



Drafting An Enforceable Non-Compete. Can It Be Done?

For many employers it is absolutely critical that its employees sign non-competition agreements that will be enforced by the courts. This is particularly true in markets that are fiercely competitive and where the employer has shared valuable proprietary information with the employee. The recent series of cases from the Supreme Court of Virginia reflect what appears to be a shift away from enforceability of these provisions, including the Court's most recent decision in *Omniplex World Services Corp. v. US Investigation Services*, 270 Va. 246, 618 S.E.2d 340 (2005). In this decision a sharply divided Court held that a narrowly drafted non-competition provision with a duration of less than a year was overbroad and unenforceable based on the restriction's hypothetical application to a person delivering materials to a governmental agency.

The case law has long indicated that these provisions are disfavored since they constitute restraint on trade. The Court's most recent decisions appear to reflect that the agreements will be closely scrutinized and not enforced unless the employer has very narrowly tailored these provisions. Once size definitely does not fit all employees. Employer's should review there provisions periodically as their business and the activities of the employee change and ask the following questions:

- 1) Geographic restriction: Is the geographic limitation well-defined and not reach further than the market area that the employer actually competes? To maximize chances of enforceability, it is best to limit the geographic restriction to the area that the employee actually worked.
- 2) Time restriction: The shorter the better in terms of chances of enforceability. Two years or less is a pretty good rule of thumb.
- 3) Activities restricted: Are the activities restricted limited to the actual work performed by the employee with only the employer's actual direct competitors. This is the one that hangs up many employers. Narrower is better for maximizing chances of enforceability.

The bottom-line is that the agreement must be narrowly tailored and customized to reflect the nature of the particular employer-employee relationship. Keeping the departing employee out of the immediate market with your actual direct employees for a short period is the goal. If you reach much further, you are likely to find that the agreement that you thought you had is not capable of enforcement.

For a more thorough review of *Omniplex World Services Corp. v. U.S. Investigation Services*, 270 Va. 246, 618 S.E.2d 340 (2005) and non-compete agreements see recent article co-authored by Scott Ford, Esquire in the most recent edition of *Virginia Lawyer* entitled, *In Search of Whales Not Minnows: Casting the Noncompete Net After Omniplex*.



Nonresident Alien Employees' W-4s, Withholding and Tax Returns

In Notices published on October 31, 2005, the IRS changed the federal income tax treatment of nonresident alien ("NRA") employees. The changes are, generally, effective for wages paid on or after January 1, 2006. However, Employers who continue to follow the old rules, despite good faith efforts to implement the new requirements, will not be liable for underpayments, penalties and interest for wages paid before January 1, 2007. The first new requirement is that employers secure new Forms W-4 from all their NRA employees. The new or continuing NRA employee specific requirements for Form W-4 are that: (a) NRA employees may not claim exemption from withholding (of course some may be eligible to do so on Form 8233 due to tax treaties), (b) "single" must be checked on line 3, whatever the NRA employee's actual marital status, (c) no more than one allowance may be claimed on line 5 (except for certain residents of Canada, Mexico or South Korea) and (d) "NRA" must be printed above the dotted line on line 6. Form W-4 line 6 will no longer have a mandatory dollar amount of additional withholding for NRA employees. (Of course, like all employees, NRA employees may voluntarily insert an amount that they wish.) Second, solely for purposes of computing each NRA employee's federal income tax withholding, the employer must add a dollar amount to wages for each pay period. For 2006, those amounts for payroll periods of different lengths are: daily \$10.20, weekly \$51, biweekly \$102, semimonthly \$110, monthly \$221, quarterly \$663, semiannually \$1,325, annually \$2,650. Those calculation additions do not affect the employees actual gross wages, W-2 wages reported, state income tax withholding, FICA withholding or the employer's FICA, FUTA or SUTA liabilities. Third, NRA employees whose only U.S. source income is wages that do not exceed one personal exemption (\$3,300 for 2006) will no longer be required to file Forms 1040NR or 1040NR-EZ.

Please call upon Tom Foster (804-775-3874 or tfoster@lawmh.com) should you need assistance in dealing with these changed requirements.

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