The Legal Strategist

S. BARRETT & ASSOCIATES, P.C.

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WE HAVE MOVED!! - S. Barrett & Associates, PC has relocated into our new offices at 4824 Bissonnet in Bellaire, Texas, 77401. Please update your records.

This quarter's Feature Topic explores the essentials for drafting an enforceable covenant not to compete, or what is more commonly known as a "non-compete." Most all employment contracts contain a non competition provision, however, more and more at-will employment relationships are utilizing non compete language. It is essential to precisely draft the non compete so that it complies with Texas law and will be upheld by the courts.

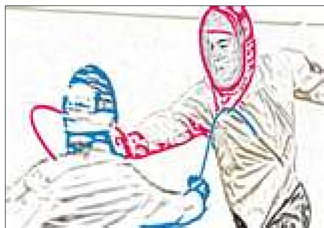
The Feature Topic is a cursory review. If you would like more information on this, or any other topic previously covered in our newsletter (which can be viewed on *The Legal Strategist* tab of our web site), please contact our office to set up a consultation.

Scott Barrett

TEXAS ESOTERIC FACTS

- In Corpus Christie, Texas, it is illegal to raise alligators in your home.
- In Port Author, Texas, Obnoxious odors may not be emitted while in an elevator.
- A citizen cannot work for the state government if his supervisor has "reasonable grounds to believe that the person is a communist," says Chapter 557 of the current Texas Government Code.

FEATURE TOPIC: DRAFTING EFFECTIVE NON COMPETE AGREEMENTS



A noncompetition agreement, or covenant not to compete, is the primary contractual restriction available to Texas employers to protect their business interests. A non competition agreement typically restrains the employee from engaging in a competing business with his or her former employer, in a certain geographic area, for a limited period of time after the termination of the employment relationship. Non competition agreements are governed by the Covenants Not to Compete Act. TEX. BUS. & COM. CODE ANN. §15.50 (the "Act" or "section 15.50").

As a practical matter in drafting an enforceable restrictive covenant of a non compete in an ancillary agreement the following considerations should be included:

- To be enforceable in Texas, non-compete agreements must be supported by adequate consideration. Texas courts have consistently held that for the consideration to be adequate, the employer must provide confidential information to the employee. This is not to say that financial consideration, such as the providing of company stock or cash considerations, can never be sufficient. However, generally speaking, for a non-compete agreement to be enforceable, the employer must provide confidential information to the employee. In the landmark *Mann Frankfort* case, the Texas Supreme Court held that a non-compete agreement could be enforceable even if it did not contain an explicit promise by the employer to provide confidential information, saying "When the nature of the work the employee is hired to perform requires confidential information to be provided for the work to be performed by the employee, the employer impliedly promises confidential information will be provided."
- As a general rule, it is preferable to include a non competition clause in the same instrument as the "otherwise enforceable agreement." If the two agreements are separate documents, the court is more likely to question whether the non competition agreement is, in fact, ancillary to the otherwise enforceable agreement. Because of this, it makes sense to include a non competition provision in an "otherwise enforceable agreement" like a trade secret nondisclosure agreement, which traditionally has been much more favorably regarded and more frequently upheld by Texas courts.
- It is good practice to recite the employer's legitimate business interest in the non competition agreement. If the agreement is litigated, this recitation will make it difficult for the former employee to deny the existence of a business interest. Moreover, having the employer's legitimate business interest specifically referenced in the agreement will focus the court's attention on it and provide additional support for its legitimacy.
- Define the scope of activity to be restrained as specifically and narrowly as possible. Avoid phrases such as "any business in competition with employer," or "the same business as employer." These types of definitions are ambiguous and, in an action to enforce the agreement, the employer will be required to present parol evidence regarding the scope of its business in order to define the scope of the non competition agreement. The narrower the restriction, the more likely it will be enforced in court.
- Reciting in the agreement the consideration provided in exchange for the employee's promise not to compete alleviates the need for parol evidence regarding consideration if the agreement is litigated.
- Although the statute allows recovery of compensatory damages, the former employee often will not have sufficient assets to satisfy a large damages award, and an injunction may be the only substantive relief the employer can expect to obtain through litigation. The employer can use a "clawback" provision, but I do not normally recommend this for anyone other than a stockholder or a former corporate officer.

If you would like more information on the impact of arbitration clauses in your contracts, please contact Scott Barrett to set up a consultation.