

An Overview of Louisiana's Law on Non-Compete

AUTHOR: Amy Duplantis Gautreaux
MARCH 7, 2016

In any market, but especially in times like these when, particularly in the oil and gas industry, good jobs, and at times good employees, are hard to come by, and information and processes ranging from sensitive business practices to information technology are at risk of being unfairly and/or illegally misappropriated, employers and employees alike should be mindful of the importance of non-compete provisions in the hiring process.

Just the other day some friends of mine were discussing their take on non-competes and whether or not such provisions are even enforceable in Louisiana. Unfortunately, as a result of a friend of ours having lost his job after only about a month of employment, their concern was whether or not the non-compete he had signed would or could prevent him from taking a similar job with another company in the same city. Of course, my take was that the contract be sent to me for review after which I could offer advice on the issue. But what I found interesting about this conversation was that most of the folks at the table (including successful, well-educated and savvy business owners and professionals) believed that non-compete provisions are not valid and enforceable in Louisiana and that our friend therefore need not worry. To the contrary, although Louisiana has long disfavored non-competes for public policy reasons, Louisiana law does not completely prohibit these restrictions. In fact, the employer/employee relationship is the classic exception to the general rule.

In Louisiana, the validity of non-competes is strictly controlled by a single statute and its interpretation and application by Louisiana courts. La. R.S. 23:921 provides, in part:

A. (1) Every contract or agreement, or provision thereof, by which anyone is restrained from exercising a lawful profession, trade, or business of any kind, except as provided in this Section, shall be null and void. However, every contract or agreement, or provision thereof, which meets the exceptions as provided in this Section, shall be enforceable.

(2) The provisions of every employment contract or agreement, or provisions thereof, by which any foreign or domestic employer or any other person or entity includes a choice of forum clause

or choice of law clause in an employee's contract of employment or collective bargaining agreement, or attempts to enforce either a choice of forum clause or choice of law clause in any civil or administrative action involving an employee, shall be null and void except where the choice of forum clause or choice of law clause is expressly, knowingly, and voluntarily agreed to and ratified by the employee after the occurrence of the incident which is the subject of the civil or administrative action.

C. Any person, including a corporation and the individual shareholders of such corporation, who is employed as an agent, servant, or employee may agree with his employer to refrain from carrying on or engaging in a business similar to that of the employer and/or from soliciting customers of the employer within a specified parish or parishes, municipality or municipalities, or parts thereof, so long as the employer carries on a like business therein, not to exceed a period of two years from termination of employment. An independent contractor, whose work is performed pursuant to a written contract, may enter into an agreement to refrain from carrying on or engaging in a business similar to the business of the person with whom the independent contractor has contracted, on the same basis as if the independent contractor were an employee, for a period not to exceed two years from the date of the last work performed under the written contract.

D. For the purposes of Subsections B and C of this Section, a person who becomes employed by a competing business, regardless of whether or not that person is an owner or equity interest holder of that competing business, may be deemed to be carrying on or engaging in a business similar to that of the party having a contractual right to prevent that person from competing.

Louisiana courts almost universally begin opinions on the subject with a statement that public policy disfavors these types of agreements. The stated justification for this public policy is the need to protect a working person from a contractual inability to support him- or herself and to avoid the result of an otherwise capable employee becoming a public burden. Therefore, these agreements are strictly construed. Based on the language in subsection C on the geographic scope of a non-compete, most Louisiana circuits require the agreement to specify the restricted parish or parishes by name. Additionally, Louisiana courts will not enforce non-compete agreements that prohibit competition "anywhere within the United States," "anywhere within the state of Louisiana," or the entirety of any other state. Also, courts may not enforce a non-compete if it includes parishes where the employer does not have an office or do business. However, courts may enforce a multistate non-compete if the counties or municipalities of the other state are specifically listed. Moreover, Louisiana courts will not enforce non-compete agreements with

geographic limitations defined in terms of distance or miles from a certain area. Finally, the time period for enforcing a non-compete agreement is statutorily limited to two years from the date of termination.

Thus, the statute and Louisiana jurisprudence clearly define the parameters for a valid non-compete agreement. Once the threshold element of the appropriate relationship is satisfied, the next step is to determine whether the geographic scope of the non-compete provision complies with the statute. Additionally, it is critical that the period of enforcement of the non-compete outlined in the contract not exceed two years from the date of termination. Beware that attempts to expand the geographic scope of the agreement to areas that cannot be protected and/or to extend the period of enforcement beyond the statutory two year period could result in the entire non-compete provision being invalid and therefore unenforceable or, in some circumstances, it could result in the entire contract of which it is a part being declared null and void unless saved by a severance or “blue-pencil” provision that allows the court to reform the agreement.

It is important for both employers and employees to be knowledgeable about any non-compete provisions being negotiated as a part of the hiring process. As an employee, you should apprise yourself of any bargaining power you may have in negotiating a non-compete. For example, you may be able to negotiate the breadth of the geographic scope outlined in the agreement or whether or not the agreement goes into effect in the event the company downsizes or your employment is terminated versus your resignation. Additionally, consider whether bonuses or salary increases can be negotiated. Finally, you may try to decrease the term of the non-compete or perhaps seek compensation during the non-compete period. As an employer, first and foremost, you must ensure that your non-compete is valid in the state in which you are operating. A Louisiana based company employing workers to perform work in Louisiana seems to be as simple as complying with La. R.S. 23:921. Note there are countless variables and scenarios that could change the results of the analysis. For instance, a Delaware company employing individuals to perform work in Louisiana may not necessarily be subject to Louisiana’s non-compete law (although most jurisdictions recognize the strong public policy interests that states have to regulate employment in their own states). Be mindful that the laws of other states regarding non-compete provisions are different from Louisiana’s. Whether or not Louisiana law applies to a contract will always depend on the specific facts and parties involved.

An interesting note: in Louisiana, non-competes, by statute, are unenforceable against car salesman. Subsection I of the statute specifically provides:

I. (1) There shall be no contract or agreement or provision entered into by an automobile salesman and his employer restraining him from selling automobiles.

(2)(a) For the purposes of this Subsection, “automobile” means any new or used motor-driven car, van, or truck required to be registered which is used, or is designed to be used, for the transporting of passengers or goods for public, private, commercial, or for-hire purposes.

(b) For the purposes of this Subsection, “salesman” means any person with a salesman’s license issued by the Louisiana Motor Vehicle Commission or the Used Motor Vehicle and Parts Commission, other than a person who owns a proprietary or equity interest in a new or used car dealership in Louisiana.

In sum, whether you are an employer or an employee, to the exclusion of a car salesman, the best thing you can do when faced with the uncertainty involved in entering into a non-compete agreement is to discuss the terms of the non-compete and your specific situation with an attorney **before** entering into the contract. If you find yourself in a situation where you have already executed a non-compete agreement, and you are concerned that you may be violating or in danger of violating the agreement or if you have any other questions or concerns in this regard, please contact Gordon Arata.