THE COMPANY • THE CANDIDATE

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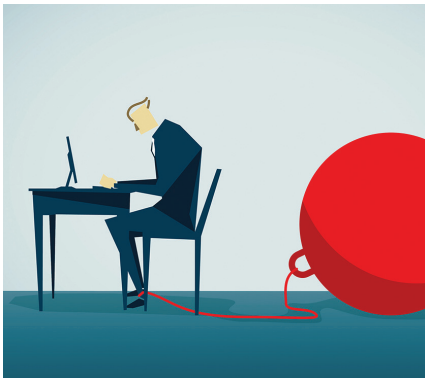
THE RETURN OF THE NON-COMPETE

Companies are getting tougher about enforcing these clauses

We've seen a surprising development over the past few months. Is it a trend or just a coincidence? Time will tell, but in either case, the non-compete agreement has once again become a topic of conversation in lighting. To be more accurate, it's not the non-compete itself—they have been around for decades. What has changed is the attempted enforcement of such agreements. In the past, enforcement appeared to occur infrequently; employees/candidates took the clause or agreement somewhat lightly and were less hesitant to sign them. With events over the past six months, all that may be changing.

Several months ago we placed an engineering manager who was working for a small lighting manufacturer when we identified him. The owner of the candidate's company took great offense to his employee daring to want to leave, and though no non-compete agreement was ever signed, you wouldn't know it from the owner's treatment of our candidate. He continued to pursue the candidate and even tried to intimidate our client company. It was a very strange situation, and at the time we chalked it up to just the very "unique" style of this owner. (The story ended happily, with said owner finally letting go.)

A couple of months later, a very talented national sales manager for a controls company was approached by a direct competitor. An offer was accepted with the contingency that the candidate receive a release from his non-compete. The candidate had been assured by his supervisor when he was first hired that he would never hold him to a non-compete. While that may have been true, the president of his company didn't feel the same way and refused to grant the candidate a release from his non-compete. This left both parties in an unusual situation. Almost like an arranged marriage, each knows that the other party clearly wants to leave but they are awkwardly bound together by the president's refusal to allow a "divorce" if you will.



Most recently, a candidate who wished to leave her role as key accounts manager approached us. The candidate had already interviewed with another company that was by no means a direct competitor, but we then introduced her to another company and she quickly received an offer (again with the provision that the candidate could get a release from her non-compete). However, the CEO of the candidate's current company was angry that she had dared seek employment elsewhere. Rather than grant a release, he instead chose to terminate her. Luckily for the candidate, the story ended happily. She went back to the company she had interviewed with first and an offer arrived shortly after. In the CEO's eyes, this company was not a direct competitor, so he did not protest when our very unemployed candidate took this position.

RULES OF ENGAGEMENT

Indentured servitude was outlawed in North and South America in 1917, but you really wouldn't know it if you examine some non-compete agreements these days. In some cases an employer's concern about having an employee leave a company to go to a direct competitor may have been well-founded, but in others the company's intentions were more questionable. Either way, with the threat to enforce non-competes being more prevalent this year, here are three

things companies should think about when considering whether to utilize a non-compete with a potential employee:

1. ***How long?*** One year is fairly standard, go to two at the most.
2. ***Everybody wants to rule the world.*** Limit it to the product line(s) and market channel(s) most important to you. Don't go too broad where it almost seems to ban someone from pursuing their craft in our industry.
3. ***Name and number.*** Some employers will vary terms of the non-compete based on the employee. We have a client company who sees the non-compete as a negotiating point, and the terms of an employee's non-compete will vary based on what candidate and company agree to. This flexibility allows them to secure some employees who otherwise might decline to join because of the non-compete. The downside is that other employees may hear about more favorable non-compete terms achieved by a new hire.
4. ***Poison pen.*** Any time a lawyer is brought in, the terminology of an agreement will often get much more restrictive—ostensibly to protect the company but also to demonstrate the attorney's value to their client by making it seem bullet-proof. (Some agreements "improved" by legal advice give the impression that the attorney is being paid by the clause). So while a law firm may be proud that its fingerprints are all over your new agreement, it may end up so restrictive that it makes your company unattractive to potential employees.
5. ***NC or NDA?*** We find in many cases, that rather than the broad overreach some non-competes employ, an NDA (non-disclosure agreement) is far more suitable and will afford the best protection for a company.

BEFORE PUTTING PEN TO PAPER

Here are three things to be mindful of when handed a non-compete by a prospective employer:

1. ***Term length.*** Non-competes vary in length from one to three years, with one or two years being more prevalent. One year is much more desirable, and with some companies the length of the non-compete can be negotiated. It never hurts to ask. Three years is excessive, and while it might not hold up in court, taking yourself out of the lighting market for three years in a time of rapid change and product and industry evolution is tantamount to deciding to exit the industry.
2. ***Broadness.*** Most non-competes we see are specific to a company's key product lines and/or market channels, but we have seen non-competes of the *'You'll never work in this town again'* variety. Our recommendation is not to sign these. Whether they will hold up in court is doubtful, but taking the time to find out is usually not worth the trouble.
3. ***To sign or not to sign.*** That is the question. Many companies will waive a non-compete for you at time of offer, and others won't force you to sign it if you state a strong preference not to. Smaller companies are often more flexible in regard to their non-compete, while corporations may be less so. Either way, realize there is always a small, but not impossible, risk a company could rescind an offer if a candidate expresses reluctance to sign a non-compete, so use your judgment here.

An important thing to remember is that even if the non-compete someone signed doesn't land her or him in court with their former employer, the actual warning letter from the company's law firm is more often than not enough to dissuade the former employee from challenging the company (who almost always will have much deeper pockets). So even if the non-compete wouldn't hold up in court, the threat of legal action does the trick before suits are ever filed. The intimidation (potential lawsuit) a non-compete brings carries the most weight and is not necessarily unfair in most instances as a tool for a company to defend itself.

We've all seen the transformation of lighting from the electrical to the electronic, the analog to the digital. With the evolution of LEDs and even lighting controls, we've also seen two letters enter the lighting vocabulary that had been extremely rare 10 years ago—I.P. No, not Internet Protocol, but Intellectual Property. As the LED evolution continues and most lighting manufacturers become more system-oriented, the players in our industry will jockey for space and place. IP issues that were previously more prevalent in Silicon Valley have

made their appearance in our industry, and lighting companies have a greater sensitivity to protecting their turf.

While the more cynical reader might think that an executive search firm's call for caution in the use of non-competes is self-serving, it's really not. While we believe some non-competes can be a necessary and appropriate protection for a company, others seem to be very far reaching, often almost seeming to limit someone from remaining in the industry. Also, a minor disclaimer: The Pompeo Group does employ a form of non-compete agreement with its new employees.

EVERYONE WINS

While a company should certainly take the appropriate steps to protect themselves in the event an employee leaves for a direct competitor, having overly restrictive non-compete agreements that prevent some of our industry's most talented people from staying in our industry—waiting to return in a year or two, but, in some cases, getting involved in their new industry and choosing not to return—is not in the best interest of job candidates and, just as important, it's not in the best interest for most of us in lighting.

What are your thoughts? I'd love to get your take on two topics: 1) Your thought on non-competes in lighting and whether they're good or bad thing for our industry and 2) Do you see non-competes becoming more prevalent? Please e-mail me at paul@pompeo.com or get in touch with us through LinkedIn, Facebook or Twitter.

Paul Pompeo is president of The Pompeo Group (*www.pompeo.com*), an executive recruiting firm in the lighting, LED and controls arena.