Binding the competition

By Tara Marion

In an effort to protect their legitimate business interests and prevent unfair advantage, employers in nearly every industry—insurance, health care, finance, auto and others—are requiring their employees to sign non-compete agreements.

In legalese, they're referred to as covenants not to compete.

Passage of the Michigan Antitrust Act in 1984 legalized competition clauses – as they are also called – in the state, noted Kevin Krauss, shareholder-director and head of labor and employment practice at **Law, Weathers & Richardson** in Grand Rapids. Until that time, these agreements were only legal between buyers and sellers of businesses.

"I'm selling you my candy store," Krauss said by way of example. "I promise I won't open up a candy store across the street for the next several years."

Modern-day competition clauses say that employees cannot compete with their employers for a specified time in particular place.

"The time and geographical components will be a function of the type of business that the company is in," said Todd Anthes, partner at **Scholten, Fant** in Grand Haven.

The specified time in a competition clause for someone in the computer or information technology industry, for example, should be short because the technology changes so quickly, Anthes said.

"A long covenant period would be inequitable, and it probably wouldn't be held up in courts as being reasonable," he said.

When determining whether to enforce agreements, both lawyers and judges will consider the reasonableness of agreements in terms of duration and geographical area. The longer the duration and the wider the geographical area of the restriction, the more critically judges will view the restriction.

If the restriction is determined to be too broad or too great a hardship on the employee, judges in Michigan have what Krauss referred to as blue-pencil rights.

"A court can actually revise the agreement between the parties to make it reasonable, which is very interesting. Several other states say if any part of a non-compete is unreasonable, then the whole thing's unenforceable," he said.

Competition clauses are meant to protect customer relationships and confidential information, both lawyers agreed. Krauss used the formula for Coca-Cola as an example of protecting confidential information.

"It's very secret, very few people know it. I could not go to another company with that information because that information is not known to the competition. It's meant to be guarded and protected," he said.
Customer relationships are arrangements that were developed and maintained during employment. Competition clauses prevent employees from soliciting former clients.

"That gives you an unfair advantage over the company that introduced you to those customers, paid you to solicit those customers, paid you to develop those customers, paid you to treat them well, etc.," Krauss said.

Employers can ask employees to sign competition clauses when they hire in, during employment or upon resignation or termination. Anthes explained why employers ask employees to sign an agreement during employment.

“Sometimes they’re imposed as a condition of receiving a benefit,” he said. “A new employee benefit comes out, and the company will say, ‘To get this benefit, you have to sign a covenant not to compete.’”

If an employee violates a competition clause, both lawyers said the former employer can obtain a temporary restraining order against the violator to stop the behavior.

“In our experience, the case has been won or lost at the temporary restraining order hearing because you get a good idea as to the equity of the case and how the judge feels about a permanent restraining order when he’s deciding if there’s going to be a temporary restraining order,” Anthes said.