Is the Company's Non-Compete Enforceable?

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There's a lot of fuss nationwide about whether agreements signed by employees not to compete after their employment are allowable. The FTC has now said that it is going to pursue a regulation banning non-competes.

I have reviewed and written many non-compete agreements over the course of my career. Many of them are likely unenforceable under existing law. Here are some possible reasons (this list is not exhaustive):

1. Agreements may be overbroad. For example, it may be that an agreement trying to ban someone from working worldwide when they only had a U.S. role is unenforceable. Depending upon where the person lives or is sued, the court might not let the employer revise the scope to make it enforceable. It would simply be thrown out, in that case. Employers: don't overreach!
2. Agreements may apply to employees who can't be restricted. If the person is working in a state in which non-competes are void, even if the person is brought into a different state court, they might not be held to the agreement. D.C. passed an ordinance banning non-competes last year.
3. Agreements don't protect a legitimate business interest. Is there a legitimate business interest in disallowing a person (who has signed a confidentiality agreement) from working in the mailroom of a competitor?
4. Agreements may restrict a person's right to free speech. Just try to enforce an agreement not to disparage a company (and its employees, services, products, etc.) forever.
5. Agreements don't offer the employee any type of consideration for signing. In some states, merely letting someone continue to work for an employer is not enough value to the signer to enforce the non-compete.

Most employees think nothing of signing these agreements – they want their jobs – or are not allowed to receive valuable things such as stock options if they don't. But when the employee is moving on, they are faced with this dilemma: will I be sued if I ignore the non-compete? My advice is to consult a lawyer experienced in non-competes and non-solicitation agreements to learn more about yours.

And employers, beware of the above common problems with non-competes; the law is changing very quickly on this subject. It's wise to have your agreements reviewed often, given the number of recent court decisions and many new state laws limiting these provisions.