Update on Restrictive Covenants in Employment Agreements in North Carolina

BLOG | SEPTEMBER 21, 2016

The NC Business Court, a division of the NC Superior Court, recently filed an opinion regarding post-employment restrictions. *Sandhills Home Care, LLC v. Companion Home Care-Unimed, Inc*, 2016 NCBC 59. The opinion contains very instructive guidelines for employers drafting, or "reworking," as we often say, restrictive covenants in employment agreements. Here are a few tips to keep in mind:

Do not overreach in describing activities that will be restricted; instead, limit the prohibited activities to the same or similar activities as those performed during the employee's tenure at your company.

> One of the agreements at issue in the *Sandhills* case included a non-competition restriction that prohibited its former employees from "consult[ing] with or otherwise assist[ing]" certain employees. Essentially, those terms would have restricted the employee from providing any type of service for a competitor, not solely activities that were similar to his/her previous job functions. Accordingly, Judge Gregory McGuire struck down the entire non-competition restriction.
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> Judge McGuire also struck down a restriction which prohibited former employees from "advising" or "holding any ownership interest" in a similar business. He noted that read literally, this would prevent the employee from owning stock in another business. As expected, that restriction was a no-go.

Avoid limitations that restrict former employees from soliciting clients with whom they had no contact. Limit the non-solicitation restriction to customers the employees had personal knowledge of and a connection with—think DIRECT CONTACT.

> In *Sandhills*, Judge McGuire applied the blue-pencil doctrine to strike a portion of the non-compete agreement which prohibited employees from soliciting customers with whom they had no direct contact.
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> In keeping with this tip, Judge McGuire had no issue with one agreement's three-year non-solicitation restriction (a two year "look-back" period during the employees' employment and a one-year post-termination period). He noted that because the look-back period did not include all of the employer's customers, just the ones with whom the employees had "direct contact," it was not unreasonable.

It is okay to include restrictions that are not limited to a geographical territory, so long as the restriction is tied to your customer base.

> As the N.C. Court of Appeals has previously held, customer based restrictions are actually preferable to geographic restrictions. Judges are looking to protect the legitimate business interests of employers. It follows that a restriction dictated by customer location would be more likely to have a "legitimate business interest" than a blanket "100-mile" type of restriction. Not that those are always invalid, but if you do use that type of restriction, you would want to make sure the restriction aligns with your customer base.

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