

Delaware Non-Compete Update

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As you may know, I provide employment law advice to our teams here at Offit Kurman, assisting our clients in company sales. In that capacity, and because I also draft restrictive covenants for businesses, I try to update my business clients on the latest news regarding non-competition clauses. The Delaware Court of Chancery recently gave us some good information regarding limits that buyers may place on sellers in terms of competing with the sold business. Many deals across the United States are written in accordance with Delaware law, so it has a wide-ranging impact.

Recently the Court of Chancery clarified that non-competes which try to prevent a seller from competing with a buyer's pre-existing business are not enforceable. *Kodiak Building Partners, LLC v. Adams, C.A. No. 2022-0311 (Del. Ch. Oct. 6, 2022)*. Such promises are only enforceable to the extent that they protect the buyer's interest in the assets or company purchased in the deal.

Even more interesting because of its larger potential effect on employment agreement non-competes is the Court's holding that a seller's promise in a purchase agreement not to challenge the reasonableness of a restrictive covenant means nothing. It is up to the Court to determine the reasonableness of the terms according to Delaware law. If your company wants a binding agreement, it is worthless to have a party promise that the non-compete is reasonable. I'd argue that this decision extends to employment agreement non-competes because the Court made the ruling based on public policy, which applies to all areas of law.

Consult a Delaware lawyer with up-to-date non-compete knowledge to draft your sales and employment agreements. The Court continues to move in favor of allowing free competition.