Ask the Counselor

Q. I had been working in sales for over twenty years when my employer recently decided to eliminate the product line I sold. I was released roughly three weeks later. Thankfully, I was blessed with another opportunity to work at a new company, but they are asking me to sign a sales representative agreement that has a non-compete clause.

I am a little concerned because in the past I have been able to work part-time on weekends or evenings selling products and making cold calls for other companies. I am a very convincing and effective salesperson. Will this be a problem? Could I end up losing my job or owing my new employer money if I sell products for other companies while employed with them? I really value the additional income from working as an independent sales rep. Should I sign this agreement? Please help. I am not sure in which direction to head.

Sincerely,

Struggling in Solon

A. Dear Struggling,

Thanks for your letter and congratulations on landing your new position. It is energizing to see

that hard-working folks in Ohio are finding gainful employment in these challenging and often frustrating economic times. You have raised a variety of issues in your letter, so let's start with the basics because you have a lot to think about.

First, non-competition agreements and non-competition provisions in contracts impose professional restrictions on employees after the work relationship with the employer ends. Non-competes generally restrict former employees from working for competitors or defined groups of competitors for a specified period of time. These types of agreements and/or provisions are not uncommon. Employers use non-competes to protect their valuable corporate assets, such as customer contacts, business methods and practices, sales information and other trade secrets as well as the company's good will. The employer may not be able to prevent you from using the skills you have gained on the job when working with another company but can restrict your ability to use proprietary or confidential information when working for another company.

It is important to recognize that not all non-competes are enforceable. Enforceability is a question of state law and may vary among states and industries. The courts in most states recognize that non-competes limit an individual's ability to make a living and will not enforce non-competes that restrict employees beyond what is reasonably required to defend a legitimate business interest. So, essentially, the restrictions imposed by the non-compete provision in your sales representative agreement must be reasonable. Simply because you sign the contract does not mean that it is enforceable.

This is a good time to pull out your contract and read it over again in detail. Pay close attention to the provisions that discuss your duties and the limits on what you are permitted to do. You need to assess what the non-compete provisions say, what types of activities they restrict, the time and duration of the restrictions (how many years after termination will the restrictions apply and remain effective), whether the restrictions are specific to a certain product type, region or territory and whether you can escape the restrictions should certain events occur.

Upon review of the contract, you may learn that your non-compete may not restrict your ability to sell products for another company during the term of your employment relationship with your new employer. It may only restrict your ability to sell competing products to customers of your new employer or to any potential customer within a geographic region. For instance, let's assume you are selling computer software for your new employer, SoftCo. SoftCo. would likely have good reason to restrict your ability to sell the computer software of competitors to its customers or customer leads during your spare time. This limitation would serve a legitimate business interest. The employer does not want you siphoning off customers and eating into its

profits on weekends when working for its competitors. Now, let's contrast this scenario with a non-compete provision that restricts your ability to sell any products, for any other company, anywhere in the world and at anytime during the term of the contract and continuing for three years after your termination. This would seem to be unreasonably broad. This type of provision would not really protect the assets and interests of the employer, but would affect your ability to work elsewhere and basically reserve the rights to all of your sales efforts and resources. It is unlikely that selling socks for Socks Unlimited, Co., or long-distance phone service for Bell Phone Service Co., on weekends and days-off would infringe upon SoftCo's business interests or compete with their business, at all. In order to know the precise limits of what you can and cannot do, you will need to review your contract.

In determining whether or not to sign the sales representative agreement you will need to evaluate how restrictive this provision will be on your ability to earn. This is somewhat of a bargaining power question. Remember, you always have the right to negotiate a contract but there are few guarantees with respect to what may come from the negotiations. If the terms of the non-compete are so restrictive that you cannot live with them, it may be prudent to avoid signing the contract rather than to sign and expect to be able to circumvent your obligations under the contract by trying to quietly continue selling products in violation of the non-compete. If you continue to struggle with your decision, there are number of competent attorneys in your area that may be able to further assist you and lead contract negotiations with your new employer.

Thanks again for your inquiry and good luck.

The Counselor's Desk encourages submission of legal questions and concerns to counselorsdesk@call-post.com

Godspeed.

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