"Promises and Pye-Crusts": State Statutes Threaten Broadcast Noncompetes

NANCY MORRISON O'CONNOR

Promises and Pye-Crusts are made to be broken.
–Jonathan Swift (1667-1745)

The enforcement of covenants not to compete (noncompetes) has long posed problems for all employers. But broadcasters now face a different kind of challenge: state legislation that singles out and bans only their noncompetes. Leading the recent legislative assault on broadcasters' covenants not to compete is the American Federation of Television and Radio Artists (AFTRA),[1] the union that represents performers and other employees in news and broadcasting, entertainment programming, recording, commercials, and other media. Based largely on AFTRA's efforts, statutes in at least four states and the District of Columbia[2] now impose specific restrictions on noncompetes in the broadcast industry, and similar bills have been introduced in at least ten other states.[3]

This new effort borrows momentum from a general increase in state legislative and judicial activity in (re)defining and weakening noncompetes, calling into question the validity of any covenant not to compete. Even broadcasters that escape the coverage of the new statutes must comply with these changed and changing requirements. Independent of the new statutory broadcast restrictions, whether a noncompete can be enforced depends on a trifecta of factors: reasonable time, reasonable geography, and reasonable duty restrictions. The noncompete simply cannot restrict the employee from earning a living by preventing competition for too long a time, in too large an area, or in too many activities. The new broadcast industry statutes now reduce this traditional tripartite focus to a single inquiry: Is the employer a broadcaster?

What Is a Noncompete?

A covenant not to compete is simply an agreement that one person or entity will not compete against the other. Noncompetes are most common in employment agreements and in agreements for the sale of a business. They are contractual and must be supported by adequate consideration. State contract, trade, licensing, and employment laws define and interpret the enforceability of the covenants.

In the employment context, noncompetes are typically part of a written employment contract and provide that the employee, during and following employment, will not compete against the employer. These covenants are narrowly interpreted by courts, which view them as restraints of trade. Some courts will rewrite an overly broad covenant to make it enforceable; others refuse to lift the judicial blue pencil and simply void any covenant that is, or becomes, unenforceable as written.

State laws and judicial decisions often impose specific requirements. For example, they may require that covenants be executed at the time of hire rather than on the brink of the employee's success. In addition, some courts decline to enforce noncompetes if the employer either has not required similarly situated employees to execute these agreements or has not enforced them.[4]

Why Do Broadcasters Bother?

In brief, noncompetes provide the employer with the incentive and security to share resources, training, and on-air opportunities safely with their employees, without having to worry that a competing station in the same market will lure its talent away.

The margins are slim in the broadcast industry, and the stakes are high. Millions in revenue can ride on a single ratings point in a local program. Research often identifies local talent as the most important criterion in the audience's selection of local programming. Not surprisingly, local television and radio stations devote significant resources to the selection, cultivation, promotion, and retention of their talent.[5] To protect their investments, these stations routinely include postemployment noncompetes in their talent contracts.[6]

Television and radio stations have few on-air positions to parlay into a ratings differential, and a station's awarding of one of these spots is the expenditure of a precious resource and represents a significant investment in the station's future. Most research and development companies can secure patent, trademark, or copyright protections to control and protect their products. However, broadcasters are limited in their ability to control or protect their products because their products are people. One of the few available protections is the noncompete.

Why Do Employees Sign Them?

Because they want the job. Neither the talent nor the employer can accurately predict success; therefore, most talent (and potential talent) agree to a noncompete in exchange for the perquisites and promises of employment. Furthermore, at the outset of the employment relationship, both the station and the talent are keen to construct a contractual framework that will encourage, even require, the development of the talent's career. Noncompetes provide such a framework. Other newsroom employees[7] who may be promoted to on-air positions, or who may become trained or experienced in station methodologies or equipment, may also sign these agreements.

Noncompetes are typically accompanied by a severance package to help bridge any period of unemployment, regardless of whether the unemployment was caused by the exercise of the noncompete. As stations and talent negotiate employment agreements, acceptable and enforceable covenants are rarely a significant point of contention.

Nancy Morrison O'Connor (noconnor@bracepatt.com) is a partner in the Washington, D.C., office of Bracewell Patterson, L.L.P.

Why Do Employees Want to Escape Them?

If the station's experiment works, the new talent becomes wildly successful. Having survived the professional equivalent of *American Idol*, the talent enjoys popularity and the station can begin the slow process of recouping its investment. But the employee's euphoria may prove short-lived. The employment contract that the talent worked so hard to secure now feels more like a stifling barrier to lucrative outside opportunities than a reason to celebrate. Most of the available opportunities are from local competitors attempting to capitalize on precisely the same audience recognition the talent's employer developed.

When such contracts finally expire, employees and their agents have increasingly attempted to escape what they regard as that pesky postemployment covenant not to compete.[8] In addition to a flurry of judicial challenges,[9] attempts to legislate more general and more permanent reforms have become widespread.

AFTRA: Leading the Charge

AFTRA, which represents some 80,000 media employees, has launched a broad lobbying campaign to secure state and local legislation banning the enforcement of all radio and television noncompetes.[10] AFTRA's efforts to initiate and support state legislation banning broadcast industry noncompetes have spanned more than a decade.[11]

The author believes that AFTRA more appropriately should focus its considerable leverage on negotiating contractual bans on noncompetes in both collective bargaining agreements and personal services contracts. Such a strategy would benefit AFTRA members in their own negotiations and also give them a competitive advantage over their non-AFTRA colleagues still subject to noncompetes. In addition, it would give AFTRA members a way to resolve issues regarding noncompetes through the grievance and arbitration provisions that are typically found in collective bargaining agreements and personal services contracts.

Nevertheless, AFTRA has focused its efforts on state legislatures. Although such legislation has not yet affected a majority of states, the influence of these laws must be viewed in light of the fact that existing statutory restrictions on noncompetes in several states (such as California, Montana, and Texas) are so broad that they would accommodate little amplification, and other states have no major broadcast interests justifying legislative attention. However, legislation has been enacted in the third, sixth, eighth, and fifteenth largest designated market areas of television households (Chicago, Boston, Washington, D.C., and Phoenix, respectively) as of September 2003.[12] Among these jurisdictions, the impact of this effort has been quite significant.

It is, of course, difficult to gauge the indirect impact of these legislative successes on either future lobbying efforts or judicial consideration of these issues. Even if both the station and the talent are currently located in a state that has not adopted noncompete legislation, the station may have to try to enforce the covenant in a state that has. The determination of which laws a state will apply in an action to enforce a noncompete is often unpredictable and always complex.[13] As broadcasters negotiate and evaluate employment contracts, they must monitor these developments carefully because of their present and potential impact on the enforceability of all noncompetes.

Common Features of the New Statutes

The recent statutes impose various broad restrictions on the ability of broadcast employers to require noncompetes; however, none is an absolute ban.[14] The only thing that these statutes have in common is that they are short, if not particularly sweet. None is comprehensive or entirely consistent with any other.

The recent statutes impose various broad restrictions on the ability of broadcast employers to require noncompetes.

The Massachusetts statute,[15] the first one to be enacted, makes "void and unenforceable" any noncompete agreement with an "employee or individual in the broadcasting industry,"[16] unless the employer terminates the employment, apparently for any reason. It awards attorney fees and litigation costs to the affected employee.[17] It does not include cable or satellite operations in its definition of "broadcast," but it specifically covers "networks . . . and any entities affiliated" with broadcast television and radio stations.[18] The Massachusetts statute has been used as a prototype for legislation elsewhere, although with several significant variations that are discussed below.

Covered Employers

The Maine statute,[19] enacted one year after the Massachusetts law, applies only to owners of television or radio stations or networks, apparently excluding such nonowner operating arrangements as local marketing agreements (LMAs). Likewise, it does not specifically include cable or satellite operations. The 2002 Illinois Broadcast Industry Free Market Act,[20] enacted over the governor's veto, specifically includes cable operations.[21] The D.C. Broadcasting Industry Contracting Freedom Act of 2002[22] covers all owners and operators of broadcast, cable, and satellite radio and television stations as well as "any other entity that provides broadcasting services such as news, weather, traffic, sports, or entertainment programming."[23] The Arizona statute,[24] which became effective in April 2003, includes television and radio stations and networks but does not specifically include cable, satellite, contractors, networks, groups, LMAs, or affiliates.

Covered Employees

The Maine,[25] D.C.,[26] and Illinois[27] statutes exclude sales employees, and the Illinois statute also excludes management employees.[28] The D.C. statute includes both employees and contractors providing such services as "news, weather, traffic, sports, or entertainment programming."[29]

Circumstances of Termination

The Maine law restricts only covenants in expiring contracts or those terminated "without fault" of the employee.[30] The Illinois Act permits enforcement of a noncompete against any employee during the term of employment, but it provides for postemployment enforcement only against an employee who has breached the agreement.[31]

Effects of the Statutes

The Maine statute establishes only a presumption of unreasonableness in covered noncompetes,[32] reserving the station's

ability to enforce covenants under undefined reasonable circumstances. The Arizona legislation makes any postemployment noncompete an "unlawful requirement"[33] for a broadcast employee. The D.C. law makes "unenforceable"[34] all postemployment noncompetes entered or renewed after January 2003. The Illinois statute prohibits the requirement or enforcement[35] of covered noncompetes.

Penalties or Damages

Violation of the Arizona statute is a Class A misdemeanor, apparently leaving direct enforcement to law enforcement officials.[36] The D.C. statute includes a penalty of damages, attorney fees, and costs against violating employers.[37] The Illinois statute awards civil damages, attorney fees, and costs against any person or entity violating the Act.[38] The Maine statute does not define a penalty or available damages.

Are There Alternatives?

Considering the importance of noncompetes to the broadcasting industry, the precarious position of such covenants should concern broadcasting employers. However, noncompetes are not the only available vehicles for the protection of stations' investment in their employees, and they need not operate in isolation. Among the options available are the following.

Assign Other Responsibilities

Some statutes permit stations to require noncompetes of sales or managerial personnel. The fact that an employee serves in more than one capacity, one of which is sales or managerial, may take the entire employment relationship outside the scope of the statute. Responsibilities in sales or management activities can be included in the employee's contract, job description, and postemployment restrictions.

Broadcasters may consider executing separate, sequenced function contracts for any dual-function employee, with the talent contract terminating first. A covenant not to compete during the remaining term of the second contract would have the effect of preventing competition after the expiration of the talent agreement, at least until the termination of the second contract.

Sign the Talent as an Independent Contractor

Another alternative for broadcasting industry protection is the particular designation of the person hired. The restrictive state statutes generally apply only to employees rather than to independent contractors.[39] The station should examine the nature and structure of the relationship between the station and the talent or other service provider prior to any contractual characterization as an "employee."

Obtain Nonsolicitation Agreements

None of the statutes prohibits nonsolicitation agreements, i.e., contractual restrictions on recruiting or hiring other station employees.[40] Under these agreements, departing employees cannot solicit co-workers, even those co-workers who are contractually free to resign and accept other employment. Evidence that such a situation has occurred may provide the station some injunctive relief.

Prosecute Breaches Confidentiality

Actual or threatened breaches of confidentiality can be prosecuted independently of the new statutes. Confidential information can be protected separately from a noncompete through confidentiality clauses and the enforcement of the common law duty of loyalty. It is unclear how states, such as Illinois, that recognize the doctrine of "inevitable disclosure" can reconcile their new statutory restrictions on noncompetes with their ruling that employees with confidential information cannot work for a competitor because they will inevitably disclose that information.[41]

Use Pay-or-Play Clauses

Many stations contractually reserve the right to decide whether and when to put the talent on air, and they include a pay-or-play provision in the talent contract. Under this provision, the employee recognizes that the employer has fulfilled any contractual obligation as long as the employer pays the employee and has no obligation to play the employee. The employer can exercise this right if renewal negotiations are not successful, thereby effecting a pretermination cooling-off period, albeit an expensive one, even when a noncompete is not available.

Other Contract Clauses

Other contractual provisions that may protect the employer against postemployment competition include the right of first refusal, an exclusive negotiations period, a penalty for failure to renew a contract, the forfeiture of all or part of deferred compensation upon termination of employment, and payment of severance over the length of the prohibited competition period.

Although choice of law is not always predictable,[42] the parties' contractual statement of the applicable law is an important factor. Groups of stations with multistate operations may evaluate the optimal choice of law reasonable within the scope and operations of the group, particularly where the group, rather than the station, is the contracting party and/or reserves the right to transfer the employee between operations. The parties may be able to select a jurisdiction that does not impose restrictions on the enforcement of their noncompete agreement.

As an additional safeguard, the parties can select a contractual termination date that maximizes the period before the next significant ratings period.

Even without a noncompete, employers can pursue tortious interference claims against a competitor where there is unfair or unlawful recruiting.

The parties should retain all negotiating documents reflecting proposals and changes to the noncompete, or the failure to request any changes.

What Does All This Mean?

Broadcast noncompetes have taken hits and are still in the crosshairs. AFTRA's campaign will undoubtedly lead to more anti-noncompete legislation. Broadcast employers that wish to continue to protect their human capital must recognize that the shelf life of currently valid protections may be limited, and, thus, they must identify and use every available resource.

The changing legislative environment makes it evident that the "pyecrusts" of employee promises to refrain from postemployment competition not only contain little but forbidden fruit, but also are made to be broken.

Endnotes

1. AFTRA has a current membership of more than 80,000 and boasts talent payments under 400 AFTRA contracts of over $1 billion a year. *See* www.aftra.org (last visited Sept. 30, 2003).

2. *See* specific discussion of the provisions of the Arizona, Illinois, Maine, Massachusetts, and District of Columbia statutes at *infra* text accompanying notes 17-41.

3. Similar legislation has been introduced in Connecticut, Iowa, Maryland, Missouri, New Jersey, New York, North Carolina, Tennessee, Washington, and West Virginia—to date without success.

4. *See, e.g.,* Maw v. Advanced Clinical Communications, Inc., 820 A.2d 105 (N.J. Super. Ct. App. Div. 2003).

5. Although this article primarily examines noncompetes from the perspective of an existing employment context, the issues addressed are also equally applicable in both the context of evaluating the existing noncompete of a prospective employee and the context of evaluating the stability and worth of a station's workforce for purposes of sale, acquisition, or disclosure.

6. Last year, the Radio and Television News Directors Association (RTNDA) and the Radio and Television News Directors Foundation (RTNDF), in conjunction with Ball State University, conducted an annual survey among all 1,396 operating, nonsatellite television stations and a random sample of 1,505 radio stations. *See* B. PAPPER & M. GERHARD, RADIO AND TELEVISION NEWS DIRECTORS ASSOCIATION/RADIO AND TELEVISION NEWS DIRECTORS FOUNDATION RESEARCH, 2002 STAFFING/AMOUNT OF NEWS RESEARCH, *at* www.rtnda.org/research/staff.shtml (last visited Sept. 30, 2003). This survey analyzed responses from 818 television stations (58.6 percent) and 622 radio stations for the last quarter of 2001. Survey data indicate that more than half (52.5 percent) of newsroom employees at the reporting television stations are under employment contracts, a significant increase over the 42.2 percent reported in 1999. These same stations reported that 46.5 percent of their newsroom employees are also covered under noncompete agreements, another significant increase over the 36.9 percent reported in 2000. *Id.* The survey data also revealed that contractual coverage is directly related to the particular newsroom position. Although at least 80 percent of news anchors, weathercasters, and sports anchors were under contract, only 5 percent of news assistants had signed on the dotted line. *Id.* On the other hand, radio newsroom personnel are rarely under contract or subject to noncompetes. The most frequently contractually covered radio newsroom position is news anchor (21 percent). *Id.* No similar data were available for radio employees outside the newsroom, such as program hosts, who may more likely be under contract.

7. Although the total number of television newsroom employment contracts has continued to increase, the number of contracts with television newsroom managers lags: only 37 percent of news directors, 45 percent of executive producers, and 52 percent of managing editors reported having employment contracts. Other station managerial personnel with access to the station's most strategic and confidential marketing, programming, financial, and operational information are also more frequently without contracts, undercutting the protection of strategic and confidential information as the oft-proffered justification for talent noncompetes. *See* RTNDA study, *supra* note 6.

8. One of the most interesting resources is the appropriately named website www.breakyournoncompete.com (last visited Sept. 30, 2003), a compilation of defenses to noncompetes, including what it describes as "one of the best ways to escape from a noncompete agreement and also, in many cases, turn the tables and sue your employer for damages."

9. For example, last year the Supreme Court of Virginia issued its first significant decision on noncompetes in thirty years. Modern Env'ts, Inc. v. Stinnett, 561 S.E.2d 694 (Va. 2002) (voiding noncompetes that do not specify the restricted postemployment position). In addition, New Jersey and California have both recognized that terminating an employee for refusal to execute a covenant not to compete may constitute wrongful discharge or unlawful retaliation. *Maw*, 820 A.2d at 105; D'Sa v. Playhut, Inc., 102 Cal. Rptr. 2d 495, 497 (Ct. App. 2000). The Pennsylvania Supreme Court recently joined numerous other states in holding that noncompete agreements are personal and are not assignable without the employee's express consent. Hess v. Gebhard and Co., 808 A.2d 912 (Pa. 2002).

10. *See* Dominique T. Bravo, National Director of Legal and Legislative Affairs, AFTRA, Testimony Before the Maryland State Senate Finance Committee Re Senate Bill 124: Employment Contracts-Broadcasting Industry—Noncompete Provisions (Feb. 11, 2003).

11. A. Baker, *Legislative Prohibitions on the Enforcement of Covenants Not to Compete in the Broadcasting Industry*, 23 HASTINGS COMM. & ENT. L.J. 647 (2001).

12. Nielsen Media Research Local Universe Estimates (US), *at* www.nielsenmedia.com (last visited Sept. 30, 2003).

13. *See, e.g.,* Application Group, Inc. v. Hunter Group, Inc., 72 Cal. Rptr 2d 73 (Ct. App. 1998); *see also* S. Brock. & A. Pedowitz, *Covenants Not to Compete, Trade Secrets and Duty of Loyalty: Choice of Law Issues in Covenant Not to Compete Cases, A State-by-State Survey*, Address at the American Bar Association Midwinter Meeting 2001, *available at* www.bnabooks.com/ababna/rnr/2001/brock.doc (last visited Sept. 30, 2003).

14. *Cf.* D. Bravo & T. Carpenter, *Personal Services Contracts: When Does Security Become a Prison*, AFTRA MAG., Spring/Summer 2001, at 22.

15. The Massachusetts statute simply provides the following:

> Broadcasting Industry; noncompete agreements. Any contract or agreement which creates or establishes the terms of employment for an employee or individual in the broadcasting industry, including television stations, television networks, radio stations, radio networks, or any entities affiliated with the foregoing, and which restricts the right of such employee or individual to obtain employment in a specified geographic area for a specified period of time after termination of employment of the employee by the employer or by termination of the employment relationship by mutual agreement of the employer and the employee or by termination of the employment relationship by the expiration of the contract or agreement, shall be void and unenforceable with respect to such provision. Whoever violates the provisions of this section shall be liable for reasonable attorneys' fees and costs associated with litigation of an affected employee or individual.

MASS. GEN. LAWS ch. 149 § 186 (2003).

16. *Id.*

17. *Id.*

18. *Id.*

19. ME. REV. STAT. ANN. tit. 26 § 599(1) (West 1999).

20. 820 ILL. COMP. STAT. 17/1–15 (2002).

21. *Id.* at 17/5 (a).

22. D.C. CODE ANN. §§ 32–531–533 (2003).

23. *Id.* § 531.

24. ARIZ. REV. STAT. § 23–494 (2002).

25. ME. REV. STAT. ANN. tit. 26 § 599(1) (West 1999).

26. D.C. CODE ANN. § 32–531 (2003).

27. 820 ILL. COMP. STAT. 17/5(b) (2002).

28. *Id.*

29. D.C. CODE ANN. § 32–531 (2003).

30. ME. REV. STAT. ANN. tit. 26 § 599(2) (West 1999).

31. 820 ILL. COMP. STAT. 17/10 (b) (2002).

32. ME. REV. STAT. ANN. tit. 26 § 599(2) (West 1999).

33. ARIZ. REV. STAT. § 23–494A (2002).

34. D.C. CODE ANN. § 32–532 (2003).

35. 820 ILL. COMP. STAT. 17/10 (2002).

36. ARIZ. REV. STAT. § 23–494A (2002).

37. D.C. CODE ANN. § 32–533 (2003).

38. 820 ILL. COMP. STAT. 17/15 (2002).

39. Note that the D.C. statute covers some contractors. *See* D.C. CODE ANN. § 32–531 (2003). The Massachusetts statute covers "the terms of employment for an employee or individual." *See* MASS. GEN. LAWS ch. 149, § 186 (2003).

40. Preventing teams of employees from resigning together to serve a competitor is another justification for requiring noncompetes from all employees.

41. PepsiCo, Inc. v. Redmond, 54 F.3d 1262 (7th Cir. 1995).

42. *See supra* text accompanying note 15.