, in particular entry - level salespeople, who may have little to no familiarity with these restrictive covenants and little to no understanding about their implications. This is of particular importance to sales graduates who are entering their first job. The situation is further complicated by variations in state law and the increasing use of social media by salespeople to find, develop, and maintain relationships with customer (Black, Reid and Biden, LLC, 2020). This article's purpose is to provide an overview of non-compete agreements and their implications for salespeople in an effort to close this gap. In addition, guidance will be provided to negotiate signing a non-compete.

Legal doctrine also says non-competes may be enforceable if they are reasonable, (Restatement of Contracts, 2nd 1981). A New York court said that employers preventing unfair competition through the misappropriation of various business assets is a legitimate interest (*Reed, Roberts Assocs, Inc. v. Strauman* 1976). According to a federal court, employees at the same time have an interest in their own mobility and marketability (*Standard Brand, Inc. v. Zumpe* 1967). In general, the courts have recognized employer interest in protecting their interests in the following areas, education and training; customer lists, specifically customer relationships; and trade secrets and confidential information. A recent area of concern in non-compete law is the use of social media. Specifically, to what extent is a salesperson's use of social media protected by a restrictive covenant? This paper will first examine each area the courts have recognized as a protectable interest and then examine circumstances that result in non-competes being invalidated by the courts, briefly discuss court–ordered remedies for violations, circumstances that result in enforceable non-competes, and non-competes and current employees, and finally conclude with suggestions for salespeople to aid in navigating non-competes and negotiating on-competes.

Protectable Interests

Employers have legitimate interests to be protected by non-competes. (Shonk, 2021). When entering into an employment contract with a non-compete clause, it is important for the salesperson to know and understand the interest being protected by the employer. The following sections explain some of these interests and why they are of value to the employer.

Education and Training

The courts have recognized that the employer has a legitimate interest in the services of an employee it has invested considerable costs in education or involve specialized training. This is based on the idea that after training the employee has an incentive to benefit from the training

by going to work for another employer who will pay a premium for that employee due to the training. In essence the employee is attempting to usurp the value of the training for his/her benefit.

The Judge in the Florida appellate court case, *Hapney v. Cent. Garage, Inc.* (1991) said "The rationale is that if an employer dedicates time and money to the extraordinary training and education of an employee, whereby the employee attains a unique skill or and enhanced degree of sophistication in an existing skill, then it is unfair to permit that employee to use those skills to the benefit of a competitor when the employee has contracted not to do so" (132).

Customer Lists and Customer Relationships

This is the area of the salesperson's job employers are particularly interested in protecting. Salespeople have direct and frequent contact with their customers. To do their job well, salespeople will develop close relationships with their customers and learn their needs. Clearly, when a salesperson leaves one employer and goes to another there is a high probability that the salesperson can take his or her customers along.

What are the specific circumstances that may prompt a lawsuit by a previous employer? A District Court judge in *Gorman Publishing v. Stillman* (1980) a case involving advertising sales said that in that case the salesperson remembered not only the employer's advertisers but also remembered "which individuals in these companies were most responsible for advertising decisions and how these individuals could most effectively be approached," (105). In addition, if an employer can show that it spent considerable resources and time in developing the list thane that list would generally be protected by a non-compete agreement and the salesperson would effectively be prohibited from using it (*House of Tools and Engineering, Inc. v. Price* 1973).

Trade Secrets and Confidential Information

Trade secrets represent the second most common justification for non-compete agreements (Garrison & Wendt 2008). In general trade secrets receive even more protection than customer lists. A trade secret is a "formula, process, device, or other business information that is kept confidential to maintain an advantage over competitors," (Garner, 2004, 1533). Under common law it is unlawful for an employee past or present to make details about a legitimate trade secret known to a future employer or the general public (Garrison and Wendi, 2008). Employers in this area often supplement the common law with on-compete agreements. This is one area in which non-compete agreements hold up.

Social Media and Non-competes

The use of social media and non-competes is evolving. The main question here is if a salesperson's social media activity violates a non-compete agreement? Salespeople are increasingly using social media in a variety of ways to interact with customers, so who owns these lists? A recent case in US District court may provide some guidance. While *PhoneDog v. Kravitz* (2011) settled out of court it raised the issue. Kravitz generated over 17,000 Twitter followers in the course of his employment with PhoneDog (McNealy 2013). Kravits left in 2011 and, instead of forgoing the account as he was asked, he changed the handle and continued using the account, going to a new employer and connecting those followers with his new employer

(McNealy 2013). PhoneDog filed suit claiming that the Twitter account along with its over 17,000 followers was a trade secret and asked for $340,000 in damages (McNealy 2013). The court dismissed the prospective economic advantage claims however, the trade secret and conversion claims were slated to go to trial (McNealy 2013).

In a 2018 case, *Morgan Stanley Smith Barney, LLC v. Abel*, Daniel Abel left Morgan Staley Smith Barney and sent out notifications through LinkedIn to various Morgan Stanley clients saying that he was starting his own firm, (Muccifori, 2019). Abel had signed a non-compete agreement which contained a nonsolicitation clause, (Muccifori, 2019). The court "acknowledged the solicitations as being harmful to the plaintiff 's business and agreed to issue a temporary restraining order and consider it further at the full hearing," (Muccifori, 2019, 12).

Defenses and Remedies of Non-competes

Just because an employment contract has a non-compete, this does not mean that such a non-compete cannot be reduced by negotiation or even be enforceable by law, in whole or in part, in a particular jurisdiction. When entering into an employment contract with a non-compete clause, the salesperson should know and understand the elements of the non-compete, and which elements may or may not be subject to negotiation or legal enforcement. This may involve a close examination of the employment contract by the salesperson or even a lawyer hired by the salesperson (Joe, 2020). This section describes elements of a non-compete that may be unenforceable or subject to limitation by successful negotiation or even by a court.

Common Elements of Enforceable Non-competes

The first consideration in the enforceability of a non-compete is the determination of the state the salesperson's residence is in since the law varies from state to state. The way state law treats non-compete agreements varies from California, that considers any such agreement to be void to Georgia, that has very clear statutes that specifically recognize the legitimacy of non-competes and outlines areas of protection (Hogan 2006).

It is also important to stay current in the law concerning non-competes since it has been changing. For example, Idaho in March 2018, Idaho adopted a law rolling back a 2016 change to its "Non-compete law that made it easier for companies to restrict the movement of 'key' employees," (Knapp and Chambers, 2019, 9).

In 2018, Massachusetts adopted a law that makes it more difficult for employers to enforce non-competes specifically, "New employees who are expected to sign a non-compete agreement at the inception of their employment must be presented with the agreement when a formal offer is extended or 10 business days before the employees' start date, whichever is earlier," (Knapp and Chambers, 2019, 8).

Non-competes in New Jersey have in the past been generally enforceable even in the face of employee termination. In the wake of the pandemic these were still generally enforceable, an "employer, even one that laid someone off due to the COVID-19 pandemic, can still use a restrictive covenant against the former employee," (Saulsbery, 2021, 10). However, New Jersey Assembly Bill 1650, "which recently passed the Assembly labor committee, would significantly limit the scope and enforceability of non-competes in New Jersey, including making them unenforceable with employees who were laid off," (Saulsbery, 2021, 10).

In general, the enforceability of a non-compete agreement rests on two conditions. First, does the agreement include geographic and temporal limits that are reasonable considering the employment circumstances and two, does the employer have a legitimate interest in the areas it seeks to protect (Hogan 2006).

Non-competes and Current Employees

In general, new employees are the individuals usually asked to sign a non-compete at the beginning of their employment, however, occasionally a current employee will be asked to sign a non-compete. One line of reasoning in this area is, did the employee receive consideration for what is in effect an alteration of the employment contract (LaVan 2000).

The Pennsylvania Supreme Court used this reasoning in their opinion in Rullex Co., LLC v. Tel-Stream, Inc., No. 27 EAP 2019 (Pa. June 16, 2020) as reported in *Business Torts Reporter*, (Restrictive Covenants, 2020), where a non-compete agreement that was signed two months or more after an employee began work and was not supported by "fresh consideration," (220). The court held that the non-compete executed after the first day of employment was unenforceable without new consideration.

Employee Defenses

If a salesperson is sued from violating a non-compete contract what defenses can be raised? Defenses fall into three categories: undue hardship, breach of contract or public interest (Porter and Griffaton 2002).

In general, under the defense of undue hardship one of the considerations made by the courts is will enforcement of the contract effectively bar the salesperson from his/her sole means of support (Porter and Griffaton 2002). Under a claim of breach of contract, the salesperson claims that his/her termination was unlawful and effectively violates their obligation under the Non-compete (Porter and Griffaton 2002). A defense of "not in the public interest" is unlikely to succeed for a defense in the case of a salesperson. In general, this defense is only likely to succeed in health related non-competes (Porter and Griffaton 2002).

Yet in a recent case in Florida while the court changed the terms of the contract to limit the restriction to one year instead of two and to only jobs of sales, the employee argued that this would result in him effectively being unemployed for a year (North Texas Legal News, 2020). This example demonstrates the necessity for salespeople to stay current in the law, understand and negotiate a non-compete agreement.

Remedies for Violation of Non-competes

In the event the courts determine that the non-compete is enforceable typical remedies include injunctive relief, and money damages (Matheson 1997). The injunctive relief may be immediate and temporary to permanent effectively preventing the employee from violating the agreement through the discontinuation of the employee's employment at the new employer (Matheson 1997). Damages can be actual requiring the plaintiff to prove the damages to liquidated where the plaintiff does not have to prove the damages (Porter and Griffaton 2002).

Recommendations for Negotiation

According to Samael Estreischer, a professor at New York University School of Law "In most states there has to be a legitimate business interest, and it has to be narrowly tailored and reasonable in scope and duration," (Greenhouse, 2014). Newly hired salespeople must be aware of what are the typical areas of coverage in a non-compete agreement and should of course seek legal counsel. In addition, salespeople should consider negotiating for consideration for signing a non-compete. Some experts say when faced with signing a non-compete, simply say "no" and continue the job search. However, that is unrealistic for many new job seekers in the current economic environment. Given that this is the situation; salespeople should consider pay attention to several items in the contract.

Just as in any element of an employment contract, non-competes can be successfully negotiated to protect the interests of both the employer and the salesperson. Non-competes specify areas and circumstances where the salesperson will temporarily be restricted in seeking future employment (Meincke, 2020). Each area –geographic area, competitor, timeframe, applicability and compensation – is subject to negotiation between the employer and the salesperson.

If handled properly, this negotiation process can significantly benefit the salesperson (Venko, 2011). First, by limiting exposure to a non-compete, the salesperson will have more employment freedom to undertake other avenues of employment should the opportunity arise. Second, the act of negotiating elements of a non-compete, if done professionally and competently, will demonstrate your skills as a salesperson and a conscientious employee to an employer. Finally, even if an attempt to negotiate a non-compete is unsuccessful, the salesperson will be better able to fight the non-compete in a legal setting should the need arise by demonstrating that the non-compete clause was an adhesion clause and not open to negotiation (Legal Information and Cornell Law School, n.d.).

Negotiating the Elements of the Non-compete

First, the salesperson should consider the geographic scope of the agreement. Employers generally want the applicable geographic area of the non-compete to be as wide as possible, while the salesperson wants this limited. The salesperson should understand the geographic area of the business and the interest the employer has in protecting their business from disruption by exiting employees. If the salesperson's job is to sell goods within a three-town area, for example, it would not be realistic for an employer to seek the geographic scope of a non-compete to be the entire country. It could, however, be reasonable to have the limitation apply to within these towns and even extending to a ten-mile radius around these towns. The salesperson should understand the impact an employee would have on an employer in taking their skills to various direct competitors to effectively negotiate a geographic limitation.

In this regard, the employer or the salesperson may find it preferable to negotiate a list of specific companies that the salesperson may not go to for employment. This will narrow the scope of the agreement and allow the salesperson an opportunity to go to another company in the same industry, if necessary, but still afford the employer protection.

This also addresses a common legal issue with non-competes: the identity of a competitor. If the employer's business is selling and servicing appliances, competitors would include other businesses that offer similar items. Does this include generalized superstores that

sell much more than simply appliances? Does this include companies that act as a go-between, or even a delivery service, between a customer and a business? Does this include international companies that have the capacity to deliver appliances into the geographic area? Employers want this list to be as broad as possible to protect their present and potential future customers. Clearly identifying the potential competitor – whether by name or description – will both limit the scope of the non-compete and help eliminate any ambiguities within the non-compete itself.

Finally, a non-compete specifies a temporal period. Salespeople should negotiate for the shortest applicable time period possible, while understanding the need for the employer to protect their customer base. If the employer is transacting in temporary, disposable products, a time period in months may be appropriate. If, however, the employer is transacting in long-term sales agreements, a time period of a year or more may be appropriate. The better the salesperson understands the protective needs of the employer, the better the salesperson will be to anticipate and negotiate an appropriate temporal period.

Negotiating the Consequences of the Non-compete

When does the non-compete become enforceable? Is it enforceable only when the salesperson voluntarily leaves employment or is it also enforceable if the salesperson was terminated? Is it enforceable only if the salesperson is terminated for cause or is it also enforceable if the employee is terminated due to a downturn in the economy, or a merger of departments, or a merger of companies, etc.? Salespeople should understand when the non-compete applies to them and negotiate different standards of applicability depending on the reason for the termination. For example, maybe the clause applies for a year if the salesperson leaves voluntarily, but only applies for a month (or the length of a negotiated severance package, see below) if the termination is not due to the fault of the salesperson.

In conjunction with this, what does the salesperson receive for limiting their future employment options? All contracts are to be considered a bargained-for exchange – non-competes are no exception. Some employers view the non-compete as a standard term where the exchange is the future employment of the salesperson. However, salespeople should take seriously the consequences to themselves of signing a contract with a non-compete. If the Non-compete prohibits the salesperson from finding meaningful employment in their area for three months, it would be appropriate for the salesperson to seek a severance package that encompasses that timeframe. Perhaps the salesperson would require additional training to find a new position in compliance with the non-compete and the employer should pay an additional amount – via a signing bonus or other mechanism – to cover that possibility.

Handling issues such as consequences of violation and compensation before such events occur are of primary importance. The parties are less incentivized to reach a settlement agreement after an event has occurred then they would be at the outset of employment. Further, the more that can be handled at the outset by the parties means less legal fighting – AKA expenses – once an ending of employment occurs. Salespeople are encouraged to handle as many issues relating to non-competes before employment commences to eliminate uncertainty and additional stress that would occur by waiting…or not addressing at all.

CONCLUSION

It is a statement of reality that most salespeople will not stay with their initial employer. On average, individuals switch employers ten or more times before they turn forty years of age (U.S. Department of Labor Statistics, 2019). While new salespeople may be eager to sign that first employment contract, they must be cautious and understand the ramifications of the provisions of that contract.

As with all negotiations, how much negotiation room is possible depends on the relative power of the parties. A new salesperson, seeking initial employment, is arguably at a disadvantage both economically and mentally in the employment contract process. However, as in all *sales* situations, any salesperson, especially new salespeople, is highly encouraged to make the effort both understand the terms of their employment contract and actively negotiate the terms of such a contract, especially when it comes to non-compete clauses.

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