

Are You Competing With Your Non-Compete Agreement?

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Most of us are familiar with non-compete agreements (NCA) and how they can operate to restrict an employee from competing against his or her former employer. After all, it's unfair for a person to accept employment with a company, learn the company's confidential information, customer base and other proprietary business methods, and then subsequently use that information in direct competition with the company.

I bet you've also heard of the three traditional hallmarks of NCA's in that they must be reasonably limited in their duration, geographic scope and list of restricted activities. Put another way, they must be narrowly tailored so that: (a) the company's business interests are protected, and (b) the former employee remains capable of earning a livelihood after leaving the company. If an NCA is too broad in any of those categories, it might be unenforceable.

Okay, enough of the boring stuff. Instead, let's take a look at some common misconceptions about these contracts. More likely than not, you'll find some surprises as we debunk these myths.

My company fired me, so it shouldn't be able to enforce the NCA I signed when I started working for it.

Not necessarily true. Unless the company specifically breaches the written provisions of the NCA or otherwise unlawfully terminates you, the NCA will remain enforceable. A carefully drafted NCA will permit the company to terminate your employment and still insist that you refrain from competing against it.

I signed an NCA that has huge time and geographic restrictions on my post-employment activities so it won't be enforced, right?

Believe it or not, NCAs which are too broad in duration or geographic scope might still be enforced, to a certain extent. In many states, courts enjoy something called "blue pencil" authority (I have no idea why we call it that). This means that a court can actually re-write an NCA to scale down its restrictions to a more reasonable level, and then enforce those modified restrictions against a former employee.