

Understanding the Differences Between NDAs and Non-Competes

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By Taylor Ambrosius on June 24, 2024

After the FTC issued a final rule **banning non-compete agreements** nationwide, businesses must be mindful of the impacts that this rule has on their future agreements with employees. While we commented on the impacts of the rule on employers and employees in [this blog post](#), this article breaks down the differences between a non-compete agreement and a non-disclosure agreement (NDA) with guidance to help you craft an NDA that will not be construed as a non-compete agreement.

Specifically, if an NDA is so broad that it prevents the employee from using their general skills, knowledge, and inventive ability as opposed to restricting the dissemination of the employer's confidential information, the court may view it as a covenant not to compete.

Notably, the South Carolina Court of Appeals found this to be the case in *Fay v. Total Quality Logistics, LLC*, 419 S.C. 622, 799 S.E.2d 318 (Ct. App. 2017). The nondisclosure provision in this case prevented the employee from revealing or using the employer's confidential information *at all times* after employment. The agreement also stated that if the employee took a job with a competing business in a similar role to his position with the employer, he would inevitably use the employer's confidential information to compete unfairly.

The court found that when these paragraphs were read together, they implied that the employee could never work in a similar position at any competitor without violating the agreement. This effectively made it a non-compete provision and barred the employee from using his skills to earn a living indefinitely. Therefore, it is important to consider this case when drafting an NDA.

Non-Disclosure Agreement (NDA)

An NDA is a legal contract that prohibits an individual or entity from sharing confidential information about a company, its products, services, or operations. The purpose of an NDA is to protect trade secrets, intellectual property, and other sensitive information from being disclosed to unauthorized parties.

Here are some key features of an NDA:

1. **Confidentiality:**

They establish a duty of confidentiality, preventing the recipient from disclosing or using the confidential information for any purpose other than the permitted use specified in the agreement.

2. **Scope:**

These agreements typically define the specific types of information that are considered confidential, such as technical data, financial information, business plans, and customer lists.

3. Duration:

They also often have a specified time during which the confidentiality obligation remains in effect, which can be indefinite or limited to a certain number of years.

4. Exceptions:

The agreement may include exceptions for information that is already in the public domain or independently developed by the recipient without using the confidential information.

Non-Compete Agreement

A **non-competete agreement**, on the other hand, is a contract that restricts an employee or former employee from engaging in activities that directly compete with their employer's business for a specified period of time and within a defined geographic area.

Here are some key aspects of a non-competete agreement:

1. Restrictions:

Non-competetes typically prohibit an employee from working for a competing company, starting a competing business, or soliciting customers or employees of their former employer.

2. Geographic scope:

A non-competete should limit restricted activities to a specific geographic area, such as a city, state, or region, where the employer operates.

3. Duration:

The non-competetes must have a reasonably limited time frame during which the restrictions apply, such as one or two years after the employee's departure from the company.

4. Protection of legitimate business interests:

For a non-competete to be enforceable, employers must demonstrate that they have legitimate business interests to protect, such as trade secrets, customer relationships, or specialized training provided to the employee.

Preventing an NDA from Being Construed as a Non-Competete

While NDAs and non-competetes serve different purposes, it's important to ensure that an NDA does not inadvertently create non-competete restrictions, as demonstrated in *Fay v. Total Quality Logistics, LLC*, especially now that the FTC has banned non-competete agreements. To prevent this, consider the following:

1. Clearly define the scope:

Ensure that the NDA is focused solely on protecting confidential information and does not include restrictions on the recipient's ability to work for competitors or engage in competitive activities.

2. Avoid overbroad language:

Carefully review the language of the NDA to ensure that it does not contain overly broad or ambiguous terms that could be interpreted as creating non-compete obligations.

3. **Include an explicit disclaimer:**

Consider including a clause in the NDA that explicitly states that the agreement does not create any non-compete or non-solicitation obligations.

4. **Consult legal counsel:**

Seek guidance from an experienced attorney who can review the NDA and provide advice on how to tailor it to protect your confidential information without inadvertently creating non-compete restrictions.

By understanding the differences between NDAs and non-competes and taking proactive steps to prevent an NDA from being construed as a non-compete, businesses can effectively protect their interests while staying compliant with applicable laws and regulations.

Charleston Commercial Litigation Lawyers

To speak to an experienced lawyer about protecting your company's confidential information without violating the FTC's rule banning non-compete agreements, [contact our office](#).