To Compete, or Noncompete

Beware of this relic of the Old Economy when developing your career.

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The nature of company-based employment in the United States has shifted dramatically over the past generation. For a large part of the last century individuals would start and end their career with one company. The system was paternalistic, with the company providing health care, pensions for retirement, and other benefits, in return for the employee loyally sticking with the company through thick and thin. Growing a company's employment base was a matter of pride for CEOs.

Fast forward to the present. The reality now is that individuals in the United States will work for multiple companies during their careers, shifting jobs and companies as different fields and product areas grow and die. Keeping the number of employees low is a corporate imperative. A person starting a career today may work for as many as 10 different companies before retirement. Additionally, the temptation for entrepreneurship is strong, and many people participate in the small company economy, hoping to participate in the Next Big Thing. Companies both large and small go through times of boom and bust, with employment levels fluctuating with their own, impenetrable rhythm.

All of these changes have led to a much more dynamic economy in the United States and worldwide, with companies (and target research areas) starting, growing, and dying at an accelerating pace. Workers in the private sector are expected to take responsibility for their own career development and finances, being able to withstand occasional layoffs and job shifts. Whether one views these changes as a benefit or curse is irrelevant, as there are no indications that this situation is changing any time soon.

As a matter of social policy, it would seem prudent to have a system that recognizes that frequent career changes is now the status quo, and encourage the dynamics and economic benefits that entrepreneurship provides. In fact, many states look longingly at regions like the Silicon Valley in California, and are actively promoting entrepreneurship in their areas as a way of driving economic growth. Many states have economic development organizations geared at promoting entrepreneurship within their regions.

Sadly, getting in the way of these trends is a holdover from the old economy, namely, noncompete agreements. The purpose of a noncompete clause in an employment contract is to restrict the ability for individuals to move to an employment situation where they would compete with their current employer, for the purpose of protecting the interests of their current employer. There is a bewildering patchwork of rules, as what is permitted in noncompete contracts varies from state to state. About all that is common across these jurisdictions is these clauses must be limited in terms of time, usually lasting one or two years.

From an employer's perspective, noncompete clauses are great! No one likes the idea of spending the money to train new hires, opening up a company's secrets to them, have the employees develop personal relationships with customers, and then have them run off and work for a competitor or set up their own business. Indeed, early uses of noncompete agreements were aimed at professions like sales representatives and hairdressers, who could be in a position to take their client lists to a new location and steal those customers.

Scientists and engineers who provide professional services and generate intellectual property (IP) can be covered by noncompetes as well. While there are plenty of legal means to protect IP through trade secret laws and patents, using these methods require that the employer prove that the employee is illegally using that IP. A noncompete provides an easier way to protect an employer's interests, as the employer only needs to determine where ex-employees are working, rather than if they are inappropriately stealing the goods.

From an employee's perspective, though, noncompete languages can make it difficult to practice one's profession. Consider the following scenarios: a worker gets the urge to start her own company in the field of her expertise; a worker's career is not progressing very quickly at a particular company, but could rocket ahead at a different place; a company is not doing well economically, so that pay and opportunity suffers; a worker gets laid off by his company. In each of these cases a noncompete agreement may prevent the employees from taking a new position that could further their career. Even if a worker is willing to take a chance that a noncompete will not be enforced, many prospective employers will not take the chance of attracting a lawsuit, and will decline to hire an applicant bound by a noncompete agreement.

What can be done? For the individual, recognize that noncompete clauses are enforceable legal contracts, and make sure that you understand what you are signing in your employment contract. Contracts are negotiable, so it does not hurt to ask for the removal of a noncompete agreement, or restricting its scope to more manageable terms. If you do not understand the terms, resorting to a lawyer could be money well spent. Just as you would not ask an attorney to formulate the conditions of a deep ion implant, asking an engineer to understand the ramifications of a clause that states "without regards to principle of law considerations" can be equally ineffective.

The social rationale for noncompetes is weak. California state law makes noncom-

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pete clauses "generally unenforceable" for its citizens, so for all practical purposes noncompete agreements do not exist in California. The strength of the California economy is a testament that these rules are not really necessary for businesses to thrive. Rather, the absence of these clauses helps level the balance between employee and employer rights in knowledge-generating fields, and has permitted the emergence of a vibrant culture of entrepreneurship. Other states might ask whether noncompete agreements present a barrier for such dynamics in their regions.

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