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WHITE PAPER

Handling Non-Compete Objections

Whether a non-compete is legally enforceable will be determined by state law

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Handling **Non-Compete Objections**

Generally, the law of the state where the employee is located will apply. A contractual agreement as to which state law applies may be ineffective. A non-compete has to be reasonable to be enforceable. Reasonableness is determined by the courts based on the specific facts in each case. Primary attention is given by the courts to:

- The geographic scope of the non-compete.
- The duration of the non-compete.
- The type of activity the ex-employee is precluded from engaging in.

Non-competes are more likely to be upheld if the geographic scope is smaller (local vs. regional vs. national vs. global), the duration is shorter (six months to a year vs. one to three years), and the type of activity is narrower (i.e., sales position only versus working for a competitor in any capacity). They are also more likely to be upheld if the employee is only prohibited from soliciting the employer's established customers vs. prospects or targets.

How Should We at Ropella **Handle Objections with Candidates and/or Clients?**

First of all we should get a copy of the non-compete agreement ASAP. We should evaluate the company that the candidate will be leaving and compare it to the company they will be joining. For instance, if the candidate is with a company like BASF or Dow, there could be a problem. These companies have deep pockets and may be compelled to enforce the agreement at all costs. However, if the candidate is coming from a much smaller company, their company may be less likely to go to the expense of enforcing the agreement.

The other considerations to be discussed with the candidate and the client are the specific products and markets the candidate is involved in. If the candidate's current company is truly a direct competitor, and the candidate will be working with the products and markets that are exactly the same at both companies, this may be a problem. However, if there isn't a direct correlation, it may not be as serious of a concern.

What is the geographic scope of the agreement? Is it local, regional, or global? The greater scope of the agreement, the less enforceable it becomes.

Does the candidate have any insight into how the company enforces non-competes?

Is there an attorney we can go to who will assess the agreement as to its enforceability?

In Regards to Dealing with Non-Compete Issues... **Here is Some Food for Thought**

The 12 month clock (the normally allowable non-compete timetable) would start on the start date and 12 months goes by very fast. On resignation day your new hire gives notice but when resigning says; "I have been asked to let my new employer announce through their own timing - my new start date. Until then, they have asked me to keep the announcement private. Besides I will not be competing with the same products, for the same customers and so my new employer has reviewed my non-compete agreement and supports this new role I'm going into."

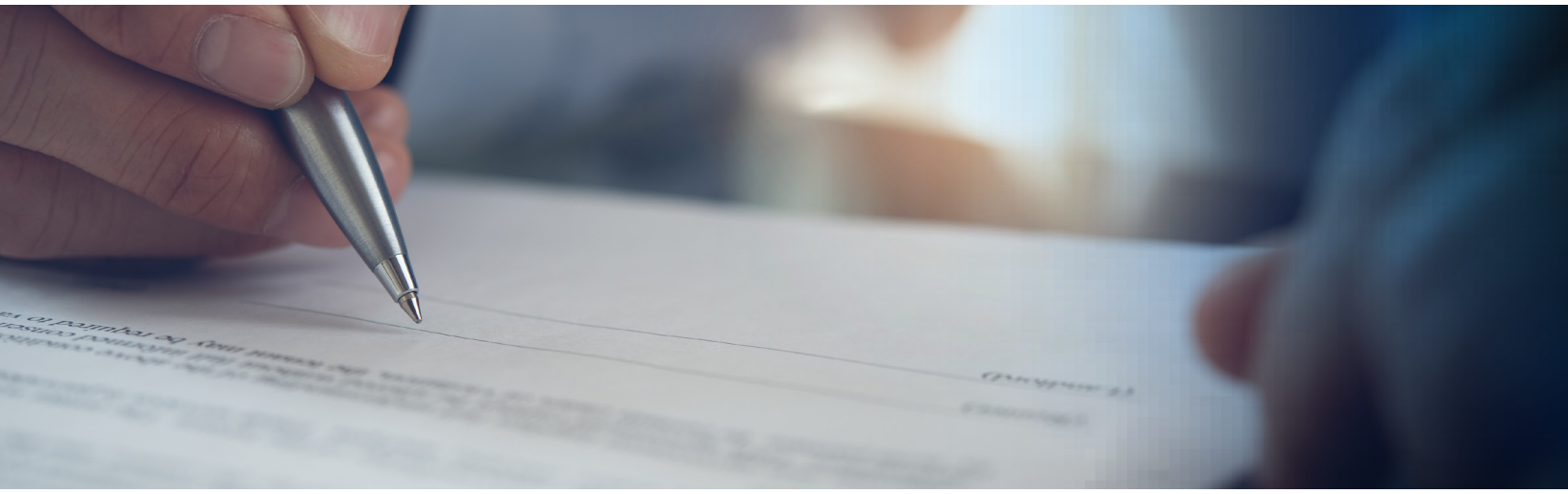
By the time your new hires' current company finds out they have actually joined your company it should be at least a month or more (often 2 or 3 months down the road) and by the time they decide whether or not they want to put forth a non-compete challenge, we are probably talking about at least another month or two. So we have now trimmed at least 3 to 4 months off the non-compete clock before you or your leadership team has even been contacted by your new hires' previous employer. This is a very typical scenario.

At this point you have the opportunity to convince your new hires' past employer that there's no non-compete issue here really worth wasting time and money on and either;

a) The challenge goes away as do 95% of these challenges because of the cost (time and money involved). In most cases after the analysis of the legality of the challenge it's determined almost all non-competes, when compared to the circumstances, prove pretty much unenforceable. Or the challenge is deemed just too darn expensive to enforce for the ROI, so typically the non-compete challenge is simply dropped.

b) Or their attorneys start talking to your attorneys and we end up right back to the challenge being dropped again as it's clear neither attorney's going to agree and/or some minor compromise is negotiated and agreed too. Something like your new hire stays away from this one or two customers for the remaining time of the non-compete or your new hire takes the remaining months of the non-compete off. In other words, someone is taken out of the very specific role you hired them for and focuses on other non-competitive customers or work.

By now you are probably at least 6 to 8 months into the non-compete clock, so what do you do now that the attorneys have spoken? Worst case scenario you simply put your candidate on a special project for the remaining few months of the 12 month non-compete period. Your new hire is a very competent professional with lots of abilities so keep your new hire busy and off the radar screen of the "competitor" for the remaining few months. As soon as the 12 month non-compete period has expired there's not a thing your new hires' previous company can say or do. You simply put your new hire right back into the position you hired them for. Now your new hire is producing for you and growing the business and you are all smiling from then on out as the attorneys are both convinced they won.



The Primary Reasons Non-Compete Agreements **Get Tossed Out as Unenforceable**

More than 12 months in term is considered too long by the courts.

More than 50 miles from current company or home office location is considered too geographically restrictive by the courts. So agreements that are national or global in scope are extremely unlikely to survive a challenge.

If a person sells or does research with a specific product for a specific market anything other than those very specific products for those specific markets would be considered too restrictive.

Also if there are state lines being crossed (in other words the current employer is in NJ - the candidate lives in PA - and the new hiring company is based in TX) it typically nullifies the non-compete. State lines extremely complicate the enforceability of a non-compete. Each state has totally different right to work laws that very often cancel out the other states' and therefore make it almost impossible to protect the viability of the non-compete.

In my thirty years as an executive search consultant, I have only seen a half dozen non-compete agreements effectively challenge a sales rep or R&D scientist from joining another company. Rarely if ever are non-competes an issue outside of sales and R&D functional roles. The only time I know of where the new hire was actually stopped from working was when a surfactants sales rep in Chicago left a company like BASF and then went to work for another but smaller surfactants company working in the same sales role right there in Chicago and begun directly calling on the exact same customers. That was really pushing the non-compete and the deeper pockets made it very hard to fight against so the sales rep left the new company and took a different job with a non-competitor... and that was the end of that.

I can count on one hand how many non-compete agreements have actually made it to court to be heard in front of a judge per the many hundreds of placements Ropella has worked on in the past 30 years.

So in conclusion - if your new hire has no direct product competition issue, very little direct "existing" customer issues, and leaves all competitive knowledge/ intellectual property from the past company, with the past company, there will be very little reason your new hires' previous company can or will complain. No matter how much they might not like the idea of your new hire joining what they might consider a competitor.