1982 WL 189219 (S.C.A.G.)

Office of the Attorney General

State of South Carolina
March 25, 1982

***1** Robert E. Leak
Director
State Development Board
Post Office Box 927
Columbia, South Carolina 29202

Dear Mr. Leak:
Your letter of March 15, 1982, to Attorney General McLeod has been referred to me for response. You have asked (1) whether an employer may lawfully provide in an employment contract that the employer shall own all patent rights to products or processes developed by an employee during the course of the employee's employment with the employer and (2) whether the employer may include in its employment contract a noncompetition clause restricting employees who terminate their employment from engaging in competition with the employer for a specified time. The answer to your first question is, in this office's opinion, yes, and the answer to your second question is, in this office's opinion, a qualified yes.

Concerning your first question, a contractual provision whereby an employee agrees to assign to his employer all inventions and discoveries that he may make during the course of his employment is valid. See 6A Corbin on Contracts § 1394A (1962); 53 Am.Jur.2d Master and Servant § 115 (1970); cf. Raybestos-Manhattan, Inc. v. Rowland, 460 F.2d 697 (4th Cir. 1972). While there is no South Carolina Supreme Court decision directly on point, there is no reason to doubt that, if confronted with this issue, the Court would adhere to the general rule recognizing the validity of such a contractual provision. Therefore, the employer may, in this office's opinion, require, as a condition of employment, that an employee assign to the employer all ownership and patent rights in inventions and discoveries made during the course of the employee's employment.

As to your second question, the South Carolina Supreme Court has frequently addressed the issue of the enforceability of noncompetition clauses, also known as covenants not to compete. In its most recent opinion on this matter, the Court said that the enforceability of a noncompetition clause depends upon whether the clause is
. . . necessary for the protection of the legitimate interest of the employer, is reasonably limited in its operation with respect to time and place, is not unduly harsh and oppressive in curtailing the legitimate efforts of the employee to earn a livelihood, is reasonable from the standpoint of sound public policy, and is supported by a valuable consideration.'

Simmons v. Caine and Estes Insurance Agency, 275 S.C. 506, 273 S.E.2d 338, 339 (1980), quoting Oxman v. Shuman, 239 S.C. 218, 122 S.E.2d 559 (1961). Although agreements not to compete are looked upon with disfavor, are critically examined, and are construed against the employer, nevertheless, such agreements are generally upheld and enforced if the agreement is reasonable both as to the territorial extent of the restraint and the period for which the restraint is to be imposed. See Almers v. South Carolina National Bank of Charleston, 265 S.C. 48, 51, 217 S.E.2d 135 (1975), and cases cited. What is 'reasonable'—in terms of time and space limits—necessarily depends upon the competing interests of the employer and the employee in a given case. Id., 265 S.C. 52. The South Carolina cases, however, are in accord with the prevailing view that a noncompetition clause is unenforceable if the restriction exceeds, either in territorial extent or in duration, that which is reasonably necessary for the employer's protection against unfair competition. See 6A Corbin on Contracts § 1394, p. 94-95 (1962), and compare Sermons v. Caine and Estes Insurance Agency, supra, 273 S.E.2d 338; Eastern Business Forms, Inc. v. Kistler, 258 S.C. 429, 189 S.E.2d 22 (1972); Oxman v. Sherman, 239 S.C. 218, 225, 122 S.E.2d 559 (1961); Delmar Studios of the Carolinas v. Kinsey, 233 S.C. 313, 104 S.E.2d 338 (1961) (applying N.C. law); Somerset v. Reyner, 233 S.C. 324, 104 S.E.2d 444 (1958) (covenant not

to compete incident to sale of business). In conclusion, it is the opinion of this office that a noncompetition clause which is reasonably limited both as to geographical extent and duration and which does not offend public policy is enforceable under South Carolina law.

***2** I hope that this information is sufficient for your needs. If I can be of further assistance in this matter, please let me know. Sincerely,

Vance J. Bettis
Assistant Attorney General

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