

Non-Compete Agreements: Increased Litigation on the Backside of the "Great Resignation"



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Our business clients tell us everyday what we are all seeing in the headlines on a regular basis: employees are hard to hire and retain. Some commentators have coined the term “the great resignation” to aptly describe the unprecedented level of employee movement in the past year. A natural consequence of this phenomenon is that non-compete agreements are getting tested now more than ever. We have seen this corresponding rise in disagreements over non-compete agreements across Arkansas. This blog post will highlight some common issues we’ve been running into lately and questions we have been asked.

In what state was the non-compete entered? Non-compete laws can vary significantly from state to state. We routinely find ourselves advising our clients in Arkansas who find themselves in non-compete agreements with out-of-state parties. The large increase in people working from home has complicated this analysis. The facts and circumstances of each situation matter greatly, but these facts and circumstances must be evaluated against the backdrop of the correct state’s law. Choice of law and choice of venue provisions can often help bring clarity, but these in part depend on whether a particular state’s law will respect and enforce such provisions. In short, more than ever before we find ourselves untangling multiple states’ laws and evaluating how they compare to Arkansas law.

Has the employer been bought, sold, or been through a merger? Often times, non-compete agreements can resurface after years of lying dormant. If the employer has been through any type of reorganization or corporate transaction, this can raise questions about whether an old non-compete with a now non-existent entity’s name on it can still be enforced. Coming to an answer on this often involves studying older corporate documents to determine how non-competes were treated. The type of corporate transaction at issue or if the non-compete agreement contains an assignment clause can often dictate whether the agreement is enforceable.

Is the non-compete agreement enforceable? This is often the million dollar question. And there is a lot here to unpack. In the coming weeks, the Mitchell Williams Between the Lines Blog will be examining a variety of issues that all go into answering the question of whether a non-compete is enforceable in Arkansas. However, the answer depends on all of the above, and often involves looking closely at how long the restriction purports to be valid for, and how specifically it is tailored to the particular needs to the business seeking to enforce such a clause.

Isn’t there a presumption against non-compete agreements in Arkansas? This is a common misconception we hear frequently. Generally, it depends, but this is not a straightforward answer. For non-competes signed before July 22, 2015, for reasons that we will explain more in future installments of this blog series, if the non-compete is overbroad by an inch it is overbroad by a mile and likely

unenforceable. But for non-compete agreements signed since that point, because Arkansas has enacted a more robust statutory scheme that allows for a court to re-write broad non-compete agreements, they are much more enforceable. In any event, this depends on a multi-factor analysis, and it is not safe to assume that non-competes are unenforceable.

This article is part of the Mitchell Williams Non-Compete Agreement series explaining how non-compete agreements are interpreted and enforced. The series will be published weekly for a total of 7 articles.

View the first article of the series: [Increased Litigation on the Backside of the "Great Resignation"](#)

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