

May 16, 2022

## **WHEN WAS THE LAST TIME YOU REVIEWED YOUR NON-COMPETES?**

Many employers rely heavily on noncompetition covenants to protect their company's vital customer relationships and confidential information. However, they frequently rely upon standard, one-size-fits all form documents which not only appear unreasonable to the employees being asked to sign them, but are less likely to be enforceable in court. If an employers' interests to be protected are indeed valuable, it may be worth a bit more time and effort on the front end to develop noncompetition covenants that are reasonable and enforceable.

Over the last five years, the case law governing noncompetition covenants (including non-solicitation covenants) in employment agreements has continued to evolve. Covenants which may have been enforceable a few years back may no longer be enforceable. So, if you haven't reviewed your covenants in the past three to five years, especially for your most valuable employees, it may be time to do so.



Although North Carolina courts as a general rule dislike noncompetition covenants, they will enforce them if the covenants are "reasonable" in time, territory, and scope of prohibited activities, and are narrowly drawn to protect the employer's legitimate business interests. If the covenants are too broad and restrictive, vague, or not closely tied to the protection of the employer's legitimate business interests, courts will not enforce them. And if a court strikes down or refuses to enforce all or part of an employer's covenant in one case, the practical impact can be to render all of the employer's similar covenants unenforceable.

We generally advise clients: i) not to use one-size-fits all covenants but to tailor them to the employee's position and responsibilities; ii) not to require that every employee execute non-competition covenants, only key employees; and iii) to draft the covenants more narrowly and focus on protecting the company's vital interests, not on trying to protect every conceivable interest.

This approach requires more thought on the front end, but is more likely to pay dividends later. Current and prospective employees will be more inclined to sign agreements which are not overreaching, and will be less likely to ignore or challenge them later. And if the employer is forced to go to court to enforce the covenants, a narrowly tailored covenant is more likely to be upheld.

## JAH Can Help

If you have questions regarding your existing noncompetition covenants, particularly if they have been in place for more than five years, please reach out to a member of our **Employment Practices Group**. We will be glad to evaluate your covenants and, if appropriate, suggest improvements. If your covenants are adequate for your purposes, we will tell you that too.

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