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Restrictive Covenants for Design Professionals in the DMV

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Since the 2022 enactment of the District of Columbia's Ban on Non-Compete Agreements Act (the "Act"), design firms often ask whether they are able to require their employees to execute agreements which restrict the employee's ability to compete with the firm. In most instances, and with careful drafting, a design firm providing services in the District of Columbia may require key professional employees to enter into an agreement with non-solicitation and non-disclosure provisions, which restrictive covenants will also be enforceable in Maryland and Virginia.

Courts require that employment agreements with restrictive covenants be drafted for the purpose of protecting those aspects of the employer's business which are entitled to legal protections. While the DC Ban on Non-Compete Agreements Act tips the scale in favor of the employee, it does not prevent all types of restrictive covenants. The Act limits restrictive covenants which prevent a former employee from engaging in professional practice at another firm, but it does not prevent the use of non-solicitation and non-disclosure provisions in employment contracts.

Non-solicitation provisions and non-disclosure provisions help protect the employer's interests without limiting the former employee's ability to work. Non-solicitation provisions prohibit employees from recruiting their former employer's clients or other employees while non-disclosure provisions protect employers by prohibiting the former employee from disclosing any proprietary information. Implementing both types of restrictive covenant allows the employer to protect its workforce, client relationships, and proprietary information.

Restrictive covenants of the type permitted by the Act in DC will likely be enforceable in Virginia and Maryland. The Virginia Supreme Court stated guiding principles for non-compete agreements as:

> (1) Is the restraint, from the standpoint of the employer, reasonable in the sense that it is no greater than is necessary to protect the employer in some legitimate business interest?
> (2) From the standpoint of the employee, is the restraint reasonable in the sense that it is not unduly harsh and oppressive in curtailing his legitimate efforts to earn a livelihood?
> (3) Is the restraint reasonable from the standpoint of a sound public policy?

Roanoke Eng'g Sales Co. v. Rosenbaum, 223 Va. 548, 552 (1982). Similar requirements exist in Maryland. Restrictive covenants are judged by a reasonableness standard and must be "confined within limits which are no wider as to area and duration than are reasonably necessary for the protection of the business of the employer and do not impose undue hardship on the employee or disregard the interests of the public." *MacIntosh v. Brunswick Corp.*, 241 Md. 24, 31 (1965).

Courts will also recognize and enforce a professional design firm's trade secrets and financial information, including bid pricing, business forms, client and vendor lists. Employment agreements which include such provisions, when properly drafted, will not raise any issues under the Act and will in many cases be enforced by courts in most jurisdictions.

Prudent design professionals engaged in a multi-jurisdictional practice will look to the most restrictive jurisdiction in which they practice to determine what types of restrictive covenants they might require as a condition of employment. In the DMV, this means looking to the Act in DC and preparing employment agreements with restrictive covenants which will be enforceable in all three jurisdictions.

Jos. Scott Shannon and Cassidy Flood are lawyers at Lee/Shoemaker PLLC, a law firm devoted to the representation of design professionals, in DC, Maryland, and Virginia. The content of this article was prepared to educate related to potential risks, but is not intended to be a substitute for professional legal advice.