




**CROWE
&
DUNLEVY**
ATTORNEYS AND
COUNSELORS AT LAW

**Keeping the Cookie Jar Safe –
Strategies for Keeping Departing
Employees from Stealing Your
Company’s Customers,
Employees and Secrets**

Presented by Adam W. Childers

 

Adam W. Childers



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- *Subsequent information should not be understood as, or considered a substitute for, specific legal advice. For inquiries, please contact Adam W. Childers, or another licensed attorney.



So.....This Has Happened.





And, You Want to Avoid This.....



What are we talking about?... Helpful Definitions

• Non-competes Agreement: A restrictive covenant entered into between parties which binds one party from competing against the other party for a specified period of time in the same or similar business in exchange for consideration.

E.g. - "In return for the benefits provided to Employee in this Agreement, during the next 2 years, Employee will not directly or indirectly within a 100 mile radius of any office of Employer in which Employee has been employed during the 2 years preceding the date of this Agreement, enter into or engage in any activity, or in any other business, which is competitive with any of Employer's current businesses in like or similar duties, capacities, responsibilities or activities which he performed for Employer."



What are we talking about?... Helpful Definitions

• Non-solicitation Agreement: A restrictive covenant entered into between parties which binds one party from attempting to solicit the business of the other party for a specified period of time in exchange for consideration.

E.g. - "During the period of my employment by the Company and for a period of 1 year after termination of such employment, I will not directly, either for myself or for any other person, business, partnership, association, firm, company or corporation, call upon, solicit, divert or take away or attempt to solicit, divert, or take away any of the Customers, prospective Customers or business of the Company made known to me during my employment by the Company on behalf of a business in competition with the Company."



What are we talking about?... Helpful Definitions

- **Non-disclosure Agreement:** A restrictive covenant entered into between parties which binds one party from disclosing the confidential information and trade secrets belonging to the other party.
- » E.g. - "I will not at any time, whether during or after the termination of my employment for any reason whatsoever, reveal to any person or entity any of the trade secrets or confidential information of the Company, except as may be required in the ordinary course of performing my duties as an employee of the Company. Further, I shall keep secret all matters entrusted to me and shall not use or disclose any such information in any manner which may injure or cause loss or may be calculated to injure or cause loss, whether directly or indirectly, to the Company."



The History of Non-compete Agreements in Oklahoma (The Old Rules)

- 15 O.S. § 217 - "Every contract by which one is restrained from exercising a lawful profession, trade or business of any kind is to that extent void."
- 15 O.S. § 218 - "One who sells the goodwill of a business may agree with the buyer to refrain from carrying on a similar business within a specified [location] as long as the buyer, or any person deriving title to the good-will from him carries on a like business therein."
- 15 O.S. § 219 - "Partners may, upon or in anticipation of a dissolution of the partnership, agree that none of them will carry on a similar business within a specified [location]."



Everything Changes in 2001... (The New Rules)

As of June 4, 2001, the OK Legislature amended 15 O.S. § 217, and added new sections - 15 O.S. § 219A:

- » "A. A person who makes an agreement with an employer, whether in writing or verbally, not to compete with the employer after the employment relationship has been terminated, shall be permitted to engage in the same business as that conducted by the former employer or in a similar business as that conducted by the former employer as long as the former employee does not directly solicit the sale of goods, services or a combination of goods and services from the established customers of the former employer.
- » B. Any provision in a contract between an employer and an employee in conflict with the provisions of this section shall be void and unenforceable."



Everything Changes in 2001... (The New Rules) cont'd

And 15 O.S. § 219B (added in November 2013):

- » A contract or contractual provision which prohibits an employee or independent contractor of a person or business from soliciting, directly or indirectly, actively or inactively, the employees or independent contractors of that person or business to become employees or independent contractors of another person or business shall not be construed as a restraint from exercising a lawful profession, trade or business of any kind. Sections 217, 218, 219 and 219A of Title 15 of the Oklahoma Statutes shall not apply to such contracts or contractual provisions.



Questions about the Application of § 219A

It is unclear what is meant by an "established customer of the former employer."

- What about customers that voluntarily quit doing business with a company and follow the departing employee? In the *Mammana* case, the OK Supreme Court approved of a clause which did not prohibit the doctor from doing business with patients who, "affirmatively request that Dr. Mammana, rather than Cardiovascular [employer], continue to provide medical services."



Questions about the Application of § 219A

The maximum enforceable duration and geographic provisions of such restrictive covenants has not been determined under the new statute.

- However, it appears that a 2-yr restrictive covenant will be enforceable, as was the case in *Tatum*.
- Ordinarily, an enforceable geographic provision extends only throughout the area in which the former employee does business.



Questions about the Application of § 219A

What consideration is needed to support a non-solicitation agreement?

- The issue of whether an agreement signed as part of a conditional offer of "at-will" employment is proper consideration to support such an agreement has not been decided by an OK court. It is expected that it would be considered proper consideration.
- It has also not been decided by an OK court whether a change in the terms and conditions of employment (or just continued employment) after an employment relationship has begun will be proper consideration to support a non-solicitation agreement.



Questions about the Application of § 219A

What about information that the employee knew about before he/she worked for the company?

- Under OK law, an employer has no protectable interest in preventing ordinary competition. Thus, OK employers have no protectable interests in the expertise, contacts, goodwill and opportunity that the employee gained before working for the employer. *Loewen Group Acquisition Corp. v. Matthews*, 12 P.3d 977, 982 (Okla. Ct. App. 2000).



The Use of Non-Compete/Non-Solicitation/Non-Disclosure/No-Raid Agreements

First, determine if such an agreement is appropriate for the employee in question

- Access to Trade Secrets?
- Access to other confidential business information?
- Customer contact?
- Highly competitive industry?
- Likely to join a competitor?
- What geographic area is under consideration?



True Non-Competes Don't Work in Oklahoma

Be aware of the current state of the law in Oklahoma on post-employment restrictive covenants

- Used to be the "Rule of Reason"
- Since 2001, 15 O.S. Sec. 219A controls
- True non-competes are out (very limited exceptions), but barring *direct* solicitation of "established customers" is allowed for
- Can be applied to independent contractors as well
- Legal review is critical!



The Ingredients for a Proper Non-Disclosure Agreement

Be as specific as possible when identifying the categories of trade secrets and other confidential business information. Questions to ask yourself:

- Is it public knowledge?
- What steps have been taken by the company to keep it secret?
- Does it have value?
- Would it provide a competitive advantage for a competitor?
- Did the employee have access?



Protecting the Employees Left Behind...

No-Raid clause

- used to just be a construct of common law
- now it is allowed for by Oklahoma statute
- you can force a "hands-off" period that extends to your employees in addition to your customers
- still have to be careful about time and geography (the old rules still cling to the case law)



The Digital Age – Act Now or Be Sorry Later

I have unfortunately seen it too many times...departed employees who leave with:

- stolen physical property – price lists, customer lists and technical data
- compromised electronic data



So, Protect Your Stuff!

Get it started with policies which delineate what is company property and how it must be treated

- establish that company furnished computers, cell phones and tablets contain company property
- be careful about the use of “virtual” settings – set boundaries!



When the Employee is on the Way Out the Door

Alert your IT department to the situation before the dismissal happens

- Lock the employee out of the computer (stops nasty “goodbye” emails, and misappropriation of information)
- Immediately change passwords that the employee used for network activities



When the Employee is on the Way Out the Door (Cont'd)

- Conduct an exit interview (contain the story now!)
- Inventory the return of personal and company property
- Have security or other appropriate personnel monitor the employee's departure and related activities



What to Do When Property is Taken

Prompt action is not only necessary, but may be required to preserve legal causes of action

- immediate contact with departed employee and demand the return of property
- memorialize your efforts (demand letters are great for this)

And, if all else fails.....



You Can Always Call These Guys!



Possible Legal Claims

- Misappropriation of Trade Secrets (Attorneys' fee's potential)
- Breach of contract?
- Unfair Competition
- Tortious interference with business relationships
 - Possible claim against new employer?
 - Issues regarding sending demand letter to departed employee's new employer



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