Non-Competes, Restrictive Covenants, and the Media

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Non-Compete agreements have received a great deal of attention recently. Lawmakers at the state and local level have analyzed, discussed, and debated whether they should be permitted, when they should be permitted, and what exceptions or parameters should be placed on them. State Attorneys General have investigated their use (and, some would say, their abuse). Even federal administrative bodies have studied the issue and taken comments on it.

While much of these discussions and proposals have been reported on by the media, what about how these discussions *affect* the media? That is, how can non-competes impact the newscasters, broadcasters, reporters, producers, on-air personalities, and others who work in the media? Could these individuals soon find that they are not just reporting on the news, but that they are the news themselves?

This brief article will discuss these question and more. Specifically, it will look at the general enforceability of non-competes, current trends that could impact their use, how non-compete agreements are used (or prohibited) when it comes to the media industry, and take a brief look at some First Amendment grounds that some raise when this discussion is brought up. Lastly, it will close with some practical advice both for employers and employees in the media.

Non-Competes – What is Enforceable, What is Not (and Where)?

In the majority of states and jurisdictions in the country, non-compete agreements are generally enforceable, if properly tailored. There are some notable exceptions to this general rule, however. California, for example, has a blanket prohibition on enforcing non-competes. The state legislature decided years ago that it was against that state's public policy to restrict trade or people's options for employment. Other states prohibit non-

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competes against certain types of professions (e.g., physicians) or against a certain level of wage-earners (e.g., for hourly workers making less than a certain threshold amount).

In most states, however, non-competes are generally upheld as long as they are "reasonable" and in furtherance of a "reasonable business interest." To be deemed reasonable, most courts and most jurisdictions (very broadly speaking) will look to three factors: whether the non-compete is reasonable with regard to geographic location; reasonable as to the scope of employment being restricted; and reasonable as to duration. Every state (and even courts within the same state) may view these factors differently.

As to geographic location, reasonableness with regard to the reach of a prohibition on competition may be within 50-100 miles, could be state-wide, or could be nationwide or beyond, depending on the industry and the actual reach of the employer attempting to enforce the non-compete. Importantly, however, the broader the geographic range, the less likely it will be found to be "reasonable" absent compelling justification. As to scope of employment, the employee must only be restricted from doing a similar scope of work for another company. A company cannot stop a salesman from going to be a janitor for a competitor, nor can it stop a janitor from becoming a salesman for a competitor. As to duration, courts have upheld non-competes from 6 months to several years, but the trend tends to be moving towards only enforcing non-competes for 1-2 years at the outer limits (and some states that allow non-competes limit the duration to 6 months or one year or another similar duration).

Current Trends from the State Legislatures, U.S. Congress, and the Administrative State

As this firm has reported numerous times (here and here), there have been many efforts in recent times to rein in—if not outright ban—non-competes. This has happened at the state level, including a 2016 Illinois law that prohibits the use of non-competes for employees who earn $13 an hour or less; in Massachusetts where a 2018 law prohibits the use of non-competes for certain professions and limits the terms for other workers; a 2020 Washington law that prohibits the use of non-competes for employees who make under $100,000 per year; and a 2019 Maryland law that prohibits the use of non-competes for employees making less than $15 per hour or $31,200 annually. Other states have attempted to outright ban non-competes, but have mostly seen those efforts fail on the legislature floor.

At the federal level, both Senator Marco Rubio (Republican from Florida) and Senator Elizabeth Warren (Democrat from Massachusetts) have raised the question of whether the federal government should ban non-competes, at least for some workers. While these two are not ordinarily fellow travelers politically, their actions show that non-competes have gained bipartisan attention (and perhaps bipartisan skepticism). More recently, the Federal Trade Commission (the "FTC") has considered whether it could or should take some sort of action with regard to non-competes. So far, there has not been any federal action limiting or prohibiting their use. (And, as full disclosure, this firm has argued that there should not be such federal action.)

Non-Competes and the Media

Which leads us to our topic subject. Can non-competes be used in the media industry? Are they enforceable? Do journalists or on-air personalities have special protections against them? And should they have special protections against them?

One problem with non-competes specific to the media industry, some argue, is that they do not just harm the employee, but arguably they could also harm the public if enforcing them restricts the free flow of news. Indeed, one of the factors weighed by courts in determining whether to grant an injunction against restricted competitive actions is the potential harm to the public or the public interest. In the media industry, the defense would argue, there could be a strong argument that the public has an interest in *not* enforcing non-competes against those in the media or news industry.

Another more pragmatic reality facing the print and on-line industry is the shrinking number of jobs. Newsrooms are now staffed by a fraction of the number of employees that they once were, the number of newspapers around the country are decreasing daily, local media has been severely harmed, online outlets are fighting for readers in a crowded space, and the number of entry level jobs for a beat reporter that used to exist are now fewer and fewer. So a non-compete clause for reporters will only restrict those employees that are most qualified from those fewer and fewer opportunities.

A number of states have or have had broadcaster exemptions to their non-compete laws (at least in some capacity). Arizona, California (universal ban on non-competes), Connecticut, Illinois, Maine, Massachusetts, New York, Utah, and Washington have all, either completely or in some form, made exemptions to non-competes for broadcasters. So, too, has Washington, D.C. New York, by way of example, has passed the "Broadcast Employees Freedom to Work Act," by which broadcast employers are prohibited from requiring an employee or prospective employee to enter into an agreement that restricts the employee's ability to obtain employment in a specified geographic area, for a specific period of time or with a particular employer or industry. N.Y. Labor § 202-K. This prohibition applies not only to on-air personalities, but also to off-air employees (excluding, though, "management employees") in television, radio, cable, and "internet or satellite-based services similar to a broadcast station," as well as employees of "any other entity that provides broadcasting services such as news, weather, traffic, sports, or entertainment reports or programming." *Id.*

Massachusetts, similarly, passed legislation forbidding broadcast employers from entering into any contract that restricts the right of an employee to "obtain employment in a specified geographic area for a specified period of time after termination of employment." Mass. Gen. Ch. 149, § 186. This exemption applies to television and radio station employees as well as employees of "any entities affiliated with the foregoing." *Id.* While this last addition is vague, it is also therefore potentially broad. In Utah, a recently passed law prohibits non-competes for employees of radio, television, and cable companies, including on-air personalities and announcers making less than approximately $47,000 annually, though non-competes for employees making more than that are not prohibited. Utah Code § 34-51-201.

Other states—such as my own home state of Michigan—have no such restrictions. It is not uncommon for the listeners of a local radio show to have their favorite on-air personalities go silent for 6-months to a year while they wait out their non-compete, before popping up on another radio station. I have personally litigated matters in Ohio and elsewhere in the mid-west pertaining to media personnel attempting to leave one job for a competitor despite the existence of a non-compete. After national personality Megyn Kelly was separated from NBC, there was much discussion of whether or not she would be restricted by a non-compete agreement from working elsewhere.

The bottom line is this: unless expressly exempted by statute, those in the media industry (whether in front of the camera, behind the camera, speaking into the microphone, typing on their keyboard, or those with ink stains on their fingers) need to take non-competes seriously and know that they may be enforced. As with all employees in any industry, those in the media need to know that if they sign a non-compete, there is a very real possibility that it will be enforced. Those in the media, therefore, need to be smart about what they sign and what they agree to. Employees in the media industry would be wise to have an attorney review their non-competes if they are asked to sign one. Employees should also negotiate the terms or even the existence of such restrictions. And if an employee leaves to go to a new employer, it may be wise for them disclose their non-competes to their new bosses.

On the flip side, media employers need to know what they can restrict and what they cannot—and where. And if an employee with a non-compete does leave, the employer must know what it should do and how it should act. In such circumstances, it is best to contact an attorney who specializes in non-competes, and if possible one that is familiar with media employers. And if you are going to move to enforce a non-compete, move swiftly.

Restrictive Covenants as Prior Restraints on Speech?

One last factor sometimes raised with regard to restrictive covenants in the media industry is whether such agreements could be considered a prior restraint on speech. Enterprising advocates fighting to dismantle or prohibit non-competes in media contracts argue that a non-compete against a media personality or newspaper employee is nothing more than a prior restraint on speech. As such, they argue, it is nothing short of unconstitutional based on the First Amendment.

The United States Supreme Court has long held that prior restraints on speech may be issued only in rare and extraordinary circumstances, such as when necessary to prevent publication of troop movements during time of war, to prevent the publication of obscene material, and to prevent the overthrow of the government. *Near v. Minnesota*, 283 U.S. 697 (1931). Most famously, in the case of *NY Times Co. v. U.S.*, 403 U.S. 713 (1971), the U.S. Supreme Court held that "[a]ny system of prior restraints of expression comes to this Court bearing a heavy presumption against its constitutional validity." For better or for worse, U.S. law errs on the side of permitting disclosure and speech, rather than restricting it. Some have argued that this is an argument against enforcing non-competes in the media industry.

What this argument misses, however, is that a non-compete is voluntarily and contractually entered into by the person against whom it would be attempted to be enforced. Parties can—and do, daily—contract to restrict their rights. Whether it is a confidentiality agreement, a non-disclosure agreement, or—as discussed here—a non-compete, citizens and employees are free to contract away many of their rights. Courts consistently differentiate between attempts to block speech based on whether or not there was a contractual agreement to restrict such speech. *See, e.g.*, *Snepp v. U.S.*, 444 U.S. 507 (1980) (upholding a bar on speech in light of a signed confidentiality agreement); *Ford Motor Co. v. Lane*, 67 F.Supp.2d 745 (E.D. Mich. 1999) (holding that an injunction against speech or disclosure may issue against one who is in violation of an employment contract and that disclosure of information in violation of a confidentiality agreement or in breach of a fiduciary duty is not protected by the First Amendment). Thus, by *agreeing* and signing a contract not to compete, an employee in the media industry would undercut this argument.

Moreover, a non-compete does not restrict speech, *per se*. Even an injunction enjoining a former employee from working for a competitor does not stop that former employee from speaking about anything. It simply restricts them from working for a competitor and assisting that competitor in competing for dollars against the former employer. Thus, it is not a prior restraint on speech, because it is not a restraint on speech at all. It is truly only a restraint on competitive behavior.

Conclusion

Everyone should be aware that in many jurisdictions, non-competes are enforceable as written. If you agree to them, they may be held against you. But this is not so in every state, and not for every circumstance. So employers would be wise to know their rights.

The same goes for employees in the media. They must know their rights, whether their state has an exception for them, and whether courts in their area uphold such agreements. But absent a statute to the contrary, those in the media (as with anyone else) should expect that an agreement they sign may be enforced as written. And while many have attempted to raise constitutional or other arguments against enforcing non-competes for those in the media, those arguments tend to not withstand scrutiny (again, absent a specific statute on point). Thus, non-compete agreements for those who work in the media are very real, must be understood, and must be planned for.

And that's the way it is.

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