

Employee Non-Compete Agreements in North Carolina

By Douglas P. Jeremiah, P.E., Esq.

Engineers in North Carolina are increasingly being required to sign non-compete agreements with their employer as a condition of employment. Employers have a legitimate interest in protecting their investment of training and compensating their employees. But don't employees also have a right to make a living in their chosen fields?

Are non-compete agreements enforceable? As always, the answer is – it depends. North Carolina appellate courts have addressed the enforceability of employee non-compete agreements numerous times. These opinions have produced several factors for North Carolina courts to consider in determining enforceability of a specific agreement. Whether a specific non-compete agreement is enforceable will depend on the application of the following factors and the specific facts involved in the employment relationship.

Historically, North Carolina courts disallowed any type of employee non-compete agreement as an invalid restraint on trade. Approximately 100 years ago, the courts began recognizing the right of employers to protect legitimate business interests in restraining competition from former employees. The restraint, however, must be related to the protection of the employer's trade secrets or other proprietary information, preventing the employee from using intimate knowledge of the employer's business, or preventing personal interaction with the employer's customer base for the benefit of another employer. The non-compete agreement must not be for the purpose of restricting ordinary competition from a former employee.

Non-compete agreements are required by statute in North Carolina to be in writing and signed by the employee. The employee's agreement not to compete must be based on valuable consideration, in other words, the employee must receive some type of benefit for his/her agreement not to compete. The initial employment of the employee is accepted as fulfilling this requirement. However, if a non-compete agreement is executed after the employee begins employment, then the employer must offer new consideration to the employee, such as a salary increase, bonus, or promotion.

Once it is determined that valuable consideration exists, the court applies reasonableness tests to the duration and the geographical scope of the restriction. When the courts began to find non-compete agreements enforceable, they would allow the agreement to be of long duration, even one extending up to the lifetime of the employee. Since then, the courts typically limit the duration of the agreement to five years, and even then only in exceptional circumstances. In determining the reasonableness of the duration, the courts will concurrently consider the geographical range. For instance, the longer the duration, the smaller the geographical range will be allowed, and vice versa.

As with the early courts' liberal allowance of duration in non-compete agreements, large geographical scopes were traditionally allowed. Presently, the courts

will limit the geographical scope to the smallest geographical unit necessary to protect an employer's legitimate interest in maintaining its customers. If the area is too broad, the courts may strike the entire non-compete agreement as invalid. The courts may not rewrite the agreement to make it reasonable.

North Carolina courts have developed a list of six factors relevant in determining the reasonableness of a geographic scope in non-compete agreements: (1) the scope of the restriction; (2) the area assigned to the employee; (3) the area where the employee actually worked or was subject to work; (4) the area in which the employer operated; (5) the nature of the business involved; and (6) the nature of the employee's duty and his knowledge of the employer's business operation.

Some examples of non-compete agreements that have been upheld by the courts include: (1) prohibition of solicitation of a motor vehicle rental employer's customers for a period of two years within North Carolina and any other state in which the company conducts business; (2) prohibition of employee working in the building wall manufacturing industry in North and South Carolina for a one-year period; (3) prohibition of employee from competing against employer in the business of accounts payable auditing in identified Southeastern states for a two-year period; and (4) prohibition of employee engaging in the business of providing dance instruction within a 25-mile radius of the employer for a one-year period.

Examples of non-compete agreements that have been found invalid by the courts include: (1) prohibition of direct or indirect competition with the electronic equipment manufacturer employer within a 200-mile radius of Greensboro (the agreement's definition of competition too include "indirect" was too broad); (2) the agreement prohibited employee from engaging in competition with another employer in any city or town in the United States where the asbestos abatement employer is doing or has signified its intention of doing business (the court found the territory to be patently unreasonable); and (3) prohibition against employee contacting any of insurance agent employer's customers for a period of five-years where the geographic area was not defined.

When drafting a non-compete agreement, it is always important to keep in mind the tension between the employee's right to use his/her own skills and talents in employment and the employer's legitimate interest in protecting its customer base and preventing unfair competition. Also, the courts recognize that North Carolina public policy favors fair competition. In light of these tensions, employers should try to make their agreements no broader than necessary to reasonably protect their interests, while making sure that the agreements meet each of the requirements described above.

Bio

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