

The Utility of Non-Solicitation Agreements for FedEx Contractors

January 23, 2023
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A restrictive covenant is an arrangement with employees that they will not engage in particular behavior after leaving your company. Non-competes^[1], non-solicitations, and confidentiality provisions are all examples of restrictive covenants. Since these covenants restrict an employee's free movement in the marketplace, strict rules govern their enforceability. While determining the enforceability of these provisions is nuanced and can vary under state, federal, and local laws, a general rule of thumb is that the covenant should be no more restrictive than necessary to protect the interest of the employer's business interests.

Given concerns around enforceability and whether an employee in a competitive labor market will agree to sign such restrictions, many contractors choose to refrain from utilizing restrictive covenants for employees. However, this is often a mistake and can lead to a fundamental member of a contractor's team leaving their employment with the company and taking several employees with them. A lack of understanding of the difference between a non-compete clause and a non-solicitation often results in contractors' failure to implement these safeguards.

Non-compete clauses are more restrictive than non-solicitation clauses and generally prohibit employees from working with competing companies within a specific geographic area. In contrast, a non-solicitation provision provides that an employee who leaves their employment with their employer cannot encourage other employees to go with them or solicit the employees for a certain period after the employee leaves. Meaning a well-drafted non-solicitation provision does not restrict an employee from working for a competitor but prevents the employee from orchestrating a mass exodus or taking the employer's top talent. Given that non-solicitation provisions are far more limited in scope than non-competes, they are generally easier to enforce, and employers face fewer challenges when presenting them to employees.

For contractors, non-solicitation agreements are vital to preventing an employee, especially a manager, from leaving to work for another contractor in the terminal and taking several of a contractor's best employees with them. Because of the challenges with finding and retaining qualified drivers, it is common for other contractors to hire another contractor's employee and encourage them to bring others along. It is also common for a manager to leave to work for another contractor or take on their own routes and attempt to take their critical drivers with them.

Ultimately, a well-drafted non-solicitation agreement can be a helpful tool for contractors. However, the key to ensuring maximum benefit is to ensure that the non-solicitation provision is in a contract, not in your handbook, and drafted in an enforceable way. For more information, please feel free to contact me at sarah.sawyer@offitkurman.com.

[1] The Federal Trade Commission has proposed a rule to ban all non-competes nationwide. The rule is pending, and employers should monitor the progress. [\[Nationwide Non-Compete Ban Makes Important Step Forward\]](#)

