The History of Non-Compete Agreements and Enforceability Issues in Oklahoma

- **Introduction**

The history of the contractual addition of an employment covenant not to compete is marked with many dramatic shifts throughout history. This confusion about the law dates back to the implementation of the practice in primitive feudal courts, and can be traced all the way up to present day. The history of the non-compete employment agreement has grown to be much more understandable in some present-day states with consistent rulings on the matter. Oklahoma has not had this clarity come to fruition of what a non-compete really means for an employee or employer in the state. There has been no solid ground on which an employer or employee could point to as a firm grounds for an employment covenant not to compete in Oklahoma. Without this knowledge there is bound to be conflict in the employment sector if neither party really knows what the law is and how it will be enforced. My essay is broken down into three parts. First I will give a brief history of non-compete agreements throughout the world. Then I will discuss the enforceability and history of non-compete agreements specifically in Oklahoma. Finally I will offer my opinion on what Oklahoma should do concerning non-compete agreements and the effect that this would have on businesses and the overall economy.

I. A History of Non-Compete Agreements

The line that restricts future employment and protects an employer's investment is an exceptionally thin line to navigate. While wanting to protect employees from unjust restrictions one can error into the territory of hamstringing entrepreneurial endeavors by not offering adequate protections. For a long period of time all non-compete covenants were found to be void and unenforceable. This behavior can be traced back to the medieval European common law courts. These rulings were based on the idea that restricting the free exchange of labor was patently unjust. By restricting someone's ability to work in a specific area it often undermined the time and resources devoted to learning a trade. Court's acknowledged this and thus refused to uphold contractual agreements not to compete until the late 18th and early 19th century. The groundbreaking case of Mitchel v. Reynolds[i], decided in 1711 by Chief Justice Parker sitting on the court of the Queen's Bench, can be pointed to as some of the first evidence of the modernization of the covenant not to compete and its enforceability. Going forward, honoring contracts and addressing the reasonableness of the individual agreement became the dominant practice of courts at the time. This allowed courts to protect the intangible capital of time invested in an apprentice and fairly protecting the assets and overall business practice of the employer. This treatment of non-competes bled into the American judgments on the matter, which was a stark contrast to the previous sentiment regarding these agreements. One of the main issues that arose with this newly adopted practice was the subjective nature of the interpretation of the word reasonableness that was used to determine whether a non-compete should be enforced. This rule of reasonableness still exists as the

predominant way to determine the enforceability of a non-compete agreement in areas that honor them. This case-by-case determination of the enforceability of a non-compete agreement raises many questions. The broad context allows for different interpretations and has created a crudely strewn together mixture of what a normal non-compete looks like in different states. This creates a large problem when looking at the technologically advanced work environment that we are involved in today. Companies based in other states routinely do business together and the uncertainty established by not having a definite non-compete standard complicates the conduct of business. If a company is unsure about what is enforceable in a state this could affect their willingness to enter into a deal in the first place. The ambiguity of the guidelines for an enforceable non-compete has far reaching implications throughout the nation as well as internationally.

II. Non-Compete Agreements in Oklahoma

To understand the history of non-compete agreements in Oklahoma we must first understand what politicians were trying to accomplish during each of these time periods. The context of this legislation must be examined through the lens of history to understand the shifts and changes of non-competes in Oklahoma. When non-compete agreements were first introduced there was a strict adherence to declaring them void. This makes complete sense when one considers the fact that Oklahoma was founded as a blue collar state that valued hard work and the ability to labor and be self reliant. These sentiments are echoed in the fact that the laws of the time restricted an employer's ability to restrict future labor of an employee.

When this policy was enacted it obviously did not encourage employers to move their companies to Oklahoma. A shift in politics in the state changed the overall direction that Oklahoma was trying to move towards. Instead of solely protecting employees ability to work they offered some protections for employers. Under these new laws Oklahoma companies could reasonably restrict their employees from directly competing against them within reason. This was an attempt by lawmakers to lure new industry to the state and increase revenues by affording new protections to the employers. Another shift in politics triggered a slide back to declaring almost all non-compete agreements void once again. This was triggered by a return to a Californian view of protecting employees more than employers in employment situations. The state of California also protects employees in general with legislative measures that favor the individual employee as opposed to favoring corporations. Delaware is an example of a state on the other end of the spectrum that offers benefits to corporations including broader enforceability of non-compete agreements. Oklahoma now once again almost exclusively rules that all non-compete agreements are void. This shift back can obviously leave people confused considering the drastic ebbs and flows in the policies that have been enacted concerning this issue. I would be remised if I did not also mention a complimentary law that is crucial to the understanding of this issue. A non-solicit agreement is very commonly included with a non-compete in employment contracts. This is where things get even more confusing because while non-compete agreements are considered void a non-solicit agreement is sometimes enforced in Oklahoma. According to Senate Bill 1031[ii] courts in the state will enforce some non-solicitation

provisions. The reason for this is that the state sees this as separate from the non-compete agreements, and maintains that certain non-solicitation agreements are valid. The exact definition of what makes a non-solicit valid is still a little unknown and up to the interpretation of judges readings of the law. The general basis for a decision comes down to whether a former employee is directly targeting established customers of their former employer. If the employee is not directly soliciting established customers than they are most likely in the clear as far as non-solicitation agreements are concerned. Now we will look at the issue of trying to attract new employees from a former employer. If the former employee does not actively recruit those employees at his old job that person will be allowed to still hire the old co-workers. This law makes sense due to the freedom of labor mindset in the state. If a former co-worker wants to leave their employer without solicitation by the new employer they should be able to do so. If the law did not read as such than it would contradict the states policy on non-compete agreements and create huge legal issues.

III. Recommendations for Reformation

Oklahoma is one of only three states in the United States that does not enforce non-compete agreements.[iii] When we look at the current state of the economy in Oklahoma it is obvious that we need to increase revenues in a slow natural resources environment. For this reason I believe that we need to change our policy on non-compete agreements to hopefully entice businesses to move to Oklahoma. It is my opinion that a codified simplistic piece of legislation should be

put into place to inform parties of their rights if this law is changed. The scope of time, geographic scope, and the extent to which an employer has the right to protect their business are all crucial factors in this scope test. It would make the most sense to me to have a panel of judges possibly the supreme court advise the legislatures on what the statute should say. Making sure that the legislature is included in the writing of this law is crucial to me for one singular point. They will be able to write this new standard in a way that all laments will hopefully be able to understand it without having to be a trained legal scholar. While the judges obviously understand many of the legal intricacies that go into a statute like this it is imperative that both the employer and employee in an everyday contract negotiation can understand it. This level of simplicity with an intricate legal matter will be difficult to achieve, but must be pushed for to ensure that both parties in a contract are aware of the enforceability of what they are agreeing to. Having preferably current or even past judges advising the legislature on this issue is crucial. By including the people who are actually passing out verdicts on this piece of legislation you can hopefully ensure that everyone is on the same page. Once a new law to make non-competes enforceable is put into place it is important for Oklahoma courts to pass out consistent judgments. Without consistent judgments being passed out and a consistent base of precedent in cases being established we will have uncertainty pervading this issue. Having a consistent and codified standard for employers and employees to base negotiations off of will have far reaching implications. It will allow employers to reasonably protect their assets and future successes, while also securing the livelihood of individual employees. This will lead to greater

transparency in contract negotiations and fewer legal disputes taking place over this issue. Enforcing non-competes as valid will also hopefully entice new businesses to move to Oklahoma. If this is the case then hopefully it will boost revenue for the state and create new jobs for Oklahoma citizens.

Works Cited

[i] Mitchel v. Reynolds (1711) 24 Eng. Rep. 347, 1 P. WMS. 181.

[ii] S. 1031, 54th Leg., 1st Reg. Sess. (Okla. 2013).

[iii] Salinas, Daniel Joshua. "New Oklahoma Law Clarifies Enforceability of Non-Solicitation of Employee Covenants | Seyfarth Shaw." *Trading Secrets*, Seyfarth Shaw, 30 Nov. 2013, www.tradesecretslaw.com/2013/05/articles/restrictive-covenants/new-oklahoma-law-clarifies-enforceability-of-non-solicitation-of-employee-covenants/.