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Does Your Organization Use Non-Compete, Non-Solicitation, and Nondisclosure Provisions? Employer Best Practices for Restrictive Covenants in NC

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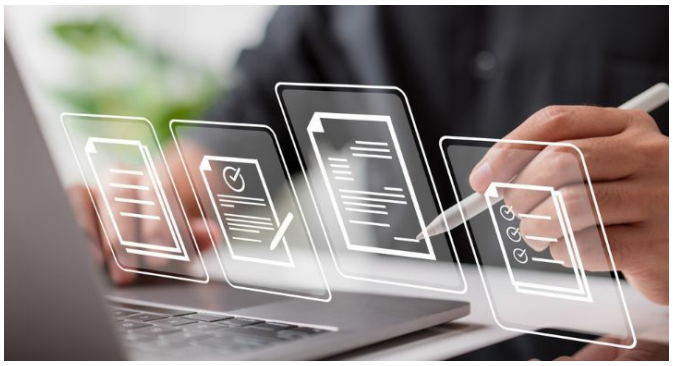
December 2, 2022

It is no hidden secret that many employers use various restrictive covenants to protect their trade secrets, confidential information, goodwill, and customer relationships.

For example, employers often use non-compete provisions to restrict or prevent former employees from working for a competitor in the same role as the company that the employee left for a specific period of time. Employers also routinely use non-solicitation and nondisclosure provisions. Non-solicitation provisions limit an employee from soliciting the employer's customers or employees, and nondisclosure provisions protect the employer's confidential and proprietary information by prohibiting the employee from disclosing such information following the employee's separation from employment.

While restrictive covenants are fairly popular in the employment context and are used in a variety of industries, they are generally disfavored by courts and often considered as a restraint on trade. Though disfavored, restrictive covenants are enforceable in North Carolina. North Carolina courts view restrictions on an employee's post-employment work with scrutiny. As such, we have included the following best practices as reminders for employers in implementing or updating restrictive covenant agreements/provisions with employees.

The basics of restrictive covenants have not changed much in North Carolina over the years. **What has changed is how and where employees do work for their employers.** Organizations have increased remote workers in recent years and also changed how employees interact with each other and customers through technology. First, the law that determines the enforceability of a restrictive covenant is generally where the employee works. This means that a North Carolina employer with a remote worker in another state will need to tailor its restrictive covenants to comply with the laws of the state where the employee is located. Second, employers must consider whether an employee's use of the employer's social media platforms warrants protection under a restrictive covenant. For some employers, social media is an important tool that is used to engage and develop customer relationships. In fact, a few courts have ruled that social

media contacts or group membership lists may qualify as trade secrets, which constitute protectable business interests. However, the determination of whether a former employee's social media conduct violates a restrictive covenant is a highly fact-specific inquiry. Courts will look at the specific language used in the restrictive covenant in connection with the former employee's conduct.

- **Employers cannot rely on venue and choice-of-law provisions** . Courts consistently invalidate contractual provisions requiring a lawsuit be brought in a certain state or jurisdiction, and also that the contract be interpreted according to a certain state's laws. This has always been problematic for multi-state employers, but it is now an issue for smaller employers with a growing remote workforce. The "fix" here is to ensure the agreement complies with restrictive covenant laws in the state where the employee performs a majority of their work. If the agreement does not comply with applicable state law, then it functions as little more than a deterrent.
- **Don't forget the "custodian rule."** In the simplest of terms, the custodian rule means that an employer cannot restrict an employee from working for a competitor in ***any*** role. Despite this widely-accepted rule, many employers fail to include such a provision in their restrictive covenant agreements/provisions, making it unenforceable regardless of what position the former employee actually takes with the competitor. An employer's non-compete provision can check all the boxes regarding the basic requirements of a restrictive covenant, but if there is no clause limiting the restriction to the same position, then the non-compete is void and unenforceable.
- **Ensure the parameters for any restrictive covenant are tailored to the employer's business and that terms are narrowly defined.** A few years ago, we published a reminder about how easily employment-related restrictive covenants can be struck down for failure to limit and define key terms. In recent years, North Carolina courts have further scrutinized non-solicitation provisions that do not narrowly define the precise customers that cannot be solicited. For example, limiting solicitation of customers with whom the employee obtains confidential information may be overly broad if that particular employee has access to basic information for hundreds of thousands of customers.

In summary, despite the profuse use of restrictive covenants in countless industries, they are not a one-size-fits-all approach. Employers may also want to consider options outside of restrictive covenants to protect their business through other contractual terms with employees (e.g., cost-share provisions and extended notice periods). Employers should consult with trusted legal counsel to revisit this critical business tool on a regular basis.

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