

**ENFORCEMENT OF NONCOMPETITION AGREEMENTS –
DISPELLING THE MYTH OF UNENFORCEABILITY
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LEGAL BACKGROUND

Professional employees, employees who are exposed to confidential information, and employees who are especially valuable to an employer are often asked to sign agreements containing “non-compete” covenants restricting the employee’s ability to work in competition with their current employer. These agreements typically prohibit the employee from soliciting the current employer’s customers and restrict the employee’s activities within a geographic radius for a set period of time. Often, employees sign such agreements believing that courts will not enforce them. This perception of unenforceability is only partially accurate. Although non-competition agreements are unenforceable if they fail to meet certain requirements, the majority of such agreements are enforced by Washington courts if they are based on Washington law (other states’ laws may differ).

Whether non-competition agreements are enforceable is increasingly important given increasing employee mobility. Employees and potential employers alike must make employment decisions based upon the agreements the employees entered into with their current or former employers. Either the employee honors the contract, which can mean the employee must leave the geographic area and possibly change their area of specialization, or the employee must risk a lawsuit with the former employer.

Washington courts will enforce non-compete agreements that meet a three-part test:

- The restraint must be reasonably necessary to protect the business or goodwill of the employer.
- The restraint must not impose upon the employee any greater restraint than is reasonably necessary to protect the business or goodwill.
- The public cannot be unduly harmed by losing the service and skill of the employee.

Failure to meet these legal requirements will lead a court to refuse to enforce the non-competition agreement. Thus, in a case where a copier company trained an employee as a service and sales technician for six months and the employee later went to work for another company servicing another brand of copiers, a court refused to enforce the non-competition agreement because the employee had had only limited contact with his former employer’s customers and because there were no customer lists to protect. Similarly, the court refused to enforce a non-compete provision that prohibited the former owner of the subject dry cleaning company from owning a competing business, but did not prohibit him from managing a competing business. The court reasoned that the “harm” from owning and managing are the same, and consequently, refused to enforce the provision.

Even though Washington courts have occasionally refused to enforce non-competition agreements, the majority of the reported decisions have enforced the provisions as written. For instance, Washington courts have repeatedly required accountants to honor non-competition agreements and have enforced non-compete periods as long as 25 years. Additionally, when the non-competition agreement includes a provision against soliciting current customers, courts allow much greater latitude with regard to what constitutes a geographic limitation.

PRACTICAL GUIDELINES

- While non-compete provisions are generally enforced in Washington, employers are often reluctant to file suit when they discover violations. Filing suit against former employees can negatively effect the morale of current employees who may feel that they are “indentured servants.” Practically speaking, many employees do not have the resources to pay any judgment that might be entered against them. Moreover, litigation is an expensive and time-consuming diversion of a former employer’s resources. Thus, it may be wise to limit noncompete agreements to key employees who are in a position to do real damage to the employer if they were to go to work for a competitor.
- If you have a present or former employee who you believe is violating or is about to violate a valid, enforceable noncompete agreement by working for a competitor, inform the competitor of the existence of the noncompete agreement and send it a copy. Depending on the circumstances, you may also wish to advise the competitor that its employment of this individual would constitute tortious interference with the noncompete agreement, and that you will be seeking damages and/or an injunction against the competitor if it was to employ this person.
- Ask potential employees if they have a noncompete agreement with a former employer. If they do, review it carefully to be sure that it would not be breached by your hiring of the individual. Do not take the individual’s word that your employment of the individual is not covered, or that the agreement is unenforceable. Have it reviewed by an attorney before making a final decision on employment.
- If you knowingly hire an employee who is covered by a noncompete with a former employer, you may be subject to a suit for tortious interference. It may be possible to have the employee indemnify you and defend you from any exposure, but most employees do not have the resources to do so.
- Check your insurance to see if it covers exposure for tortious interference with a contract or business expectancy if it seems likely that the situation will arise.
- Other related types of agreements include confidentiality agreements, employee nonsolicitation agreements (requiring employees not to solicit other employees to go to another employer), customer nonsolicitation agreements (allowing an employee to work for a competitor, but prohibiting the employee from contact with the former employer’s customers), and vendor nonsolicitation agreements (allowing an employee to work for a competitor, but not to solicit the former employer’s vendors or suppliers; for example,

allowing a car salesman to work for another car dealer, but not selling the same manufacturers' cars). These agreements are also enforceable under many circumstances.

- Confidentiality of trade secrets is protected by statute (the Uniform Trade Secrets Act), even in the absence of a confidentiality or noncompete agreement.
- To determine whether a noncompete or similar agreement an employee has signed is valid and enforceable, in whole or in part, contact an attorney with experience in this area.
- To determine if a noncompete agreement or related type of agreement is a good idea for some of your employees, contact an attorney with experience in this area.

The above suggestions are broad, general comments only, and are not legal advice, nor do they create an attorney-client relationship. Individual situations require individual analysis. For assistance with a specific situation, contact an attorney with experience in this area, such as Geoff Bridgman, a Member of the Litigation Department of Ogden Murphy Wallace, P.L.L.C. Geoff Bridgman can be reached at (206) 447-7000 or by e-mail at gbridgman@omwlaw.com. Karen Sutherland, Chair of the Employment and Labor Law Practice Group of Ogden Murphy Wallace, P.L.L.C, can be reached at (206) 447-7000 or by e-mail at ksutherland@omwlaw.com.