Restrictive Covenants: The More Things Change The More They Stay The Same

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Flashing back to 2024, the country's employers had a near universal gasp at the proposed Federal Trade Commission (FTC) rule that would have largely banned employers from imposing restrictive covenants on their employees and former employees. Then came one federal court in Texas that temporarily blocked the rule, followed by a federal court in Pennsylvania that rejected an attempt to block the rule; then came January 16, 2025 when the U.S. Department of Justice and FTC issued Antitrust Guidelines for Business Activities Affecting Workers; and then came a new administration. At this point most employers are wondering: so what exactly has changed with respect to employee restrictive covenants? The answer as of publication is: not much for most employers. So now is probably an appropriate time to remind New Jersey employers what they can and cannot do by way of restrictive covenants with employees and former employees.

As recent as 2019, in *ADP, LLC v. Kusins*, 460 N.J. Super. 368 (App. Div. 2019) and *ADP, LLC v. Rafferty*, 923 F.3d 113 (3d Cir. 2019), our New Jersey state and federal courts reiterated the long standing precedent known as the *Solari/Whitmyer* factors governing the enforceability of post-employment restrictive covenants. This test is similar to the test applied in New York and many other states that permit these restrictive covenants in the employer/employee setting.

Under the *Solari/Whitmyer* factors, a restrictive covenant is enforceable if it protects the legitimate business interests of the employer without imposing undue hardship on the employee, and is not injurious to the public. An employer's legitimate business interests include the protection of trade secrets or proprietary/confidential information, as well as customer relationships. In some instances, investment or training of an employee can constitute a legitimate business interest. But an

employer does not have a legitimate interest in simply preventing competition. Therefore, employers should ensure that their restrictive covenants protect only their legitimate business interests or otherwise risk a court finding the covenant to be unenforceable. If the employer can establish a legitimate business interest, the covenant should be enforceable provided that enforcement does not cause the employee an undue hardship or harm the public interest.

All three of these factors are routinely weighed by courts when confronted with a dispute between an employer and a former employee. The case law results are as diverse as the facts and circumstances of each case. Therefore, while these covenants are enforceable in New Jersey, New York, and many other states, each dispute requires a fact specific analysis and knowledge of how courts in each venue come out in each circumstance.

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Please contact us if you would like more information on restrictive covenants:
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