

The Five O'Clock News®

from America's Premier Career-Coaching and Outplacement Service

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"One organization with a long record of success in helping people find jobs is The Five O'Clock Club."

FORTUNE

Can Your Old Boss Stop You

From Taking a New Job?

What You Need to Know About
Restrictive Covenants

by David Madison, PhD
Director of the National Guild of
Five O'Clock Club Career Coaches

This article is based on a presentation at the first meeting of The HR Network on January 31, 2003, in New York City, co-sponsored by the Five O'Clock Club and Marsh. At this first meeting a 'dream team' panel of experts spoke on the topic, "New Trends in Restrictive Covenants." These included labor attorney and radio host Steven Sack; Pearl Zuchlewski, an attorney who has specialized in representing individuals in employment disputes; Peter Hillman, co-head of the employment practice at the law firm Chadbourne & Parke, LLP, principally representing management; and Cathleen Fitzpatrick, SVP at Marsh. The meeting was convened by Marsh SVP Michael Wiebe and the panel was moderated by Kate Wendleton, president of the Five O'Clock Club.

Chances are, most people don't lose a lot of sleep worrying about restrictive covenants. If they've been on the job a long time, they may not even recall that, tucked away in a file in the HR department, is the restrictive covenant that they signed as a 'condition of employment.' And they wouldn't be able to lay hands on the copy they carried home 'to put in a safe



THE NATIONAL EMPLOYMENT PICTURE

KATE AND DALE TALK JOBS

A SUCCESSFUL JOB HUNTER REPORTS

Non-Compete Agreements; The National Employment Picture

ANOTHER JAM-PACKED ISSUE

We're three years into a bear market, many companies are into their second or third round of downsizings, and job hunters are not getting the 10 or 12 offers many were getting only a few years ago. The covenants not to compete, disclose confidential information, or solicit former co-workers and clients have changed dramatically.

We told HR Execs: It's not enough to talk only to your *management* attorneys. Hear what employees are told by their attorneys. And we convened this first meeting of the HR Network to hear an esteemed panel on the topic. The panel included two employee and one management attorney, and a Marsh representative.

Our cover story this month is a summary of the panel's observations.

The National Employment Picture

Some industries are growing. Most of the growth in health services, public and private education, and social services has to do with demographic trends. The increase in mortgage bankers, however, has to do with low interest rates, and its growth is likely to slow. Read more inside about the employment picture.

Successful Job Hunters Report

Need some inspiration from a fellow Five O'Clock Clubber who's done it before? We've noticed that those who return to the Club the second and third time (over the course of a decade) really grasp the methodology. Their knowledge as well as their ability to manage their careers increases. Joanne Dillon shares her insight with us.

Job-Search Buddy

If you don't have one and you're in search, you may want to think about getting one—or two. Five O'Clock Clubbers report more progress when they are able to talk to a fellow Five O'Clock Clubber—per-

haps every day—just to keep themselves pushing ahead. Think about it for yourself.

Look at the Members-Only Section You'll find the updated

research bibliography developed by Wendy Rothman. Use it whether you're job hunting or simply want to keep up in your present field.

Kate Wendleton
President and Editor-in-Chief



"Don't bother using your computer. It's only a plastic display model. We'll get you a real one when our company actually makes money."

THE FIVE O'CLOCK NEWS

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Article submissions based on 5OCC methodology are welcome. There is no guarantee of publication. All submissions become the property of The Five O'Clock Club, Inc.

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place.' What is more, if they're searching for a new job—maybe after being with the same company for 5 or 10 years—they may not realize that the unremembered document can have a bearing on the kind of new job they accept, and even the kind of company they move to.

By conservative estimate, however, about 25 million Americans have signed restrictive covenants, and the business climate today seems to favor this practice of asking new hires to agree to abide by certain rules—perhaps for years into the future.

But just what are these agreements, and why are they deemed so important?

According to the *Atlanta Journal Constitution*, in 1999—the last year for which statistics are available—Fortune 1000 companies *lost \$45 billion in business* because ex-employees divulged trade secrets, client lists and other confidential and proprietary information to competitors. There is, of course, a common law obligation not to share your company's confidential information with others—just as there is common decency and common sense obligation not to do so.

Management, however, naturally feels better having it in writing. And restrictive covenants can cover a variety of concerns and issues.

About 25 million Americans have signed restrictive covenants.

Non-Compete Agreements: You Can't Go Work for Our Rival

Kellogg's, of course, would not like to see its Vice President of marketing for raisin bran cereal jump ship to go work for Post to market raisin bran—or probably any other line of cereal. A key manager like Kellogg's VP is privy to corporate strategies, knows the marketing plan and has important connections in the industry. Kellogg's assumes that real damage could be done if this knowledge ended up at Post. In this case, a non-compete agreement might bar the VP from taking another job in the cereal industry—at

least for a specified period. Or a company may want to stipulate that top-producing sales people cannot go work for competitors, taking valuable customer information and client lists with them.

Trade Secrets: Inventions and Formulas to Be Protected

With seemingly almost anything and everything available on the Internet these days, it is easy to lose sight of the fact that corporations do have confidential proprietary information—the disclosure or sharing of which can do great harm. The recipe for Coca-Cola, of course, comes to mind as the most famous of protected trade secrets. But in our age of unprecedented invention and accelerating technological advancement—with teams of scientists or technicians working on projects—the need to see that confidential information stays where it belongs becomes a primary concern. Hence, 'Intellectual Property' is a growing area of corporate law and employment practices.

And not just 'insider information' on inventions and technologies is the focus here. Corporations have a right to require confidentiality when it comes to marketing plans, sales strategies, growth projections and histories of client relationships and purchasing patterns. In recent years the trend has been toward drafting tight, clearly written covenants not to divulge confidential information.

Non-Disparagement Agreements

Who speaks for—and about—the corporation? Restrictive covenants can place curbs on unabridged speech. In this era when high-profile libel cases end up on *Entertainment Tonight*, corporate executives know the potential for nightmare scenarios. Anyone who accepts employment in the British royal household, for example, promises *never* to write a 'kiss and tell' book about what was seen and heard within the palace walls. That's the idea here. Employees may be asked to sign agreements that impose restrictions on speaking about people and practices encountered during employment. They are not to write books or articles, or talk

to the media. Image, reputation, word-of-mouth mean a lot to corporations, and they don't want former employees trashing the bosses and top brass they've left behind. Hence prohibitions of bad-mouthing after departure can be incorporated in restrictive covenants.

The 'Company's Interest' Vs. Your Need to Make a Living: Where to Draw the Line?

The first of the above covenants—the non-compete—is probably the one that can have the most impact on most workers, and is the one that deserves the most attention—from the 'right to work' perspective. Obviously, any organization that hires people—essentially welcoming strangers on board—has a need to protect itself and ask for minimum standards of behavior. No employee, however, can be expected to *sign away the right to earn a living*. So how does a person who is about to be hired as a VP of marketing at a cereal company protect herself when she's asked to sign a non-compete that seems heavily to favor the corporation? And how do people look out for their own interests—especially in tight labor markets—when the feeling that 'I'm lucky to have a job' may prevail? "How do I ask to see the fine print without 'rocking the boat'?"

Of course what we are about to say here is not a substitute for advice from an employment attorney. We offer some simple guidelines as you are about to walk into HR to sign all the papers and walk to your new desk (or walk out on your last day). There are issues and trends to be aware of that can impact your situation.

In recent years, the trend has been toward drafting tight clearly written covenants not to divulge confidential information.

Everything is Negotiable

Well, maybe not everything, and it's no good to rely on the word of your brother-in-law who is a real estate attorney and who assures you that 'non-com-

petes are not enforceable.’ Many factors come into play, but non-competes *are* enforceable—it’s just that there may be more flexibility than first meets the eye. Employment attorneys know case law and can shed light on what *has been enforced*. In the world of non-competes, you would do well to remember the fable about the three answers to “What does 2 + 2 Equal?” The accountant, of course, said, “Two plus two always equals four, never more, never less.” The physicist hedged his bets, pointing out that in a parallel universe, under the influence of time dilation, things could be different. The attorney—after drawing the shades, locking the door, and checking for hidden mikes—asked, “What do you *want* it to equal?” (This story was told by one of the attorneys on the panel!) You *do* have control over non-competes—your interests can often be protected—both before you sign them and sometimes many years later when a former employer tries to enforce them.

Corporations must be very specific in how they want to hedge or limit productive, taxpaying members of society.

Where You Live Can Make a Difference

Restrictive covenants are creatures of *state* law. You may live in a state that won’t allow employee rights to be abridged in this way. In California, for example, corporations are at a disadvantage. When a job offer was withdrawn because a man recently refused to sign a non-compete agreement, he sued for wrongful failure to hire—and won. In New York and New Jersey, however, the law generally upholds these agreements if they are reasonable. People for whom restrictive covenants could pose a substantial roadblock to livelihood—because of their levels or technical knowledge of a field—should learn as much as they can about what state laws permit, especially if they’re considering job offers in various states. Obviously, given the patchwork of state rules, this is also a complex issue for human resources officers and corporate counsel who work for

corporations with offices in many states. “One size fits all” doesn’t apply: restrictive covenants will only be as good as the states they’re written in.

No More “Confetti-Fights”

Who can forget what the world was like in 2000, before three years of a bear market? At the height of the dot.com mania, a law firm was under ‘over-night’ rush orders from a startup company to deliver the employee manual and non-compete agreements for all the new hires to sign. When the attorneys phoned the next day to make sure everything was in order, the human resources officer reported having witnessed a ‘confetti-fight.’ The new employees had simply laughed at the non-compete agreements and torn them up. Most of them had moved from job to job, and if they wanted to ‘walk,’ they would walk.

That was then, this is now. Many people feel fortunate to have jobs, covet stability, and are not as bothered by the idea of loyalty and trust—and corporations are in a much better position to call the shots. Companies are also much more likely to attempt to enforce non-compete agreements, at least selectively. To establish precedent and send the right signals, they’re picking their non-compete battles shrewdly.

In this climate, job-hunters would be well advised to do plenty of due-diligence. Of course, a smart job-hunter will always do exhaustive research on any company targeted for interviewing. The due diligence should continue if the process seems to be leading to a job offer, especially with respect to the company’s policy on non-competes. In other words, avoid the firms whose non-compete requirements put your career progression in serious jeopardy. Senior-level people especially—who will be in key positions, privy to very sensitive information—would do well to have a clear understanding of a company’s non-compete expectations *before* committing to extensive interviewing.

‘Not to Compete’: The Narrower the Better

Courts seem less inclined these days to look favorably on broadly written non-

competes. In a free society, we have to be very careful in limiting the right of people to ply their trades and earn a living doing what they do best. In other words, corporations must be very specific in how they want to hedge or limit productive, taxpaying members of society. Generally speaking, the old boilerplate covenants intended for anybody and everybody won’t fly. Hence, if you are asked to sign a non-compete, you are justified in asking that it be tailored and fine-tuned, as much as possible, to your situation.

For example, it’s probably not good enough for a corporation to stipulate that you can’t go to work “for a competitor.” For a non-compete to be reasonable and in the best interests of all—and have a chance of being upheld in court—it’s best that the competitor companies be identified, the geographic areas defined, and a *reasonable* time limit set. Usually *reasonable* cannot be more than a few months. Since any period of time barred from working at your chosen profession is likely to be a hardship, usually *reasonable* cannot be more than a few months. (Obviously, management attorneys would press for a year or more.) But the purpose of the non-compete should be to *balance*, as fairly as possible, both the needs of the company and the individual.

For a non-compete to be reasonable and in the best interests of all—and have a chance of being upheld in court—the competitor companies should be identified, the geographic areas defined, and a reasonable time limit set.

As you embark on non-compete negotiations—when you’re being hired or at the time of departure—remember that you may have control over some of the ‘fine print,’ and details here can make a big difference. If you’re a top-notch salesperson, for example, there is the matter of the clients that you brought with you, as well as the clients you brought in after

joining the company. You can argue that this is your book of business, your 'following,' customers who like and trust you—and who perhaps represent your biggest asset as you sell yourself in the job market. Hence a non-compete agreement may be written to protect your interests here—at the same time that it prohibits you from raiding a company's full client list.

You should also ask employers who want you to sign a restrictive covenant to be specific. List the unique skills, talents and areas of expertise that they would define as *their* 'legitimate protectable interest,' and they don't want to see you exercising with another company. And it's good insurance to ask that a non-compete agreement provide you with a money cushion: if your new employer wants to prohibit you from working for a competitor—or even earning your living in the same industry—for three or six months, try to have three to six months of severance pay included in the deal.

Of course, perhaps the best advice is don't sign a non-compete if you can avoid it. Years later, when you may not even remember that you once signed such a document, it may come back to haunt you and your new employer. Companies have been sued for having a new employee who is violating an agreement, or simply for neglect in not verifying that the new hire was free of encumbrances.

If your non-compete is for three to six months, try to have three to six months of severance pay included in the deal.

Caught in the Act: What to Do When the Old Boss Comes After You

Maybe you realize you've got a problem during your exit interview, when the HR officer shows you the restrictive covenant you signed once-upon-a-time (by this point you've resigned, after getting your new job offer). Or maybe you get wind that things are about to turn ugly a few weeks after you've been in your new position.

As with almost anything else in life these days, the first thing you can do is check the Internet. Go to www.breakyournoncompete.com for a good introductory course on the grounds you may have for beating a non-compete, as well as steps to take. But, as the people who run this site point out, they're not really giving legal advice. So the second thing to do is consult an *employment* attorney who specializes on the employee advocacy side.

You may have reason for hope, depending on a variety of factors:

- ◆ Your restrictive covenant may be old—one of those broadly written boilerplate documents that has been successfully challenged.

Go to www.breakyournoncompete.com. Then consult a labor attorney.

- ◆ You may be able to exploit the circumstances. For example, the VP of marketing for Kellogg's may not have been lured away to work for Post (in the case of a defection, Kellogg's wants to protect itself), but may have been laid off when divisions merged. What are Kellogg's chances of getting a non-compete enforced if it pushes this VP out the door? Given the turbulence in the job market these days, there may be a variety of circumstances that can make a restrictive covenant appear obsolete or inappropriate.

- ◆ Delay probably works in your favor. If your former employer doesn't get around to taking action for several months, your attorney may be able to make the case that damages haven't been serious.

- ◆ You may be able to exploit ambiguities in poorly written restrictive covenants. If a salesman is forbidden to call former clients to solicit business, does that mean that she can't call former clients to let them know where she works now?

Corporations will always need protection from employees who are dishonest, greedy, prone to ethical lapses, who act without thinking or purely out of self-interest. And employees will always need protection from corporations that would prefer to impose the most sweeping

restraints. In other words, restrictive covenants are here to stay—but as we go forward—with everyone being more aware of what is at stake on both sides—there will probably be more balance and reasonableness in the way restrictive covenants are written, interpreted and enforced. ●

The Lively and Entertaining DREAM TEAM of Panelists on Restrictive Covenants

On Friday morning, January 31, about 85 senior human resources officers listened to our lively and entertaining dream team of panelists. The next meeting of the HR Network will be Wednesday April 9th at the Marsh facility. Attendance is restricted to HR officers from corporate or not-for-profit organizations. The meetings are always free. ●



Pearl Zuchlewski, represents individuals



Cathleen Fitzpatrick, Marsh, Mercer, Putnam



Peter Hillman, head of employment practice, Chadbourne & Parke



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The HR Network

briefings for the informed professional