

What We Know

ARTICLES & INSIGHTS

ABOUT THE AUTHOR



[Connie Elder Carrigan](#) is a partner in the firm, with a practice concentration in Business Law. Her focus is assisting clients with issues regarding employment law, business advice and litigation, construction law, equipment leasing and creditor bankruptcy. Connie has lectured on topics ranging from employment law, bankruptcy, and equipment leasing to construction law.

Employers, Beware! United States Senate Introduces Bill to Limit Enforceability of Covenants Not to Compete

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Effectively drafted restrictive covenants are valuable tools employers can utilize to protect their proprietary interests. Covenants not to compete and covenants not to solicit an employer's clients or employees are the most common forms of restrictive covenants used by employers to prevent their former employees from working for a competitor for a period of time after the termination of their employment or from enticing their former coworkers or clients to follow them when they depart.

North Carolina courts have a long history of scrutinizing covenants that prevent an employee from competing with his or her former employer. As a general rule, judges in North Carolina have disfavored enforcing restrictive covenants unless they are thoughtfully crafted in order to meet certain requirements. In order to be enforceable, restrictive covenants must be (1) in writing, (2) made part of a contract of employment, (3) based on valuable consideration, (4) reasonable both as to time and territory and (5) not against public policy.

According to the United States Treasury Department, about 40 percent of workers have been required to sign a noncompete agreement at some point in their careers. The desirability of enforcing such agreements has received ever-increasing scrutiny as opponents of restrictive covenants raise concerns that they create challenges in hiring workers with marketable skills and that they create untenable barriers to career advancement, particularly for lower-wage employees. In 2016, for example, Jimmy John's restaurants settled lawsuits filed by officials in New York and Illinois to enjoin the company from requiring sandwich makers and delivery drivers to sign restrictive covenants.

In recognition of those concerns, Senators Todd Young (R-Ind.) and Chris Murphy (D.-Conn.) introduced legislation on October 17 entitled the [Workforce Mobility Act](#) which has received bipartisan support. If passed, the Act would ban the use of noncompete agreements except in connection with the dissolution of a partnership or the sale of a business. Enforcement of the law would be undertaken by the Federal Trade Commission and the US Department of Labor. Employees would also have access to a

private right of action against their employers in the event of a violation of its provisions, and in actions filed by the Department of Labor, employers would be charged with a penalty of \$5,000.00 for each week the employer is in violation of the Act. The Act would further require employers to post disclosures to their employees regarding the Act's legal limitations on noncompete agreements.

The sponsors of the legislation argue that employers have other means, such as nondisclosure agreements, by which to protect their legitimate business interests. If an employer retains valuable proprietary information or trade secrets, it makes sense to require employees to sign such agreements prohibiting their disclosure and to ensure that their processes and systems protect against unintentional disclosure. In order to ensure that such agreements are enforceable, the definition of confidential information contained therein must be narrowly tailored to protect information that is truly proprietary. In addition, the federal Defend Trade Secrets Act, which was enacted in 2016, requires employers to include language in their nondisclosure agreements advising of whistleblowers' rights to disclose trade secret information to federal enforcement authorities.

If you have questions regarding this pending legislation or other legal issues pertaining to the employment relationship, please feel free to contact Connie Carrigan at ccarrigan@smithdebnamlaw.com.

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