

# CAPITAL

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## Do You Really Need A Non-Compete Agreement?



By Sara Romine

214.855.3103 | [sromine@ccsb.com](mailto:sromine@ccsb.com)

In recent years, non-compete agreements have become increasingly common in a variety of industries. Many companies include non-compete covenants in their new hire paperwork as a matter of course. This practice has its benefits: if you are providing a new hire with valuable training, access to confidential information, or the opportunity to develop relationships with customers and investors, you need policies and procedures in place to ensure the employee cannot later use this information to unfairly compete. Non-competes can serve this important function by restricting an employee who gained access to valuable information and relationships from using this information to unfairly compete with his or her former employer. But reflexively requiring all employees to sign a non-compete agreement—regardless of their position within the company—can land a business in some very hot water.

In the fall of 2014, national sandwich retailer Jimmy John's came under intense scrutiny for requiring employees tasked with making and delivering sandwiches to sign non-compete agreements. Jimmy John's non-compete prohibited these employees—for two years following their termination from Jimmy John's—from working for any business that derives 10% or more of its revenue from selling sandwiches and is located within 3 miles of any Jimmy John's store. National news media condemned Jimmy John's for forcing "low-wage workers" to sign "oppressive and overbroad" agreements. The media firestorm resulted in a congressional inquiry, regulatory investigations, and—of course—litigation. Several employees filed suit in Illinois, seeking a declaration that the non-compete agreements were overbroad and unenforceable. Jimmy John's declined to seek enforcement of the non-compete, which rendered the non-compete portion of the litigation moot. Nonetheless, the damage to Jimmy John's over the public scrutiny was considerable.

Many states, including Texas, will only enforce a non-compete agreement to the extent it is reasonable and necessary to protect a legitimate business interest. And, under Texas law, an employer that overreaches with an overbroad non-compete cannot obtain damages for any breach of that agreement by the former employee until after the agreement is reformed. Worse, if an employer knows the non-compete agreement is overbroad at the time it drafted the contract, the employee against whom enforcement is sought may recover his or her reasonable attorneys' fees. Texas's statutory scheme is designed to deter employers from drafting and enforcing non-compete agreements that are overbroad.

For this reason, companies utilizing—or wishing to utilize—non-compete agreements should give careful consideration to *why* they want a non-compete agreement. A company certainly has a legitimate business interest in protecting its confidential information, trade secrets, and goodwill. But, at least under Texas law, the restraints imposed by the non-compete agreement must be no broader than reasonably necessary to protect that legitimate business interest. For this reason, a business should think critically about the justification and scope of the non-compete agreement before it is presented to the employee to ensure the agreement is ultimately defensible and enforceable in the courts of law and public opinion. ■