



# Mastering Non-Compete Agreements

Legal Essentials and Emerging Trends

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- The information in these slides and this presentation is not legal advice and should not be considered legal advice.
- This presentation represents the personal opinions of the presenters.
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# General Overview: Non-Compete Clauses

- Limit competition for specific duration within set geographic range
- Inherent tensions and public policy concerns
- Pervasiveness without uniformity

## **NC Requirements for Enforceability**

In Writing

Part of Employment Contract

Valuable Consideration

Legitimate Business Interest

Time and Territory

# Requirements: Consideration

- In the form of employment
- The promise of *new* employment
- Change in terms/conditions
- BUT
  - Existing employment without a non-compete—any *new* non-compete must be based upon *new* consideration

# Requirements: Legitimate Business Interest

- Protection of:
  - Customer Relationships
  - Company/Customer Goodwill
  - Workforce/Employee Training
  - Trade Secrets
  - Confidential Information
- Specificity: Industry and Role

# Requirements: Time and Territory

- Considered in tandem
- Reasonableness factors for territorial restrictions:
  - Area/scope of restriction
  - Area assigned to employee
  - Area in which employee actually worked
  - Area in which the employer operated
  - Nature of employee's duty and knowledge of the employer's business operation

# Requirements: Narrow-Tailoring

- Considering *all* factors, is the restriction narrowly-tailored to protect a legitimate business interest?
- Often where non-competes fail





# Blue Pencil Doctrine

- Allows for Courts to strike portions of overly broad non-competes to make them reasonable/enforceable
- Cannot create terms not originally agreed upon by the parties

# Blue Pencil Doctrine, contd.

[f]or a period of two (2) years from the date of the termination of his/her employment, the Employee will not, within the geographical limits of the Counties of Beaufort, ~~Brunswick,~~ ~~Camden,~~ ~~Craven,~~ Currituck, ~~Edgecombe,~~ ~~Hertford,~~ ~~Martin,~~ Nash, New Hanover, ~~Pasquotank,~~ ~~Pender,~~ ~~Pitt,~~ ~~Tyrrell,~~ ~~Wilson~~ or within a sixty (60) mile radius of Greenville and Wilmington, directly ~~or indirectly,~~ perform actuarial services in competition with Employer ~~or otherwise own, manage, operate, join, control, be employed or participate in the ownership, management, operation or control of, or be connected in any manner~~ with any business of the type and character of the business engaged in by the Employer at the time of such termination.



# Challenges: Remote Workforce

- Geographical Restrictions
  - Choice-of-Law Provisions
- Employee Monitoring vs. Privacy Interests

# Challenges: FTC Proposed Rule

- Proposed rule to ban non-compete clauses from employment agreements
  - Also targets NDAs “written so broadly” that they function as “*de facto* non-competes”
  - Approximately 1 in 5 Americans are bound by non-compete agreements
- Final rule expected sometime this April

# Challenges: Constantly Evolving Landscape

- Banned in CA, MN, ND, & OK
- Some states prohibit non-competes for low-wage workers
- Some states prohibit enforcement against terminated employees
- Specific Requirements
  - IL: Continued employment is not adequate consideration
  - ME/CO: New hires must be given notice of any non-compete before an offer

# Special Considerations in Non-Compete Litigation

- Cases typically won or lost at the TRO/PI phase
  - Preliminary injunction may outlast covenant
  - Compressed litigation can be labor intensive and costly
- Race to the courthouse: cease-and-desist?
- Goose/Gander considerations
- Signaling to other employees/competitors

# *Prometheus Grp. Enters., LLC v. Gibson*

- N.C. Super. Ct. Mar. 21, 2023
- Non-Compete at Issue:
  - Prevented Gibson from “*directly or indirectly* engaging in . . . a Restricted Business in a Restricted Territory”

# *Prometheus Grp.*, contd.

- **Restricted Business:**

“any business *related* to the creation, development . . . of enterprise application software”

- **Restricted Territory:**

“(i) the entire world; (ii) North America; (iii) the United States of America; . . . ; (vi) the State of North Carolina; **and** (vii) Wake County.”



# Special Considerations in Drafting

- Tailor, tailor, tailor
- Avoid “catch all” language and ambiguities
- Careful with conjunctions
- Think critically and practically
- Forum and choice-of-law?
- Legal appendices?
- Arbitration?
- Anticipating the blue pencil?

# Evaluating Your Company' Protection Programs

- Training and standards for protecting confidential information and trade secrets
- Review and update agreements to reflect anticipated changes in roles or scopes—remember consideration here!
  - Bolster confidentiality agreements to fill any gaps
  - Consider utilizing other restrictive covenants to plan for potential bans

# Onboarding Restricted Employees

- Hire for skill/abilities, not intel/connections
- Privilege limitations: consider independent counsel
- Advise/document limits on restricted activities
- Blanket indemnity against non-compete is risky

# Questions?



# Contact Us!



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