



CUT AND PASTE POST AUGUST, 2021

EMPLOYMENT NON-COMPETE AGREEMENTS UNDER FIRE

On July 9, 2021, President Joe Biden signed [Executive Order on Promoting Competition in the American Economy](#), encouraging the Federal Trade Commission (FTC) to ban or limit non-compete agreements. I'm not seeing any HR news that you haven't already received from SHRM, so let's do a [non-legal] deep dive into Non-Compete Agreements (NCA's).

Employers use NCA's to protect proprietary information by preventing employees from working for competitors. One of the stated goals of the Executive Order is to make it easier for employees to "change jobs and help raise wages by banning or limiting non-compete agreements and unnecessary, cumbersome occupational licensing requirements that impede economic mobility."

SHRM says that, in preparing to comply with this Order, employers need to check relevant state law, but also need to review their processes for protecting confidential information and trade secrets. There may be legitimate reasons for NCA's, but employers need to clearly understand what their agreements restrict, and which employees are affected. SHRM suggests that broad NCA's may need revised and some agreements may need cancelled.

So, what about non-compete agreements in Montana?

Many of Montana's employers require their employees to sign NCA's. While these are allowed in Montana, some of the agreements I've seen would probably not be enforceable if challenged.

In 2008, in [Access Organics v. Andy Hernandez](#), the Montana Supreme Court considered whether two former employees of Access had violated its NCA. In an interesting decision, the Court established a 3-pronged test to determine the enforceability of a "covenant that restricts trade" (which includes a NCA). The 3 prongs include:

Prong 1: The covenant must be partial or restricted in its operation in respect either to time or place.

Comments: Time restrictions limit, *how long* the employee agrees not to compete; a geographical restriction defines *where* the employee is prohibited from competing. Montana's employers may not place time and geographical restrictions on former employees, and neither restriction may place an *undue* burden on the (former) employee's ability to compete.

When placing geographic restrictions on a former employee's ability to compete, employers may want to mirror the provisions found in Montana Code Annotated 28-2-704, Exception -- sale of goodwill of business, which reads as follows:

- (1) A person who sells the goodwill of a business may agree with the buyer to refrain from carrying on a similar business within the areas provided in subsection (2) so long as the buyer or any person deriving title to the goodwill from the buyer carries on a like business in the described areas.
- (2) The agreement authorized in subsection (1) may apply in:
 - (a) the city where the principal office of the business is located;
 - (b) the county where the principal office of the business is located;
 - (c) a city in any county adjacent to the county in which the principal office of the business is located;
 - (d) any county adjacent to the county in which the principal office of the business is located; or
 - (e) any combination of the areas in subsections (2)(a) through (2)(d).

Prong 2: The Agreement must be based on some “good consideration”.

Comments: dictionary.thelaw.com defines “Consideration” as “the value or benefit for which the mutual promises are based upon and which the parties are required to bargain for. Consideration can take the form of a promise to do something (repair a car) or a promise not to do something (such as not to smoke on the premises.) There must be something of value (consideration) exchanged, in order for a binding contract to exist.”

In *Access*, the Court said good consideration for NCA’s may be agreed to: 1) at the time of hiring, or 2) during employment:

- **Good consideration entered into at the time of hiring occurs when**, during pre-employment negotiations, the prospective employee and the employer engage in a bargained-for exchange, for example, the employee obtains employment and the employer obtains the desired NCA.

Employers who intend to restrict their (future) former employees’ employment activities must put applicants on notice that employment offers are conditional upon signing a NCA. Finalists should receive a copy of the NCA with their conditional employment offer, so they can consider the NCA when deciding whether to accept or reject the employment offer. The employer must also obtain the necessary signatures on the first day of employment.

- **For non NCA’s entered into during employment to be enforceable**, they must be supported by “independent consideration”. For example, an employer may provide an employee with a raise or promotion in exchange for signing an NCA. In that case, the salary increase or promotion would serve as “independent consideration”. The Court also said that providing the employee with access to trade secrets or other confidential information may be a form of “independent consideration.”

Employers who wish to enter into an NCA with an existing employee should draft an Agreement specifically for this purpose which details the ‘independent consideration’ to be received.

Prong 3: The Agreement must be reasonable in that it affords “only a fair protection to the interests of the party in whose favor it is made”, and must not be so “large in its operation as to interfere with the interests of the public.”

Comment: I suspect the interpretation of this prong may be well above the pay grade of most human resource professionals! If this is the case, contact your attorney for assistance.