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**EMPLOYER ALERT**  
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**ARIZONA RECENT SUPREME COURT RULING: IS YOUR RESTRICTIVE COVENANT AGREEMENT STILL ENFORCEABLE?**

On November 19, 2014, the Arizona Supreme Court issued its long-awaited ruling in *Orca Communications Unlimited, LLC v. Ann J. Noder*, 1 CA-CV 12-0183 (Ariz. 2014). The case is important for two (2) major reasons. First, it makes clear that Arizona courts will not enforce confidentiality, non-solicitation, or non-compete agreements that are overly broad or poorly drafted. Second, it clarifies that the Arizona Uniform Trade Secret Act (A.R.S. § 44-401 *et seq.* ("AUTSA")), does not necessarily pre-empt (or supersede) common law tort claims for misuse of an employer's "confidential information."

**A. Basic facts of the case**

Orca Communications sued its former employee, Ann Noder, and her new company for allegedly taking its confidential information and trade secrets. While employed by Orca, Noder signed an agreement that prohibited her from using Orca's trade secrets, confidential information (defined broadly) and from soliciting Orca's clients and prospective customers for eighteen (18) months after her termination. The agreement also prohibited Noder from providing "Conflicting Services" in all fifty (50) of the United States for the same period.

The trial court dismissed Orca's complaint, and Orca appealed. The Arizona Court of Appeals agreed with the trial court and ruled that the agreement's confidentiality, non-compete, and non-solicitation covenants were overly-broad and unenforceable. The confidentiality covenant was flawed because "Confidential Information" was defined to include publicly available information and any information that Noder learned during her employment, whether or not it was truly confidential. The non-compete provision was unenforceable because the definition of "Conflicting Services" was so broad it prevented Noder from using the skills and talents in the industry that she developed during the normal course of employment with Orca. Finally, regarding Noder's non-solicitation covenant, the Court of Appeals declared it unenforceable because it prevented Noder from contacting Orca's actual and "potential" clients. The Court pointed out that "potential customer" was defined so broadly that "anyone could be included as a potential customer."

The Court of Appeals also ruled that Orca's common law claims (*i.e.*, breach of fiduciary duty, tortious interference and unfair competition) against Noder for allegedly using Orca's "confidential information" were not pre-empted by AUTSA because AUTSA's definition of "trade secret" is not necessarily the same thing as "confidential information."

In its review, the Arizona Supreme Court did not modify the Court of Appeal's reasoning and analysis of Noder's restrictive covenants. However, the Supreme Court did clarify the reasoning and legal authority for the conclusion that AUTSA does not preempt tort claims based on improper use of confidential information that does not rise to the level of a trade secret.

### **B. Recommendations for Arizona Employers**

The upshot of the decisions in *Orca Communication v. Noder* is that Arizona employers have two (2) ways to protect their trade secrets and confidential information from misappropriation by a current or former employee: (1) require employees to sign properly drafted agreements (such as a "Non-disclosure Agreement") that prohibit the improper use or disclosure of the employer's trade secrets and confidential information; and/or (2) bring court claims against a former employee for misappropriation of a trade secret under the AUTSA or for breach of contract.

Employers should also do the following:

- Review employment agreements to ensure that any restrictive covenants are narrowly tailored to protect only the legitimate interests of the business.
- Consider including geographical and temporal restrictions in confidentiality provisions – especially if the definitions of "confidential information" must be very broad.
- Draft non-competition provisions that do not prevent a former employee from performing any type of work in the industry, even work that would be based on the employee's skills and talents.
- Do not define "potential customer" in non-solicitation provisions so broadly that anyone could be included as a potential customer.
- Ensure non-solicitation provisions do not include former customers.
- Take appropriate steps, and adopt policies, procedures and guidelines to protect, the inadvertent or intentional disclosure of trade secrets or confidential information.

In light of these changes in Arizona law, please let us know if we can help review or revise your employment agreements or help you develop policies, practices, and training materials to protect your trade secrets and confidential information.

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