



Will A Non-Compete Ruin My Life?

News

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Mike Greco was quoted in *CMS Wire* on July 6, 2015. The article “Will A Non-Compete Ruin My Life?” discussed what to do when asked to sign a non-compete agreement.

“People say non-compete, but they are using that term too loosely,” Mike told CMSWire.

“Restrictive covenant is the word I use and these come in all shapes and sizes. Non competes are just one type of restrictive covenant.”

There are three scenarios that would warrant the use of a restrictive covenant under the law, he said: If the employee has access and uses confidential information in his job or is involved in customer relationships or receives an extensive and valuable course of training.

Then a second layer of analysis must be applied, Mike continued. “The courts will say that the employer must develop a restrictive covenant that is no more broad than absolutely necessary.” In other words, the employer can’t stretch the covenant to cover more than is absolutely necessary under the law.

It is here that Mike encouraged workers to consider the employer's point of view. “This company may have invested money, a significant amount, in establishing a company, in obtaining or developing proprietary information or processes. It is entitled to protect this investment as it can under the law.”

Employers don't always stay within the lines, so to speak, when crafting these statements — a point with which Mike agreed.

“There is room for some abuse,” he said. “I certainly can see a situation in which an employee is asked to sign a non-compete that may not fit the requirements of the law and then is afraid to take a new job because he doesn't have the \$75,000 it might cost in legal fees to challenge it.” That employee could well win in court, he said -- but he probably wouldn't want to gamble his life savings to find out.

“That's not fair,” Mike agreed.

I asked Greco, what such an employee could do, then -- especially if it is after the fact. Let's say this person has signed a non-compete and has come to realize that the language is too broad, or at least broad enough, that it could be challenged in court.

This is what Mike explained:

"First of all, there is risk in everything I have to suggest. If you push at your employer, no matter how gently, you might not like the results.

Also, obviously, the best scenario of all is one in which someone is able to consult their own attorney. All that said, an employee in the circumstance you describe should:

Be forthright with the employer. Tell your manager, 'I am thinking about leaving and this is why I think it will be okay from your perspective.' Then explain all the ways in which the employer's confidential information will be protected. Tell him all of your duties and responsibilities. Explain how you will avoid soliciting their employees. Address the company's legitimate interests.

Don't, under any circumstances, bad mouth the company on the way out. "The unfortunate reality is that a lot of litigation is driven by emotion of the employer. Either they feel betrayed or the employee said or did something that really angered him."

"Don't come in at 6 am to collect your things before you give notice," Mike said. "People will notice this and later assume you were riffling through the files. Be above board about everything. Tell management, after you've given notice, that you want to collect your personal belongings and how should you proceed."

Make sure you are devoting your best efforts to the job right up to the minute you leave. "You don't want to be accused of slacking off in order to benefit the competition that you are about to join."

Don't take anything from the office that isn't yours — and that includes records that have to do with pending commissions. This trips up a lot of people, especially in sales, Mike said.

"If you want to track your commissions that haven't closed, make copies of the relevant records and give those to your manager. Tell her, 'this has to do with the XYZ deals that are still pending. Can you keep this for reference when the time comes to calculate my commission?' "

It's your career, Mike said — and your bank account. "Only you know if this career move is worth the risk and if you can afford protracted litigation."

It might not come to that, of course. Perhaps the employer will back off if it gets a firmly worded letter from the employee's counsel. Perhaps not.

Another possibility is to see if the new employer would be willing to foot the legal bill, Mike said. "If it comes to this, then all of the above steps the employee has taken — being forthright, not being sneaky — will go a long way to helping the case."

Another moving part to consider: perhaps the employee has misjudged what its employers' legitimate interests really are, and his departure to a competitor does indeed violate them, at least in the eyes of the law.

And no self-deception or rationalization allowed, Mike said. "If you want your employer to play fair with you then you play fair with it."

In the end, though, Mike is of the opinion that most employers will not sue if they have some kind of reasonable assurance their secrets aren't slipping out the door.

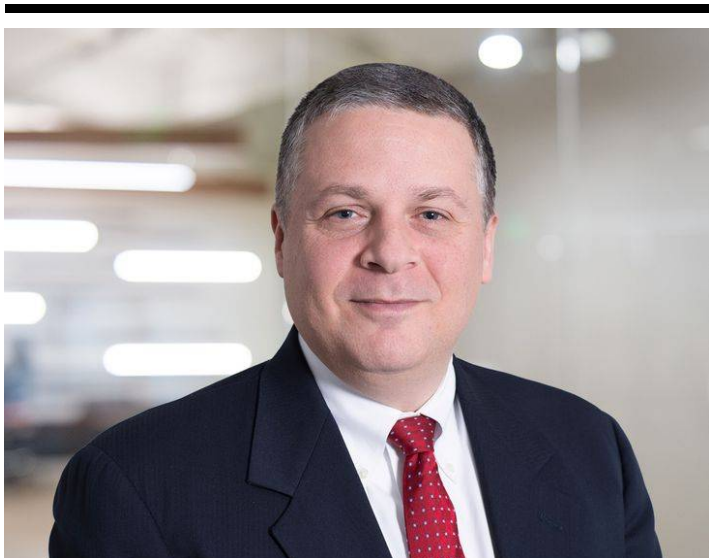
Much of this analysis applies to him as well. He should read the agreement carefully to see if actually applies to his job description. Often, Mike said, companies will insert boilerplate language in offer letters to cover all the bases and the non-compete could well not apply in that particular job. In that case, it doesn't hurt to gently point that out during the interview process.

"You have to weigh the advantages of the job and all that comes with it -- new contacts, networking, training, the salary, the benefits — against a commitment not to work for a competitor or in a field for a certain amount of time in the future," Mike said.

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