



A Worrisome Trend

Educational agreements are being targeted

by: Robert C. Goldberg, BTA General Counsel

I have recently shared with you the trend of the federal government and states curtailing the use of non-competition agreements. The Federal Trade Commission (FTC) has proposed a Trade Regulation Rule that would negate non-compete agreements. The Business Technology Association (BTA) has commented on this proposal, emphasizing the investment dealers make in acquiring and retaining end users — an investment that should not be free to departing employees.

The National Labor Relations Board's general counsel has brought a case challenging the enforcement of a non-compete. At the same time, several states have enacted legislation that limits or prohibits non-compete agreements. The future for non-competition agreements is unclear. However, their enforceability is certainly going to be limited.

The investment dealers make in acquiring customers is often matched by the cost of training sales and technical staff members. For years, BTA has provided the industry with educational programs to enhance the knowledge of industry employees. But bringing various dealership employees together for education often presents a problem: A student may be approached by another dealer to change employers. If the employee decides to do so, a dealer ends up investing in an employee's knowledge, only to lose that investment to a competitor.

As a result, BTA developed an Employee Educational Agreement. There are both short and long forms depending on the amount of the investment the dealer is making in the employee. See www.bta.org/LegalDocuments to download them. This agreement creates a financial obligation on the employee to reimburse the dealership if he (or she) should voluntarily leave the dealership's employment during an agreed-upon period. The financial obligation is reduced each month the employee remains with the dealership. The form has the additional benefit of identifying employees who lack commitment. A dealer could decide not to send an individual who refuses to sign the agreement to training.

BTA's Employee Educational Agreement was challenged by a Michigan employee who contended it violated the Thirteenth Amendment to the U.S. Constitution forbidding "involuntary servitude." The court found the defense interesting, however, it enforced the educational agreement as it was voluntarily entered into and there was a companion non-compete.

In another example, at the time of employment, a California employee signed a Training Repayment Agreement (TRA). There was no negotiation of the terms and employment would



not be offered without a signed agreement. The agreement stated the employee would receive \$50,000 worth of on-the-job training. Educational/training agreements are viewed as a means to circumvent restrictions on non-compete agreements, and California has legislated against non-compete agreements, rendering them unenforceable. The individual subsequently quit, providing four months' notice.

In August of this year, the employer sued the former employee based on the TRA. The suit sought \$38,000 in training costs and \$100,000 for "loss of business." The court opined that where training is required by the employer, that is a cost of doing business and an employee cannot be forced to bear or reimburse that cost. However, where an employee is going through training voluntarily, primarily for his own benefit, the repayment obligation can be enforced. If training results in a certification or degree that will qualify an individual for other positions, the agreement is enforceable. If the training enhances the individual's abilities in his current position, the repayment agreement may not be enforced.

An additional factor to consider is when the agreement is signed. An agreement signed prior to a training course is more likely to be enforced over one signed at the time of employment.

Federal agencies are looking to curtail TRAs. Connecticut and Colorado have limited TRAs, while California, Pennsylvania and New York have introduced bills to forbid them.

Employees are clearly gaining advantages over employers in their relationships. The trend is worrisome. Dealers make substantial investments in training employees and should be able to gain the full advantage of that investment. ■

Robert C. Goldberg is general counsel for the Business Technology Association. He can be reached at robert.goldberg@sfbg.com.

