It is Time for the Family Feud:

Non-Competition, Non-Solicitation, and Confidentiality Agreements

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Non-Competition Agreements

Types of non-compete agreements: (1) Those that are intended to protect a business's customer base (goodwill), and (2) those that are designed to safeguard sensitive business information such as customer lists, product development, sales and marketing plans (trade secrets).

Public Policy/ Law:

- Public policy "encourages free trade and discourages covenants not to compete." *Concord Orthopaedics Professional Assoc. v. Forbes*, 142 N.H. 440, 443 (1997).

- Covenants are narrowly construed and enforceable if they (1) are supported by consideration and (2) if the restraint is reasonable in the context of the case. *Merrimack Valley Wood Prods. v. Near*, 152 N.H. 192, 197 (2005).

    - However, if the noncompetition covenant was ancillary to the sale of a business, "it may be interpreted more liberally." *See Walpole Creamery, LTD v. David A. Westover, et al.*, No. 213-2014-CV-109 (N.H. Super. Aug. 22, 2014); *Centorr-Vacuum Indus. v. Lavoie*, 135 N.H. 651, 654 (1992)

Must be Fair and Reasonable:

- Nonetheless, "restrictive covenants are valid and enforceable if the restraint is reasonable, given the particular circumstances of the case." *Merrimack Valley*, 152 N.H. at 197.

    - **Reasonable** – To be reasonable under New Hampshire law, a non-competition agreement must not (1) be "greater than necessary to protect the legitimate interests of the employer," (2) "impose an undue hardship upon the employee," or (3) be "injurious to the public interest." *Merrimack Valley*, 152 N.H. at 197.

    - "A restraint on employment is reasonable only if it is no greater than necessary for the protection of the employer's legitimate interest, does not impose undue hardship on the employee, and is not injurious to the public interest." *Moore v. Dover Veterinary Hosp*., Inc. 116 N.H. 680, 684 (1976).

    - RSA 275:70: July 2012-July 2014 applied to all employees who were offered a new position. After 2014, it has applied only to new employees. Agreement must be given to employee before or contemporaneous with the offer of employment. Some courts have applied the 2012-2014 statute to non-competes issued during that time frame.

        - **Legitimate interests**: trade secrets, confidential information (including customer information), & goodwill

        - An agreement is more likely to be enforceable if it is explained and signed before the worker takes a job, rather than after they are already on the payroll.

- Non-compete agreements that are too broad or too burdensome are less likely to be enforced than those that are more narrowly tailored.

- More likely to be enforced when the business can concretely demonstrate that a former employee has hurt its business, either by purposely attracting its customers or taking its trade secrets to a competitor.

- **Duration** – For non-competition agreements that are designed to protect goodwill, the duration of the restriction must "last no longer than necessary for the employee's replacement to have a reasonable opportunity to demonstrate his effectiveness to customers." *Concord Orthopaedics*, 142 N.H. at 444.

    - **For trade secrets** – no specific standard articulated (balance interests of parties to assess reasonableness of duration of the restriction)

- **Geographic Limitations** - For non-competition agreements designed to protect goodwill, the law has been that the "geographic limits imposed on an employee by a covenant not to compete generally must be limited to that area in which the employee had client contact, as that is usually the extent of the area in which the employer's goodwill is subject to appropriation by the employee." *Concord Orthopaedics*, 142 N.H. at 444.

    - Courts may overlook the geographic limitation requirement when technical trade secrets or confidential information are at stake, or conclude that it is reasonable to have no geographic limitation in the agreement. *See ACAS Acquisitions (Precitech), Inc. v. Hobert*, 155 N.H. 381, 385 (2007) (enforcing non-competition agreement lacking any geographic limit).

Employer's Interests: The legitimate interests an employer has in preventing its employees from working for competitors extend to where the employee had actual client contact, and to current customers. *Concord Orthopaedics*, 142 N.H. at 444.

- There is no legitimate business interest in new customers because there was no contact with them before the employee left the employer.

- *See also, Weber v. Tillman*, 259 Kan. 457, 913 P.2d 84, 92 (1992). The length of time prescribed in a noncompete is that which "obliterate[s] in the minds of the public" the association between the defendant and the employer.

Reformation: New Hampshire courts *may* reform an overly broad covenant; however, before a court will do so, the employer must prove that it acted in "good faith in the execution of the employment contract." *Smith, Batchelder & Rugg v. Foster*, 119 N.H. 679, 682 (1979); *see also Syncom Industries, Inc. d/b/a Syncom Services v. Eldon Wood*, 155 N.H. 73 (2007) (finding that a court will reform a covenant if it was made in good faith).

- An employer seeking to have a covenant reformed bears the burden of proving that it did not act in bad faith. *See Granite Investment Advisors, Inc. v. Michael L. Timm* 2013-CV-00094.

- Example of bad faith: Employer fails to discuss the restrictive covenant with the employee *prior* to or at the time of hiring, presents the covenant to the employee only after the start of employment, and indicates to the employee that the signing of the covenant is a condition of continued employment. *See Merrimack Valley*, 152 N.H. at 200.

Consideration: In a non-compete agreement, the employee is giving up certain personal and legal rights. Courts generally consider such contracts valid only when a business offers the employee something of value in return for waiving those rights.

  - Tied to a raise or promotion

  - *See Smith, et al.*, N.H. at 683 ("Continued employment after signing an employment contract constitutes consideration for a covenant not to compete contained therein.")

Things to Consider: Whether it was the employer who brought the customers to the employee, or the employee who brought the customers to employer.

  - If employee brought the customers, then those customers may choose to follow the employee because their loyalty is to the individual employee and not the specific company.

Conclusion: A "one-size-fits-all" approach is likely ineffective. Employers instead should use agreements with different restrictions for different types of employees.

Trade secrets under New Hampshire Uniform Trade Secrets Act ("NHUTSA")

"Trade secret" definition and limitations:

- "Trade secret" is defined as "information, including a formula, pattern, compilation, program, device, method, technique, or process that:

  (a) derives independent economic value, actual or potential, from not being generally known to, and not being readily ascertainable by proper means by, other persons who can obtain economic value from its disclosure or use; and

  (b) is the subject of efforts that are reasonable under the circumstances to maintain its secrecy.

  RSA 350-B:1, IV.

- The New Hampshire Supreme Court has suggested the following actions may be evidence that information is "not a trade secret:"

  - Not marking documents "confidential" or "trade secret;"
  - failing to uniformly treat information as a trade secret throughout the company;
  - storing information in a public (or readily accessible) place; and
  - drafting employment contracts without any reference to trade secrets or misappropriation.

  See Mortgage Specialists, Inc. v. Davey, 153 N.H. 764, 771-72 (2006).

Liability under NHUTSA:

- The NHUTSA imposes liability if a "trade secret" is "misappropriated."

- "Misappropriation" means"

  (a) Acquisition of a trade secret of another by a person who knows or has reason to know that the trade secret was acquired by improper means; or

  (b) Disclosure or use of a trade secret of another without express or implied consent by a person who

  1. Used improper means to acquire knowledge of the trade secret; or

  2. . . . knew or had reason to know that his knowledge of the trade secret was derived from or through a person who had utilized improper means to acquire it. . . ; or

  3. . . . knew or had reason to know that it was a trade secret and that knowledge of it had been acquired by accident or mistake.

RSA 350-B:1, II.

- The New Hampshire Supreme Court has found liability for misappropriation of trade secrets when information was disclosed despite a disclosure statements mandating that the parties "will endeavor to maintain the confidentiality of" the information and the parties signed an employment contract providing "both parties are under a duty of confidentiality not to disclose trade secrets." *CarmarkPCS Health, LLC v. N.H. Dep't of Admin. Servs*., 167 N.H. 583, 588-89 (2015).

- Therefore, even if a party is not expressly told to refrain from disclosing certain confidential information, properly drafted disclosure statements and employment contracts puts a party on notice that it "knew or had reason to know that its knowledge of the trade secret as acquired under circumstances giving rise to a duty to maintain its secrecy or limit its use." *Id.*

Injunction and damages:

- The NHUTSA provides that courts may enjoin "actual or threatened misappropriation" of trade secrets. RSA 350-B:2, I.

- The NHUTSA also states a party enjoined from misappropriating a trade secret may petition the court to terminate the injunction if the trade secret has ceased to exist. *Id.*

- However courts may further limit the duration of an injunction in appropriate circumstances, as "the duration of an injunction is designed to preclude defendant's wrongful activities for a period of time reasonably necessary to protect plaintiff's interests; [and] the period of time that would be required for independent development [of the trade secret information] is the most commonly employed standard." *Vention Medical Advanced Components, Inc. v. Pappas*, 171 N.H. 13, 32-33 (2018) (citing 4 Roger M. Milgrim & Eric E. Bensen, Milgrim on Trade Secrets § 15.02[1][d], at 15-248 to 15-248.1 (2017)).

- In addition to an injunction, the NHUTSA allows for "damages for misappropriation," including the "actual loss caused by misappropriation and the unjust enrichment caused by misappropriation that is not taken into account in computing actual loss." RSA 350-B:3.

- If the misappropriation is "willful and malicious" the trial court may additional award "exemplary damages" up to twice the amount of the actual damage award. RSA 350-B:3, II.

- Statutory attorney's fees are also appropriate where "willful and malicious misappropriation exists" or "a claim of misappropriation [or motion terminate an injunction] is made in bad faith." RSA 350-B:4.

Common Exceptions to Confidentiality Provisions in Separation Agreements

- Information that was known to the employee prior to employment;
- Information that is generally available to the public through means other than an unauthorized disclosure by the employee;
- Information that was or subsequently is disclosed to the employee by a third party having a bona fide right to disclose such information without breaching any obligation to the employer;
- Information that is developed independently by the employee without benefit of or recourse to any of the employer's information;
- Information disclosed for tax or legal advice;
- Information that is disclosed in response to a subpoena, court order, or statutory duty;
- Information that is disclosed while making a report to a state or federal law enforcement agency, EEOC, SEC, or other governmental organization, or in response to an inquiry from such an organization;
- Residual knowledge (general ideas, concepts, know-how, methodologies, processes, technologies, algorithms or techniques retained in the unaided mental impressions of the employee relating to the services that the employee provided);
- Information disclosed by agreement of the parties; and
- Information that is disclosed beyond a particular time period.

These exceptions are commonly addressed by carefully defining "Confidential Information" and "Disclosure" in the agreement.

Sample confidentiality provision for an employment separation agreement

Smith shall maintain the confidentiality of all Confidential Information of Hillforest Bank. Confidential Information means all documents, data and information that Smith received, acquired or learned through his employment at Hillforest Bank, including this Agreement. It does not include information that was or is generally available to persons who are not employed by Hillforest Bank, information subsequently disclosed to Smith by a third party without a breach of confidentiality, information possessed by Smith prior to disclosure, or information developed by Smith independently of any Confidential Information. This term includes, but is not limited to, the following:

1. documents, data and information related to customers and potential customers;

2. documents, data and information that are marked or designated with a word or symbol indicating that the document or information should be considered confidential, such as "Confidential," "Personal" or "Privileged";

3. documents and information that Hillforest Bank informed Smith are confidential; and

4. documents, data and information that Smith knows or should know are confidential or proprietary information or trade secrets of a third party (such as customers and potential customers) that Smith received, acquired or learned from Hillforest Bank.

Nothing herein shall be construed to prevent or in any way limit Smith from using in any current or subsequent endeavors the general knowledge, skill, and expertise acquired during the course of and in the performance of his employment.

Smith agrees that the Confidential Information, including the terms and conditions of this Agreement, shall remain confidential as between the Parties and that he shall not disclose them to any other person, excluding attorneys and tax advisors, who shall also be advised of its confidentiality and who shall agree to be bound by this confidentiality agreement. Notwithstanding the foregoing, Smith may disclose the Confidential Information to any state or federal law enforcement agency, the EEOC, the SEC, or other governmental organizations in the course of making a report, or in response to any inquiry from such an organization; in response to any lawful subpoena, court order, or regulatory demand; in the event of any subsequent litigation between the Parties, in the course of such litigation; or as may otherwise be required by law. Smith shall take reasonable efforts to ensure that such disclosure is subject to all applicable governmental or judicial protection available for like material and, if possible, give reasonable advance notice to Hillforest Bank. Smith shall take reasonable steps to limit the scope of such disclosure.

Without limiting the generality of the foregoing, Smith shall not respond to or in any way participate in or contribute to any public discussion, notice, or other publicity concerning, or in any way relating to Confidential Information. In the event that Smith discloses Confidential Information, Hillforest Bank shall have the right to assert a breach of contract action against Smith, seeking remedies allowed by law and equity. Hillforest Bank shall be entitled to recover reasonable enforcement costs, including reasonable attorneys' fees in any proceeding for the enforcement of this provision and/or remedies for its breach.

Consumer Protections Claims Regarding Employment Disputes

Scope of RSA 358-A, the Consumer Protection Act:

- RSA358-A:1,II defines trade and commerce broadly.

- However, the scope of the CPA has been held to be narrower than the broad language suggests and applies to business transactions, and the CPA is not available where the transaction is strictly private in nature and is not undertaken in the ordinary course of business. *See, Hughes v DiSalvo,*143 N.H. 576, 578 (1999); *See also, Ellis v. Candia Trailers and Snow Equip., Inc.* 164 N.H. 457, 465 (2012);

Employment Contracts are Personal and Not Covered by the CPA:

- The New Hampshire Supreme Court has not addressed this issue directly. However, New Hampshire frequently looks to Massachusetts law for guidance in interpreting its analogous CPA.

- Massachusetts has held that its CPA is not applicable to employment disputes. *See, Psy-Ed Corp. v. Klein*, 459 Mass 697, 947 N.E.2d 520, 539 (2011).

- The United District Court and the Business Court of New Hampshire have reached similar conclusions under the New Hampshire CPA. *See, Donovan v. Digital Equipment Corp.,* 883 F. Supp. 775, 786-87 (D.N.H. 1994); *Coutu v. State,* 2016 N.H. Super. LEXIS 12 at 15 (Merrimack Cty. Super. Ct. Sept. 23, 2016); *Solito v. Direct Capital Corp.,* 2018 N.H. Super. LEXIS 6 (2018).

Abusive Litigation Tactics In a Particular Case Have Not Been Found to Violate New Hampshire's CPA:

- *See Axenics, Inc. v. Turner Cosntr. Co*, 164 N.H. 659, 676-677 (2013) (stating even assuming litigation tactics covered by CPA, no violation of the CPA where the plaintiff alleged Defendant's litigation tactics unfair and intended to make litigation prohibitively expensive).

- *Fat Bullies Farm, LLC v. Devenport*, 170 N.H. 17, 28 (2017) (stating Defendant's conduct pre-litigation and during litigation would not "raise an eyebrow of someone inured to the rough and tumble of commerce.").

Abusive Litigation Tactics Employed as Part of Broader Business Strategy May Implicate the CPA but Could Only Be Raised by Business Competitor Not Employees:

- *See Spiegel, Inc. v. FTC*, 540 F.2d 287, 292-293 (7th Cir. 1976); *FTC v. Sperry & Hutchinson Co.*, 405 U. S., 233, 244, 92 S. Ct. 898 (1972); *Solito v. Direct Capital Corp.*, 2018 N.H. Super. LEXIS 6 (2018).