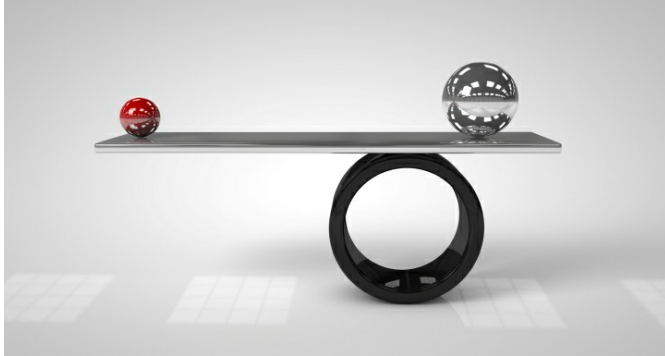


Restrictions on Employees' Post-Employment Work in North Carolina: The Balancing of Interests

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The use of "covenants not to compete," or "non-compete agreements," which limit former employees from working for a competitor are gaining in popularity and are used in a wide variety of industries and by service providers. Although increasingly popular, non-compete agreements are not without controversy.

On the one hand, you, as an employer, may find these agreements helpful in avoiding the loss of key talent to a competitor, protecting trade knowledge, and preserving valuable customer accounts. On the other hand, your potential employees will be concerned that these restrictions will prevent easy job movement and may prove a hardship if the agreement limits their job possibilities after they leave your employment. Some states, like California and South Dakota, ban the use of non-compete agreements altogether, while other states, like Texas and Florida, place few limits on the use of these agreements.

Restrictive Covenants in North Carolina

In North Carolina, non-compete agreements are enforceable, but they are not favored and, therefore, when they are challenged in court, they are viewed with scrutiny. When analyzing the enforceability of such agreements, North Carolina courts use an approach intended to balance the tension between the employer's and the employee's needs. Thus, in North Carolina, any non-compete agreement will be enforceable only when the restrictions on your employee's future employability by others is no wider in scope than is necessary to protect your business interests.

Specifically, to be enforceable in North Carolina, any non-compete agreement you implement must be:

- In writing;
- Reasonable as to time and territory;
- Made a part of the employment contract;
- Based on valuable consideration; and,
- Designed to protect your legitimate business interests.

A typical non-compete agreement consists of a few paragraphs in an employment agreement stating that your employee, for a period of time after leaving your business, agrees not to engage in certain jobs in a particular geographic area or for your competitors. The manner in which each of these variables is stated or defined will play a major role in determining whether the limitations will be enforceable by you when your employee changes jobs.

Time and Territory

North Carolina law has not precisely defined the range of acceptable time or territory restrictions, requiring only that they be "reasonable." The reasonableness of a geographic restriction contained in your non-compete agreement typically will not depend exclusively on the stated size of the area but, instead, upon where your customers are located and whether the geographic scope of the non-compete term is necessary to maintain those customer relationships. If your non-compete agreement is intended to prevent an employee from using knowledge about your customers to assist a competitor, the restricted territory should be only those areas in which the employee made contacts during his or her employment. Thus, when courts review territorial limits, they consider:

- The area, or scope, of the restriction;
- The area assigned to the employee;
- The area where the employee actually worked or was subject to work;
- The area in which you do business;
- The nature of your business; and,
- The nature of the employee's duty and the employee's knowledge of your business operation.

North Carolina law also does not dictate the exact length of reasonable time restrictions, but courts have generally approved restrictions of up to two years. Conversely, a five-year limitation is presumed unreasonable, is rarely approved, and then only when there are unique circumstances.

Because the standard is one of reasonableness, courts consider the time and territory in tandem. For example, a restriction with a wide geographic reach is more likely to be enforceable if it is for short period of time and *vice versa*.

Consideration

The consideration requirement means that your employee must receive something of value from you in return for the post-employment restriction. In other words, in exchange for the employee's promise not to work in certain areas or for certain companies for a period of time, you must give the employee something of value. The consideration need not be a monetary payment, and can be in the form of a promotion or additional benefits or initially hiring the employee. Courts have consistently held that if the non-compete agreement is signed at the beginning of employment, the new job is adequate consideration.

However, if an existing employee is asked to enter into the agreement during employment, the agreement will not be enforceable if the employee does not receive some new consideration from you.

In instances where a business is sold and the employee of the seller becomes an employee of the buyer and is then asked to sign a non-compete agreement, depending on the type of business transfer, new consideration may be required to create an enforceable non-compete agreement with the new owner.

Scope of Post-Employment Work Restrictions

One of the most contested issues regarding enforceability of non-compete agreements is the nature of the post-employment work your former employee will be barred from performing. Courts will examine the language of your agreement to see if the limitations are narrowly tailored to protect your competitive interests or, more specifically, if the scope of job duties the employee held while working for you is consistent with the duties barred under the non-compete agreement.

Restrictions prohibiting your employee from working in an identical position for a direct competitor are usually valid and enforceable. However, restrictions intended to keep your employee from working in a capacity unrelated to that in which he or she worked for you are generally held to be overbroad and unenforceable. Additionally, a broad statement that your employee may never work for a competitor in any capacity is unlikely to be enforceable.

A recent case involving a nurse-staffing firm illustrates the North Carolina courts' distaste for overly-broad restrictions. In that case, the non-compete agreement prohibited the employee nurse from working for another nurse-staffing service, but it did not merely limit the nurse from providing nursing services for the new employer. The court held that because the language could be understood to bar the former employee from engaging in food preparation or performing secretarial or other services unrelated to the employer's business, and because the agreement prohibited the nurse from working with any clients of any subsequent employer, not just those to whom the nurse was assigned to work by the former employer, the non-compete agreement was held to be unenforceable.

Similarly, in another case, a North Carolina court held a non-compete agreement to be unenforceable where the employee worked in the sale and distribution of fine paper products, yet the non-compete agreement sought to prevent him from engaging in the manufacture or distribution of *all* paper or paper products.

Conclusion

Covenants not to compete are extremely useful and important tools that can protect your business's legitimate competitive interests. Because, however, there are opposing public policy motivations related to these agreements, precise restrictions related to the employee's duties and area of work are necessary to withstand a former employee's challenge. You must narrowly tailor the components of your agreement and exercise caution to avoid blanket prohibitions on a former employee's work with a competitor or your agreement may be unenforceable.

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