

WHAT EVERY NORTH CAROLINA EMPLOYER NEEDS TO KNOW ABOUT RESTRICTIVE WORKPLACE COVENANTS (PART 2)

Insights
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This is the second in a three-part series that discusses restrictive covenants in North Carolina. If you missed the first part, [click here to read the Insight](#). This Insight will focus on entering into restrictive covenant agreements in North Carolina. There are three common situations when employees enter into a restrictive covenant agreement: 1) at the beginning of employment; 2) during employment; and 3) at the end of employment. This article will also discuss when a restrictive arrangement may be necessary upon the sale of a business.

Consideration is Key

As we know from [the first Insight](#), it is important that there is consideration (an exchange of compensation or benefits, or promise to act or not act) when an employer enters into an agreement containing restrictive covenants. In each of the instances discussed below, an exchange of consideration is necessary to enter a valid restrictive covenant agreement.

In the Beginning . . .

Employers typically require workers to accept restrictive covenants at the beginning of employment, often (but not always) as part of a broader employment agreement. In fact, in many instances, the employment relationship is conditioned on signing such agreements. Under North Carolina law, the promise of new employment is considered valuable consideration in support of restrictive covenants.

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When hiring a new employee, you should have the relevant restrictive covenant agreements or provisions in an employment agreement prepared for a new employee's signature. If a restrictive covenant agreement was discussed before entering into an employment relationship but not signed at the beginning of employment, you can still have the employee sign an agreement. The best practice, however, is to have any restrictive covenant agreements signed at the beginning of employment.

During Employment

If an employment relationship already exists—either without any restrictive covenant agreements in place or with ones you wish to change—you may have your employees sign a restrictive covenant agreement during their tenure. Any restrictive covenants entered during employment, however, needs to be based upon new consideration. This new consideration may be a promotion, new job assignment, mutual promises, or raise in pay or additional compensation, such as a one-time bonus. While North Carolina courts typically do not assess the *amount* of additional consideration provided, they do require that *some* additional consideration be provided. Accordingly, these examples may or may not satisfy the consideration element depending on the particular situation. Continued employment, alone, will likely not constitute adequate consideration in North Carolina. However, fact-specific exceptions may apply.

The End is Near

The final common instance for entering into restrictive covenant agreements is when an employee separates from their employment. A separation agreement may incorporate previously signed restrictive covenants or include new restrictive covenants that did not previously exist during the employment relationship. As part of a separation agreement, consideration may be exchanged, such as a severance package.

For Sale

The above instances appear in the context of an employer-employee relationship. In addition to that relationship, restrictive covenant agreements are common with the sale of a business. A sale of a business does not need to be for the entire ownership interest in order to implement restrictive covenants. Naturally, when you acquire a

business as a new owner, you want to restrict the seller from opening a competing venture right next door and taking back any customers you just acquired. A portion of the sales price is used as consideration to obtain the seller's promise not to go into a similar business, in various capacities, within a specific geographic area for a certain amount of time. The geographic area should relate to the area in which the business operates and the length of the restriction should be reasonably limited to a time frame necessary to protect the interests of the business. The sales agreement may also include a provision that the seller cannot use or disclose the confidential or proprietary business information of the business being sold.

Restrictive covenant agreements in this context are viewed slightly differently in North Carolina compared to those entered between an employer and employee. In North Carolina, non-competition agreements contained in an employment contract are more closely scrutinized than those contained in a contract for the sale of a business. However, the general reasonableness and some of the factors identified in the first Insight apply.

Parting Considerations

Whether you are having employees enter a restrictive covenant agreement or are considering restrictive covenants in connection with the sale of a business or purchase of a co-owner's interest, you should consult with an attorney to ensure the necessary requirements are met for an enforceable restrictive covenant agreement.

Attorneys at Fisher Phillips can assist you in drafting restrictive covenant agreements in North Carolina and throughout the United States. If you are interested in adopting restrictive covenants, need your current employment agreements reviewed, or intend to purchase a business and want to include restrictive covenants, please contact your Fisher Phillips attorney, the authors of this Insight, or any member of our [Employee Defection and Trade Secrets Practice Group](#). Make sure you are subscribed to [Fisher Phillips' Insight System](#) to get the most up-to-date information and to receive the final edition of this three-part series.