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Restrictive Covenants: Protecting Proprietary Information and Competitive Advantage in the Wake of Reform Legislation

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Agenda

- Restrictive Covenants: Overview
- Growing Hostility to Restrictive Covenants
- State of the Law in DC, MD and VA
  - Recent Changes
  - Looking Ahead
- Other Strategies for Protecting Proprietary Information and Competitive Advantage
- Practical Tips

Restrictive Covenants: Overview

Restrictive Covenants: Types

Three are three principal types of restrictive covenants in employment:

- Non-compete provisions ban employees at a given company from going to work for a competing employer, or starting their own competing enterprise, during and/or for a certain period of time after leaving a job, within a defined geographical location and/or with respect to specified clients or customers.
- Non-solicitation provisions ban employees at a given company from soliciting either the company's current or prospective clients or customers or current or recently departed employees to either terminate their relations with that company or join a new company.
- Confidentiality/Non-Disclosure provisions preclude the employee from using or disclosing the company's confidential or proprietary information or processes.

Restrictive Covenants: Principal Goals

Employers use restrictive covenants in order to:

- Protect goodwill, confidential information and trade secrets,
- Reduce labor turn-over,
- Retain clients and customers, and
- Create conditions designed to incentivize investment in:
    - workforce training,
    - research,
    - improved business methods, and
    - product development

Restrictive Covenants: Criticisms

While, on the one hand, promoting entrepreneurship and growth at the enterprise level, restrictive covenants can reduce employee bargaining power, resulting in:

- Decreased job mobility,
- Depressed wages,
- Increased probability employees will leave their field or trade, reducing labor productivity,
- Brain drain (i.e., increased probability employees will leave a geographic region to escape a restrictive covenant's reach),
- Restricted customer/client choice

Restrictive covenants also can inhibit innovation by reducing (healthy) competition.

Restrictive Covenants: Abuses

Studies also show that Employers:

- Knowingly impose unenforceable restrictive covenants on unsuspecting workers, including in states that have statutory bans against most non-competes (like California), or
- Introduce them only after a job offer has been extended and accepted, or bury them in other policies or compensation arrangements.
  - Even if the individual provisions are valid, the presentation can mislead employees as to their existence or enforceability.

Restrictive Covenants: Enforceability

- The enforceability of restrictive covenants are governed by state common law and, increasingly, state statutes.
- Where not otherwise void by statute, to be enforceable restrictive covenants must be:
  - Supported by a **valid business reason**, such as protecting confidential or proprietary information or trade secrets, and
  - **No greater than necessary** to protect the employer's "legitimate business interests," and must
  - **Reasonable** in terms of:
    - Duration,
    - Scope (of Prohibited Activity), and
    - Geographical Area, and
  - Supported by **valid consideration**.

Restrictive Covenants: Growing Hostility

Growing Hostility Toward Restrictive Covenants

- Driven by concerns that noncompete agreements were unjustly benefiting employers, imposing undue hardship on employees and negatively impacting the economy, non-competes are increasingly likely to be legislated against and treated with a higher level of scrutiny.
- In 2016, the Obama White House issued a Call to Action challenging states and federal agencies to reform legislation governing non-competes.
- Prior to the Call to Action, three states – California, North Dakota and Oklahoma – had near total bans on non-competes while a number of others states banned non-competes as applied to low-wage earners and/or within specific professions.

Growing Hostility Toward Restrictive Covenants (cont.)

- Since the 2016 Call to Action:
  - Numerous states have adopted or amended existing statutes governing non-competes imposing near total bans against non-competes generally or as applied to low-wage earners,
  - Some states have prescribed durational and/or other limits on post-termination restrictions,
  - Many states have imposed a variety of notice obligations at various stages of the employment process (as to the fact that a restrictive covenant is a condition to employment or that restrictive covenants are unlawful in the state, as applicable).

Growing Hostility Toward Restrictive Covenants (cont.)

- Since the 2016 Call to Action:
  - The Biden Administration, Federal Agencies, Congress and state attorneys general also have been active on a number of fronts, although no new laws or rules have yet been passed.
  - Bipartisan bills have been introduced (and reintroduced) in both branches of Congress that, if adopted, would impose a federal ban against non-competes outside the dissolution of a partnership or sale of business contexts.

Restrictive Covenants:
State of the Law in DC, MD & VA

DC Non-Compete Ban

DC Non-Compete Ban

DC's Ban on Non-Compete Agreements Amendment Act (DC Act 23-563) states "[n]o employer may require or request that an employee sign an agreement that includes a non-compete provision," and "[n]o employer may have a workplace policy that prohibits an employee from: (1) being employed by another person; (2) performing work or providing services for pay for another person; or (3) operating the employee's own business." [Sec. 102(a) & 102(c)]

- "Employer" defined to include any person or business "operating in the District," or "any person or group of persons acting . . . in the interest of an employer operating in the District in relation to an employee, including a prospective employer."
- "Employee" includes an individual who "performs work in the District on behalf of an employer" and any "prospective employee who an employer reasonably anticipates will perform work on [its] behalf in the District."

DC Non-Compete Ban (cont.)

- Excludes:

  (a) highly compensated medical workers;

  (b) unpaid non-profit volunteers;

  (c) religious officials;

  (d) babysitters working in or around the employer's home; and

  (e) DC and US government employees.

- Also excludes otherwise enforceable non-compete agreements entered into in the context of a sale of a business.

DC Non-Compete Ban (cont.)

- Applies to covered employees both during employment and post-termination.
- Impacts both agreements and policies.
- Will apply prospectively (grandfathering pre-existing agreements, but not policies).
- Imposes a substantial notice requirement.
- Prohibits employer retaliation (includes robust prohibitions).
- Repeals DC Code §32-571 *et seq.*, which bans post-termination restrictions within the broadcast industry.
- Expected to become law this fall, with the approval of DC's next budget and financial plan.

Maryland Non-Compete Ban

Maryland Non-Compete Ban

Maryland's Non-Compete and Conflict of Interest Clause Act (MD Code Ann., Lab. & Empl. § 3-716) bans any "noncompete or conflict of interest provision in an employment contract or similar document or agreement that restricts the ability of a[covered] employee to enter into employment with a new employer or to become self-employed in the same or similar business or trade."

- A covered employee is an employee who earns equal to or less than (1) $15 per hour; or (2) $31,200 annually.
- Excluded employees: None (other than as to earnings).
- "Employer" not defined.
- Applies to covered employees both during employment and post-termination.
- Impacts only agreements, not policies.
- Does not include any notice requirement.
- Presumed applies retroactively.

Virginia Non-Compete Ban

Virginia Non-Compete Ban

Virginia's non-compete ban (Va. Code Ann. § 40.1-28.7:8) states "no employer shall enter into, enforce or threaten to enforce a covenant not to compete with any low-wage employee" (subsection B), and "[n]o employer may discharge, threaten, or otherwise discriminate or retaliate against a low-wage employee for bringing a civil action" pursuant to the ban (subsection D).

- "Low-wage employee" includes (1) employees earning less than Virginia's average weekly wage; (2) interns, students, apprentices and trainees, regardless of income; and (3) independent contractors earning less than Virginia's median hourly wage. (Wage thresholds are not fixed, but rather determined by formula.)
- Excludes employees whose income is wholly or predominantly derived from commissions, incentives or bonuses as well as non-competes in the sale of business context.
- "Employer" not defined.
- Applies only to post-termination restrictions.
- Impacts only agreements, not policies.
- Imposes a notice requirement (posting only).
- Applies prospectively (from and after July 1, 2020).

Notice Requirements

Notice Requirements: DC

- Covered employers (including those whose current non-competes are grandfathered under the Act) will be required to provide the following notice to covered employees within ninety (90) days after the law's effective date:

> "No employer operating in the District of Columbia may request or require any employee working in the District of Columbia to agree to a non-compete policy or agreement, in accordance with the Ban on Non-Compete Agreements Amendment Act of 2020."

- In addition, covered employers must provide notice to new employees within seven (7) days of their start date and otherwise within fourteen (14) days of any written request from an employee.

Notice Requirements: MD & VA

- **MD**: Maryland law does not impose any notice requirements.

- **VA**: Virginia employers must post a copy of the law or an approved summary in the same location where other employee notices required by state or federal law are posted.

Anti-Moonlighting

Moonlighting: Overview

- In the United States, the number of people holding multiple jobs has increased significantly over the past 20 years. Based on most recent figures available, approximately 8% of the U.S. workforce holds more than one job.
- “Moonlighting” includes scenario where employees run a personal business in addition to their primary job.
- Moonlighting is often motivated by financial concerns.

Moonlighting: Potential Drawbacks

- Decline in performance (fatigue; stress)
- Decreased scheduling flexibility (availability for OT)
- Risk of using company time and/or resources
- Potential loss of confidential/proprietary info
- Conflicts of interest

Anti-Moonlighting: DC

- One of the unusual aspects of the DC law is its broad prohibition against anti-moonlighting policies or agreements.

- DC Ban prevents employers from prohibiting employees from competing not just after, but <u>during</u> their employment.

  - No employer may have a workplace policy that prohibits an employee from:

    (1) Being employed by another person;

    (2) Performing work or providing services for pay for another person; or

    (3) Operating the employee's own business.

- DC Ban does not contain any express exclusions (e.g., safety issues)

Anti-Moonlighting: MD & VA

- Maryland law precludes anti-moonlighting agreements (but not policies) for low-wage employees only.

- Virginia's law does not address anti-moonlight agreements or policies. So, they presumably remain legal.

Anti-Moonlighting: Duty of Loyalty

- Neither the DC law nor the MD law appears to abolish common law duties of loyalty that address issues other than competition.

- Generally, under basic common law duty of loyalty (where no heightened fiduciary duties), an employee may work for a competitor as long as the work:

  - is not done during time committed to the first employer,
  - does not involve use of the employer's resources,
  - does not involve the use or disclosure of the first employer's trade secrets, and
  - does not otherwise injure the employer to any greater extent than would any other individual working for the competitor.

    - E.g., *Food Lion, Inc. v. Capital Cities/ABC, Inc.*, 194 F.3d 505, 516 (4th Cir. 1999) (surveying cases)

Anti-Moonlighting: What's Potentially Still Valid?

- Restricting outside work that creates conflict of interest (beyond just competing).
  - For example, self-dealing or adversely acting against employer's interest for another (e.g., working for vendor and charging/authorizing above market prices).
- Barring use of primary employer's resources for outside work.
- Requiring that employees provide notice of all outside employment (allowing employer to assess potential conflicts and protect confidential info).
- Policies protecting confidential & proprietary info and trade secrets.

Enforcement

Enforcement: DC – Administrative Relief & Penalties

- Employers may be liable for administrative penalties that are payable both to the Mayor and to the aggrieved employee.

Mayor

- Penalty from $350 to $1,000 per violation.
- Retaliation incurs penalty no less than $1,000.

Employees (via Administrative Complaint)

- Seeking non-compete agreements or policies: liability payable to employee of $500 - $1,000 per violation.
- Attempting to enforce invalid non-compete: liable for not less than $1500 per employee.
- Retaliation: liable for $1,000 to $2,500 for each instance.
- Subsequent violations trigger liability of not less than $3,000 to each affected employee.

Enforcement: DC – Civil Actions

- In lieu of filing administrative complaint with the Mayor, employee may bring private civil action in court.
- Plaintiff's recovery can include (per cross-reference to Section 8 of the Wage Theft Act):
  - Reasonable attorneys' fees and costs
  - Equitable or injunctive relief
- Employers also may face collective actions and class actions (also per cross-reference to Section 8 of the Wage Theft Act)

Enforcement: MD & VA

- MD: Maryland's ban does not include specific enforcement mechanisms; simply renders offending agreements null and void.

- VA: Virginia law imposes civil penalties, payable to the Commissioner of Labor & Industry for deposit in the general fund as follows:

  - A Virginia employer who enters into, enforces, or threatens to enforce a covenant not to compete with any low-wage employee will be subject to a civil penalty of $10,000 per violation.

  - Virginia employers who fail to post a copy of the law or an approved summary will receive a written warning for the first violation, shall be subject to a civil penalty of up to $250 for a second violation, and up to $1,000 for the third and each subsequent violation.

- Separately, Virginia employees can bring civil actions in court seeking declaratory or injunctive relief or damages.

Looking Ahead

Looking Ahead: DC Ban

- DC law is new. Has not yet been applied. But, we can look to states that have had similarly expansive laws to get clues as to how courts might interpret or apply the DC law in the future.

- One of the strongest analogous situations would be California. CA has established history of expansive ban on non-competes. (Recently extended to include non-solicitation clauses).

Looking Ahead: California Example

- Companies with operations/employees in California have attempted to evade ban by including choice of law provisions that look to laws of other states. This has met with mixed success.

- In recent years, out of state employers have seen non-California courts apply California law to invalidate restrictive covenants notwithstanding contrary choice of law provisions.

Looking Ahead: California Example (cont.)

Under Second Restatement of Conflict of Laws [s 187], courts will generally honor the choice-of-law provisions in a contract unless:

> "(1) the chosen state has no substantial relationship to the parties or the transaction; or
>
> (2) application of the chosen law would be contrary to a fundamental public policy of a state with a materially greater interest in the issue in dispute."

Looking Ahead: California Example (cont.)

- In disputes involving out of state employers with employees who live and work in California, courts have determined that CA has "materially greater interest in the issue in dispute" and applied its fundamental public policy against non-competes.
  - *Pactiv LLC v. Perez*, Slip Copy (2020) 12/4/2020 N.D. Ill. (USDC)
  - *Ascension Insurance Holdings, LLC v. Underwood*, 2015 Del. Ch. LEXIS 19, at *6-8 (Del. Ch. Jan. 28, 2015)
- Also applied California law to CA employer as to employee who lived outside CA and only occasionally worked in CA.
  - *Avaya Holdings Corp. v. Haigh*, C.A. No. 2019-0344-JRS (Del. Ch. July 2, 2019)
  - Employee worked virtually from his home in North Carolina and at times worked physically in California.

Other Strategies for Protection

Other Strategies for Protection:

- Non-Solicitation Agreements
- Confidentiality/Non-Disclosure agreements
- Fixed-Term Employment Contracts
- Exclusive Employment Contracts
- Advance Notice/Garden Leave Requirements
- Forfeiture/Incentive Provisions

Non-Solicitation Agreements:

Non-solicitation agreements can be an effective tool to protect an employer's interests. However, state law must also be consulted as many states have imposed bans or restrictions against such agreements.

- Some states permit non-solicitation of customers and clients, but not employees.
- Some states permit non-solicitation of employees, but not customers or clients.
- Some states permit both types of non-solicitation.
- Some states preclude both types of non-solicitation.
- Other states are silent, but common law or other authorities may serve as a guide.

Non-Solicitation Agreements: DC & MD

- DC: DC's new act is silent with respect to non-solicitation agreements, leaving open the possibility that a non-solicitation agreement could be held to violate the non-compete ban. Notably, at least in relation to clients and customers, some DC legislative history indicates that non-solicits should be viewed differently. And existing case law suggests that non-solicitation clauses as applied to customers will be enforced if not overbroad. *See Ellis v. James. V. Hurson Assocs*., 565 A.2d 615 (D.C. Ct. App. 1989) (supporting restrictions applied to customers known to the employee or with whom the employee had dealings).

- MD: Maryland's non-compete ban also is silent with respect to non-solicitation agreements. However, existing case law suggests that non-solicits will be enforced, if they are not overbroad. *See Padco Advisors, Inc. v. Omdahl*, 179 F. Supp. 2d 600, 608 (D. Md. 2002) (criticizing restrictions applied to all customers, sweeping in those with whom the employee had no contact).

Non-Solicitation Agreements: VA

- VA: In contrast, Virginia's ban is not silent, and instead seems to support non-solicitation agreements indirectly by stating that "a 'covenant not to compete' shall not restrict an employee from providing service to a customer or client of the employer *if the employee does not initiate contact with or solicit the customer or client*."

- The statute is in keeping with existing case law. *See Mona Elec. Group, Inc. v. Truland Serv. Corp.*, 193 F.Supp.2d 874, 876-77 (E.D.Va. 2002) (distinguishing non-solicitation provisions from non-compete provisions).

Confidentiality/Non-Disclosure Agreements:

In banning non-compete provisions, each of DC, Maryland and Virginia took steps to expressly permit employers to protect at least some confidential information and trade secrets.

- DC excludes from the definition of "non-compete provision" "any otherwise lawful provision that restricts the employee from disclosing the employer's confidential, proprietary, or sensitive information, client list, customer list, or a trade secret."

- Maryland's law "does not apply to an employment contract or a similar document or agreement with respect to the taking or use of a client list or other proprietary client-related information."

- Nothing in Virginia's ban "shall serve to limit the creation or application of nondisclosure agreements intended to prohibit the taking, misappropriating, threating to misappropriate, or sharing of certain information, including trade secrets, as defined in § 59.1-336, and proprietary or confidential information."

Fixed-Term and/or Exclusive Employment Contracts

- DC: In that, with respect to covered employees, DC employers no longer can prohibit moonlighting, fixed-term or exclusive employment contracts entered into after DC's law becomes effective cannot be used to prohibit DC employees from providing services to competitors while under contract.
- MD: Maryland's law likewise prohibits bans against moonlighting.
- VA: In contrast, since Virginia's non-compete ban applies only to non-competes "following the termination of the individual's employment," both fixed-term and exclusive employment contracts remain an available tool with respect to Virginia employees.

Advance Notice/Garden Leave Requirements:

Employers in jurisdictions hostile to non-competes could require that employees provide significant advance notice prior to terminating their employment and allow the employer to place that employee on paid "garden leave."

- Lengthy notice obligations can be vulnerable to attack if the notice provisions are too long (rendering them tantamount to a non-compete), require that the employee perform services during the notice period (amounting to involuntary servitude), or disadvantage clients.

- However, such provisions, even if enforceable, will not help DC with respect to covered employees or Maryland employers of low-wage workers given the new bans against anti-moonlighting.

- In contrast, advance notice/garden leave requirements may remain an effective tool with respect to Virginia employees making less than the relevant wage threshold.

Forfeiture vs. Incentives: Forfeitures

Some employers use contract provisions that make receipt or retention of certain benefits contingent on not competing rather than forbidding competition.

Forfeiture – Penalty imposed for engaging in competitive activity. Often analogized to an RCA but may be subject to somewhat lesser scrutiny because it doesn't actually prevent activity. Employee has the choice to take or accept the benefit at issue.

- Some state courts review forfeiture provisions under standards similar to those applicable to restrictive covenants.
  - **Virginia** – Allows forfeitures for post-employment competition without applying reasonableness test. (along with many other states)
  - **Maryland** – Imposes reasonableness analysis applicable to RCA to forfeiture clauses. (minority view)
  - **DC** – DC law does not expressly address "forfeiture for competition" provisions.

Forfeiture vs Incentives: Incentives

Unlike forfeiture provisions – which take something away – incentive plans provide a benefit that one would not otherwise be entitled to and which one has the option to accept or decline.

The Fourth Circuit recently analyzed the distinctions between forfeitures and incentives (interpreting Maryland law). *Allegis Group, Inc. v. Jordan*, 951 F.3d 203 (4th Cir. 2020).

- Plan provided incentive payments for 30 months following separation, provided that the employee did not compete or solicit. Former employees breached agreement shortly before end of 30 month period.
- Court held that the incentive plan was valid condition precedent, rather than a forfeiture. Ordered employees to return all prior payments made under plan.

Forfeiture vs Incentives: ERISA Plans

- If additional benefits are incorporated into an ERISA-governed plan, this may sidestep any state law analysis. ERISA has a preemption provision that supersedes state laws.
- Both state and federal courts have been more willing to enforce non-competition forfeiture provisions contained in plans governed by ERISA.
  - *E.g.*, *Baskin v. Central Nat. Bank of Cleveland*, 460 N.E.2d 644 (Ohio App. 1983) (Upheld forfeiture of benefits under profit sharing plan where employee was not fully vested per ERISA service requirements. Ohio law would have yielded different result.)
  - *Clark v. Lauren Young Tire Ctr.,* 816 F.2d 480, 481 (9th Cir. 1987)(discharged employee of 9+ years forfeited benefits under profit-sharing plan when accepted employment from nearby competitor); *accord Hepple v. Roberts & Dybdahl, Inc.,* 622 F.2d 962 (8th Cir.1980); *Noell v. Am. Design, Inc., Profit Sharing Plan*, 764 F.2d 827, 830–31 (11th Cir. 1985).

Forfeiture vs Incentives: ERISA Plans (cont.)

- Non-competition forfeiture provisions in ERISA plans are subject to ERISA's minimum vesting requirements. These requirements establish a maximum time period over which employer contributions to a subject plan must vest.
- Forfeiture provisions in an ERISA plan cannot apply to:
  - amounts that are fully vested (e.g., voluntary employee contributions), or
  - employees who are fully vested (satisfied minimum number of years' service requirements).

Forfeiture vs Incentives: ERISA Plans (cont.)

- ERISA minimum vesting requirements do not apply to "top-hat" plans (but other provisions such as preemption still apply).
  - Top-plans are unfunded deferred compensation plans "maintained by an employer primarily for the purpose of providing deferred compensation for a ***select group of management or highly compensated employees***." 29 U.S.C. § 1051(2) (emphasis added).
- Thus "top hat" plans with forfeiture provisions may be upheld, even in states that would otherwise bar forfeitures.

Practical Tips

Practical Tips: Do's

- Audit existing restrictive covenant agreements and policies for compliance with applicable statutory and common law.
- Establish procedures for complying with relevant notice obligations.
- Assess, draft or revise and deploy other (enforceable) measures for protecting trade secrets and confidential information.
- Include appropriately tailored severability provisions.
- Be cognizant of what law is likely to govern the enforceability of the agreement or policy in question and whether relevant courts will reform offending language or employ the blue pencil doctrine or the red pencil doctrine.

Reformation and Blue & Red Pencil Doctrines

In the face of an offending restrictive covenant, and in the absence of an outright ban, courts can do one of three things:

- Employ what is sometimes referred to as the "**red pencil**" doctrine and render unenforceable the entirety of the restrictive covenant;
- Employ the "**blue pencil**" doctrine and strike out only the specific language that renders the restrictive covenant unenforceable, enforcing what remains, if still coherent; or
- Revise the offending language to be consistent with the parties' original intent but, as revised, nonetheless enforceable under state law (**equitable reformation**).

DC: DC courts may blue pencil or reform offending provisions.

MD: Maryland courts also recognize the blue pencil doctrine.

VA: Neither blue penciling nor reformation is permissible in Virginia. Instead, a Virginia court would strike the entirety of the restrictive covenant.

Practical Tips: Don'ts

- Don't include unenforceable restrictive covenants in the hopes that they will nonetheless deter unsuspecting employees.
  - To do so may risk penalties and other liabilities from ensuing lawsuits.
  - The entire agreement, not just the restrictive covenants, may be rendered unenforceable.

- Don't place undue weight on choice of law and exclusive venue clauses whereby a more favorable state's laws and courts purportedly would decide the question.
  - The court (or arbiter) may disregard choice of law provision and apply the law of a different jurisdiction.
  - You could find yourself in an entirely different forum, if public policy arguments prevail.

Practical Tips: Moonlighting Policies Do's & Don'ts

- Avoid blanket rules on outside employment.
- Cannot require employer approval of outside employment.
- Any concerns should be focused on actual job performance (pattern of tardiness; performance deficiencies).
- Policies should be documented and consistently applied.

Questions?

Speakers

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Zoe Sharp

Zoe Sharp is Deputy General Counsel at Optoro, Inc., a company using innovative technology to help its clients manage excess and returned inventory. In that role, she is responsible for privacy, security, compliance, contracting and IP issues.

Previously she served as special counsel to a Board Member at the Public Company Accounting Oversight Board (PCAOB), a nonprofit corporation established by Congress to oversee the audits of public companies. Zoe is both a lawyer and a CPA and is an adjunct instructor at American University's Kogod School of Business in Accounting and Business Law, Ethics and Governance, Co-Chair of the Board of My Sister's Place DC, and a Committee Co-Chair of the ACC's National Capital Region Technology and IP Committee.

Helen Dooley

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