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Client Advisory

Caution: Your Over Broad Non-Compete Agreement May Get Mopped Up By The Janitor Rule

Our Trade Secret Protection and Non-Compete practice group is routinely asked by our clients whether the following non-compete language is enforceable:

> You will not become employed by a company which competes, directly or indirectly, with us for a reasonable period of time and reasonable geographic location.

This very common and seemingly innocuous non-compete language would, if interpreted and enforced literally, prevent a former employee from working in any capacity-even as a janitor-for a competitor. Can such broad language be enforced? The answer is that it depends on the jurisdiction.[1]

Some jurisdictions follow the so-called "janitor rule," which basically provides that a court will not enforce a non-compete agreement if it restricts the scope of a future employee's future employment indiscriminately, unrelated to the legitimate business interests recognized in that jurisdiction.[2] In other words, if the non-compete clause is drafted so broadly that it would literally prevent the former employer from working as a janitor for a competitor, the court will disregard the agreement entirely.

One of the first times (or at least the first reported case in which) the janitor rule was used (though it was not called so at the time) was in 1974 in the Supreme Court of Pennsylvania case, *Trilogy Associates, Inc. v. Famularo*, 314 A.2d 287 (Pa. 1974). That case involved a restrictive covenant that required former employees to agree, for a period of two years after the end of employment, "not to come under the employ of any customer or client" of the employer, "or of any business or individual with which employee has come into contact or acquaintance principally through" his employment. *Id*. at 293.

The court noted that, taken literally, this language prevents the former employees from working for a competitor "in any capacity." *Id*. at 294. This broad language prevented the former employees, who were data processors, from working "as janitors, bank managers, truck drivers, doctors, lawyers or indian chiefs - for any customer or client of [the employer]." *Id*. The Court found that such a covenant is a completely unreasonable restraint of trade and refused to enforce it. *Id*.

In New Jersey, by contrast, there is no case that explicitly invokes the janitor rule. Instead, the state generally follows the "blue pencil rule," which grew out of two cases from the early 1970s, *Solari Industries v. Malady*, 264 A.2d 53 (1970), and *Whitmyer Brothers vs. Doyle*, 274 A.2d 577 (N.J. 1971). However, employers should be wary of relying too heavily on this rule and would be ill-advised to simply draft overly broad non-compete agreements with the expectation that the court will later limit it. As the Solari court noted, if the non-compete agreement goes too far, it could be struck in its entirety.

The point is, although many people may believe that they should not "bet against themselves" and tailor their non-competes so as to avoid the so-called "janitor rule", this may be an ill-suited roll of the dice in New Jersey and beyond. For this reason, our Trade Secret Protection and Non-Compete practice group has vast experience with drafting and reviewing non-compete agreements, and we are here to help. If you have an existing non-compete agreement and would like it reviewed, or if you would like a new non-compete agreement drafted, feel free to call Thomas A. Muccifori, chair, Daniel DeFiglio, or Anthony M. Fassano at (856) 795-2121 or any member of Archer's Trade Secret Protection Group in Haddonfield, N.J., at (856) 795-2121, in Princeton, N.J., at (609) 580-3700, in Hackensack, N.J., at (201) 342-6000, in Philadelphia, Pa., at (215) 963-3300, or in Wilmington, Del., at (302) 777-4350.

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[1] Our group, with over 40 years of experience with non-compete agreements, can help. The most suitable jurisdictions and choice of law clauses to include in the non-compete agreement will often depend on the specific factual context.

[2] In New Jersey and Pennsylvania, for example, the most commonly enforced legitimate business interests include confidential information/trade secrets, customer relationships and unique and valuable substantial specialized training. However, other jurisdictions have different standards.