Non-Competition Agreements (1)

by M. E. Kabay, PhD, CISSP-ISSMP
Associate Professor, Information Assurance
Norwich University, Northfield VT

I was recently in my old home-town of Montréal to give a lecture on management’s role in preventing industrial espionage at an information technology conference there (anyone who likes to read French can find the presentation in PPT or PDF at <http://www.mekabay.com/courses/industry/index.htm>). On two separate occasions there, I was asked about how to handle the issue of non-competition agreements (NCAs) – once from the employers’ point of view and once from the employees’ point of view.

Non-competition clauses or agreements are intended to prevent employees from taking confidential information or proprietary knowledge to a competitor (Business Owner’s Toolkit, <http://www.toolkit.cch.com/text/P05_5750.asp>). They stipulate that an employee shall not accept employment with competitors of a potential or actual employer for a specified period after termination of employment. Carl Mueller writes that NCAs may specify limits on work with direct competitors, competitors in a specified geographic area, or even the industry in which a former employee shall work <http://tinyurl.com/8dof3>.

NCAs must be carefully phrased to comply with legal requirements – and these requirements may vary across jurisdictions. The QuickMBA Web site has a useful article about “Employment law and duties to one’s former employer” <http://www.quickmba.com/law/empl/>. This article includes several interesting discussions of case law bearing on employment law. The authors point out that _confidentiality agreements_ are distinct from _restrictive covenants_. They write that there are two types of confidentiality agreements: non-use and non-disclosure. If an employee were to leave a company with an unauthorized copy of their client list and use it himself to set up a new service, that would violate a non-use clause. An employee who turned the stolen client list over to her new employer would be violating a non-disclosure clause. As for restrictive covenants, the QuickMBA authors explain that these can include

* NCA
* non-disparagement agreement – “prevent the employee from talking negatively about the employer”
* non-interference agreement – “prevent the employee from interfering with certain relationships [such as] vendor/supplier, referral patterns, customers”
* non-solicitation agreement – prevent the employee from soliciting employees or clients from their current employer.

All sources emphasize the importance of reviewing NCAs with an appropriately-trained attorney. Improperly constructed NCAs may be unenforceable; excessively restrictive (but legal) agreements may seriously harm an individual.

In my next column, I’ll look in more detail at the pros and cons of these agreements from both the employer and the employee perspectives.

M. E. Kabay, PhD, CISSP-ISSMP is Associate Professor in the Division of Business and Management at Norwich University in Northfield, VT. Mich can be reached by e-mail at <mailto:mkabay@norwich.edu>; Web site at <http://www.mekabay.com/index.htm>.

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