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But I Never Signed A Noncompete!

Why Sometimes Agreeing To a Noncompete Is Better than Not Doing So

by Andrew Gould
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The lawsuit filed by Hewlett Packard Co. against its now former CEO to prevent him from joining its chief rival Oracle Corp. is not surprising to many individuals. He was being paid millions of dollars to run an internationally respected and prominent corporation and, in exchange, it was reasonable for HP to bind Mr. Hurd to a post-employment noncompetition obligation.

But what is surprising (to some, at least), is that Hurd never entered such an agreement with HP.

HP is seeking to prevent its former executive from joining Oracle not based on a noncompete (which is wise, considering in California they are considered to be against public policy), but rather based on Hurd's obligations to maintain the confidentiality of HP's proprietary information (it might also have something to do with the reported $12,200,000 severance payment he received from HP).

HP's argument will surely be based on what is known as the *inevitable* or *probable* disclosure doctrine, a court-created doctrine (which originated out of federal court in Illinois) that imposes the equivalent of noncompetition restraints on former employees where permitting the individual to join the competitor will *inevitably* result in disclosure of the prior employer's confidential information.

That is only one of the many interesting aspects of the *Hurd* matter.

The inevitable disclosure is often a choice of last resort for employers faced with an unanticipated situation involving a former executive and the need to take steps to protect a company's valuable information. Most would agree that it is best to establish up front, and in a clear agreement, the express terms of post-employment obligations.

From the executive's perspective, this can be a tricky question. Are you better off trying to negotiate specific and clear terms of a non-compete, a narrow geographic scope, and a reasonable time frame, or would you prefer to try to eliminate the noncompete altogether and hope that the employer will not pursue an amorphous claim based on the protection of confidential information and the alleged probable disclosure of that information *ala* Mark Hurd?
From a company's perspective, a broadly-defined noncompete (but still limited by the business needs of the company) is generally best. It helps to avoid confusion should the employment relationship end and it puts both the executive and any subsequent, prospective employers on notice of the expectations for the former executive.

From the executive's perspective, it is a closer call. As noted, there are arguments for and against including a noncompete (as opposed to negotiating your way out of one). It seems to me, however, that ultimately it is best for everyone that these types of provisions be figured out at the inception of employment and that, ideally for executives, specific and narrow restrictions be identified and specified in an agreement.

It may be that the best solution for all parties is one in which the executive is given the option to decide whether to compete or not and that such option be provided when it actually matters, at the end of employment. This is accomplished through something known as a "forfeiture-for-competition" clause in which the employer offers up a carrot to the individual (often in the form of a large severance payment) if the individual chooses not to compete. If the individual wishes to compete, receives a tremendous offer from a competitor that he or she cannot turn down, or is presented with a similar scenario, the individual can opt to forego (or forfeit) the benefit (i.e. the severance) and compete. Interestingly enough, some states frown on these sorts of provisions viewing them as backdoor noncompetes.

Whatever your perspective, you are well-advised to give thought to these issues at the same time you are thinking through the more immediately impactful provisions of a contract such as compensation and benefits.

For a multitude of reasons, negotiations regarding these post-employment restrictive covenants get pushed into the background: the language in many of these provisions is often arcane, seemingly contradictory, and redundant; often executives believe the topic of what happens *after* employment will simply become the subject of a secondary negotiation over the terms of severance following employment; a belief that fighting over terms of these restrictions before employment even starts sends the wrong message to their new (or existing) employer; and, perhaps most important, many believe these sorts of restrictions aren't worth the paper they're written on so why waste time fighting over them.

From the perspective of the employer, I can assure you that none of these positions hold much water, and for executives who hold these views, the contract you end up with (or the court-prescribed doctrine discussed above) may come back to bite you when you least expect it.

Like any negotiation, much of this turns on the leverage of the respective parties, what it is each party wants out of the negotiated agreement, where each is in terms of their horizon in the business world or the employment market, etc.

Certainly there are instances when an individual will have no leverage to negotiate away certain terms of a contract, where a guaranteed signing bonus may be such that one truly does not care about terms post-employment, where a company so badly desires to hire someone that it is willing to forego valuable post-employment restrictions to ensure that the individual is hired. But for those negotiations that fall somewhere in the middle, which is pretty much most of them, there are some things everyone would be wise to keep in mind.

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About the Author

Andrew Gould heads the labor and employment practice of Wick Phillips. His practice principally involves the defense of federal and state employment discrimination claims, wrongful discharge claims, unfair labor practice claims under the National Labor Relations Act, contract negotiations, and denial of benefit claims under the Employee Retirement Income Security Act.

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