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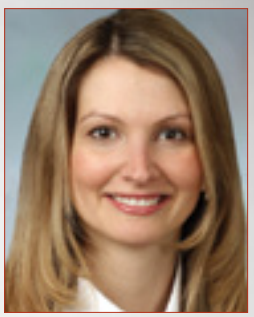
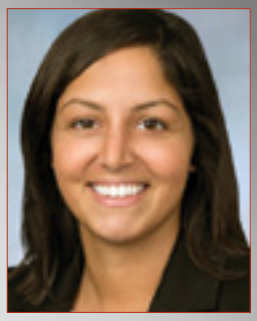
Enforceable Non-Compete Agreements *in Government Contracting*

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Restrictive covenants can be an appealing tool for employers seeking to protect their customer relationships, intellectual property, and human capital. In today's globalized marketplace, where labor and information are more mobile than ever, an employer can face a crippling competitive setback if an employee accepts employment with a competitor and endeavors to take the employer's customers and proprietary information. Carefully crafted restrictive covenants can significantly reduce these risks by setting clear parameters around acceptable post-employment conduct and imposing severe legal consequences on employees if they breach these obligations.

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Such restraints on trade can be extremely difficult to draft and enforce when the customer is the United States government. The factors that typically permit a limitation on trade in most business contexts frequently do not apply to government contractors and their employees. This article examines how the traditional analysis for analyzing the enforceability of restrictive covenants has been applied in the government contracting context and identifies some key factors courts consider when determining whether to uphold such restrictions.

Restrictive Covenants Generally

Restrictive covenants can take many forms, but the most common are covenants not to compete ("non-competes") that preclude an employee from working for a competitor; non-solicitation provisions that prohibit the solicitation of the former employer's customers or employees; and non-disclosure clauses that forbid the disclosure of an employer's confidential and proprietary information. Regardless of their form, all restrictive covenants seek to prevent competitors from unfairly exploiting certain vital assets of the employer.

Non-competes are typically the most difficult to enforce, as they seek to prevent an employee from working within a particular segment of an industry, thereby limiting the employee's future employment opportunities. Non-solicitation agreements are generally easier to enforce, as the focus is on prohibiting the former employee from poaching a company's customers or employees. Non-disclosure agreements are more limited in that they seek only to shield an employer's confidential information and business methods from dissemination to competitors. Though their enforceability varies from state to state, restrictive covenants are generally enforceable as long as they are "reasonable." Some states – including California, North Dakota, and Oklahoma – have outright prohibitions against non-compete provisions. State laws tend to recognize that restrictive covenants are important tools for employers, but that without some limits they would unduly restrict the free movement of labor and hamper competitiveness. Most states therefore require these covenants to be limited in geographic and temporal scope, and confined to an employer's legitimate business interests. The requirement that a non-compete contain a geographic limitation has been significantly relaxed in many jurisdictions given the global economy and ability to perform competing services from a variety of locations. See, e.g., Preferred Sys. Sols., Inc. v. GP Consulting, LLC, 732 S.E.2d 676, 682 (Va. 2012). Usually, the legitimate business interests justifying a restrictive covenant are protecting the company's goodwill in its relationships with its customers, and safeguarding the company's confidential and proprietary information and trade secrets.[1]

Goodwill and Intellectual Property Issues for Government Contractors

Relying on these legitimate business interests to support a restrictive covenant when the employer is a government contractor can be problematic, however. Courts tend to view employer claims of a legitimate business interest in protecting goodwill and customer relationships with skepticism, because for government contracts subject to public bidding, knowledge about when the work is available is public, and the determining factors in obtaining a contract are typically price and quality rather than goodwill. Goodwill between the government contractor and the "customer" agency is therefore less relevant in obtaining business

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[1] When selecting a particular state's law to govern a non-compete agreement, employers should consider whether a state has adopted the "inevitable disclosure doctrine." The doctrine provides that employers can enjoin a former employee from working in a job that would inevitably result in the use of the employer's trade secrets. In other words, it need not be shown that the former employee improperly removed or used confidential information. For example, Maryland has flatly rejected the doctrine (*see, e.g., LeJeune v. Coin Acceptors, Inc.,* 849 A.2d 451, 471 (Md. 2004)); Virginia generally disfavors it (*see Motion Control Sys., Inc. v. East,* 546 S.E.2d 424, 426 (Va. 2001)); and the District of Columbia has been more open to adopting the doctrine (*see Info. Strategies, Inc. v. Dumosch,* 13 F. Supp. 3d 135, 143 (D.D.C. 2014)).

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from the government than from private sector clients, which can often turn on the personal relationship that has been established between a company and the customer.

Non-competes and other restrictive covenants have, however, been upheld in the government contracting context where the employer is able to identify a legitimate business interest other than goodwill. For example, the business contacts that a lead employee for a company's Eastern European operations had developed as a result of his employment were held to be sufficient protectable business interests to justify enforcement. This not only included the local contacts and "regional experience" the employee had developed, but also the value the government placed on such contacts in awarding future contracts.[2] Courts have also been willing to enforce agreements that limit an employee's ability to work for specific competitors or on specific government projects. The key issue when evaluating such covenants is whether the competitor or projects are sufficiently and narrowly tailored so that a balance is struck between the employer's legitimate business interests and the employee's ability to earn a living in his or her chosen trade.[3]

Separately, it can be difficult for government contractors to identify the confidential, proprietary, and trade secret information that belongs to them rather than to the government. What might otherwise be considered company confidential, proprietary, or trade secret information in another context often either comes from the government or belongs to the government under the contract. For similar reasons, company bidding procedures have not been considered trade secrets, at least not if the procedures are not unique to the company at issue, but reflect general practices and knowledge in the trade or industry. Additionally, deliverables that have been turned over to the government are unlikely to be protected as trade secrets, although if a company had a particular proprietary method of creating the deliverables, that method could be a protected trade secret. For example, preventing a former employee from providing a particular type of training to the contractor's competitor has been held to be a protectable interest.[4] In upholding that the employee's non-compete agreement, the court reasoned that the former employee had developed specialized skills during his employment and received unique training using teaching methods that were part of the contractor's intellectual property. The court determined that even though the contractor had relinquished much of its intellectual rights in the deliverables, the confidential methods used to produce the deliverables were still protected.

Unique Regulations Affecting Government Contractors

In addition to presenting challenges to establishing goodwill as a legitimate business interest, having the government as a customer also imposes certain regulatory obligations that could impact an employer's ability to enforce a restrictive covenant. For example, the Non-displacement of Qualified Workers regulation ("Non-displacement Rule")[5] and the Continuity of Services regulations ("COS Regulations")[6] that seek to ensure the continuity of services would appear at first blush to render many non-compete agreements unenforceable. The Non-displacement Rule establishes that a successor to a services contract must offer employment to certain non-exempt employees who worked on the predecessor contract, if those employees' jobs would otherwise be terminated because of the contract transition. Although the Non-displacement Rule is relatively new, and it is too early to say precisely how it will affect the validity of non-competes, the rule is not fatal to such agreements. The COS Regulations generally require that contractors transitioning off of a contract providing "vital" services to the government "allow as many personnel as practicable to remain on the job to help the successor maintain the continuity and consistency of the services required by this contract." Furthermore, the COS Regulations do not require a contractor to release all of its employees to work for a successor contractor; they only require the release of "as many personnel as practicable to remain on the job" to aid the successor in maintaining continuity.[7] The fact is that both sets of rules have exceptions that can be relied upon to exempt broad classes of employees, and courts have refused to invalidate non-competes solely based on the Non-displacement Rule or the existence of a COS provision.

Conclusion

Although there is no magic language to ensure the enforceability of a restrictive covenant, there are key areas to focus on to maximize enforcement. Traditionally, these have included defining reasonable time and geographic limitations so that the employee could endeavor to find new employment. While such factors are still important to consider, the critical question when attempting to draft and enforce a restriction on trade in the government contracting space is what is the company's legitimate protectable business interest and how does that interest fit within the government's competing interest in ensuring a free and open marketplace. These interests need not be at odds with one another. The trick is finding the right balance. This begins with looking at what information, training or other resources the company has provided to its employees, and how these investments in human capital make the company different than its competitors. How can these interests be protected in a way that prevents an employee from unfairly competing, while at the same time not unduly limiting the employee from working on other government contracts? Giving real thought to these questions, and understanding how courts have applied the traditional analysis governing enforcement of restrictive covenants to government contractors, is critical to both drafting an effective agreement and plotting out a winning strategy to enforce (or defeat!) such provisions. ■

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[2] Overseas Strategic Consulting, Ltd. v. Larkins, No. CIV.A. 01–4115, 2001 WL 1198661 at *1-3, 5-10 (E.D. Pa. Oct. 10, 2001).

[3] *See Preferred Sys. Sols., Inc. v. GP Consulting,* LLC, 732 S.E.2d 676 (Va. 2012). In this case, the court upheld a government contractor's covenant not to compete with its subcontractor where the duration was limited to 12 months, it applied only to work in support of a particular program run under the auspices of a particular government agency, and it was limited to other contract holders.

[4] *See* Order Granting Plaintiff's Emergency Motion for a Temporary Restraining Order and Preliminary Injunction, *Orbis Operations, LLC, v. Fracker,* No. 1:14-cv-00567 (E.D. Va., May 21, 2014).

[5] 48 C.F.R. § 52.222-17.

[6] 48 C.F.R. § 37.110(c); 48 C.F.R. § 52.237-3.

[7] *See id.; see, e.g., Talus Grp, Inc. v. Ostrander,* No. A11–51, 2011 WL 4008286 at *3 (Minn. Ct. App. Sept. 12, 2011). The *Talus* court also permitted the employer to sue the successor contractor for tortious interference, because the successor sought assurances from the employees that they would work for the successor while they were still employed by the plaintiff, and that this enabled the successor to bid on the contract, knowing the successor would have those employees.