

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

**Mapping Out Restrictive Covenants:  
 Why It's Important to Get Them Right**

Presented by: Allen Hutson and Katie Campbell




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- \*Subsequent information should not be understood as, or considered a substitute for, specific legal advice. For inquiries, please contact Allen L. Hutson, or another licensed attorney.



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



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## Agenda

Introduction to Restrictive Covenants

Oklahoma Law

Other States & Federal Government

Implications for Businesses/HR

Get in Touch

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## What are Restrictive Covenants?

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## Restrictive Covenants

- In the employment context, refers to a type of agreement that imposes a restriction of some type on an employee
  - Non-Solicitation
  - Non-Competition
  - Confidentiality

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## Non-Solicitation

May pertain to:

- Solicitation of customers or vendors
  - Typically prohibits an employee from soliciting clients or vendors of the employer after employment ends
- Solicitation of employees or contractors
  - Typically prohibits an employee from soliciting employees and contractors of the employer after employment ends

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## Non-Competition

- Typically prohibits an employee from competing with the employer during employment and/or after employment ends
- State legislatures and courts across the country are increasingly invalidating non-competition agreements

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## Confidentiality

- May pertain to:
  - Protection of the employer's confidential information
  - Protection of third parties' confidential information (e.g. clients)
  - Employee's obligation to return confidential information
- Examples of confidential information:
  - Trade secrets, designs, ideas, etc.
  - Product and pricing information
  - Customer/marketing lists and information

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## What Does Oklahoma Law Say About Restrictive Covenants?

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### Non-Solicitation

15 O.S. § 219(B):  
 "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."

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### Non-Solicitation (Customers)

- Under current caselaw, it is generally acceptable to prevent an employee from:
  - **Directly soliciting** the sale of goods and/or services that are the same or similar to those provided by the Employer
  - From the Employer's "Established Customers"
  - For 24 months or less after employment ends
- Use caution when defining the scope of the agreement

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## Non-Solicitation (Employees)

- Under current case law, it is generally acceptable to prevent an employee from:
  - **Directly or indirectly soliciting** the employment of employees of the employer
  - For 24 months or less after employment ends
- Use caution when defining the scope of the agreement

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## Non-Solicitation

*Howard v. Nitro-Lift Techs., L.L.C.*, 2011 OK 98, 273 P.3d 20

- Determined that an employee may be barred from soliciting the goods or services from the employer's **established customers**, but not more

*Autry v. Acosta*, 2018 OK CIV APP 8, 410 P.3d 1017

- Concluded that a contract governed by Oklahoma law that prohibited more than the **direct solicitation** of established customers was unenforceable

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## Non-Competition

- 15 O.S. § 217
  - "Every contract by which any one is restrained from exercising a lawful profession, trade or business of any kind, otherwise than as provided by Sections 218 and 219 of this title, or otherwise than as provided by Section 2 of this act, is to that extent void."
    - § 218 deals with someone who sells the goodwill of a business
    - § 219 deals with partners who are dissolving a partnership

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## What Do Other States and Federal Law Say About Restrictive Covenants?

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### Other States

- Extreme variation from one state to another
- Oklahoma is much more strict than other states, but...
- State legislatures are increasingly adopting more harsh rules limiting the use of non-competes
- Examples:
  - Washington (2020)—Non-competes invalid for employees under certain salary threshold, 18-month maximum duration, etc.
  - Maine (2019)—Non-competes invalid for employees under certain salary threshold, procedural/timing requirements such as waiting period before it becomes binding

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### Federal Government

- July 2021: President Biden issued an executive order asking the Federal Trade Commission (FTC) to ban or limit non-competes
- Questions have been raised over whether the FTC has the authority to enact a ban
- Stay tuned for more developments

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### Evaluate the Situation

- Is the restrictive covenant necessary given the employee's role?
- What are the legitimate interests you need to protect?
  - Trade secrets? Special training? Confidential information?
- What law applies?
  - Be cognizant if you have employees located in multiple states
  - One size does NOT fit all
  - Choice of law provisions are not a cure-all

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### Tailor Your Approach

- There is a trade-off between broad scope and enforceability
- A broad one-size-fits-all approach carries a higher risk of being thrown out by a court
  - Real life examples from practice
- A custom-tailored approach for each individual employee is more likely to be upheld, but is burdensome
- Possible middle approach:
  - Separate agreements for certain categories of employees or states

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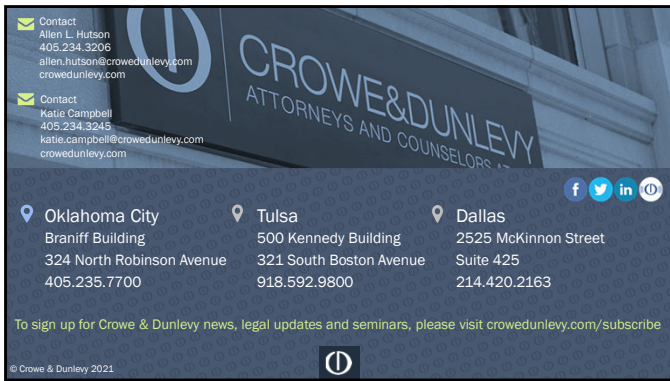
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