

NON-COMPETE AGREEMENTS: WHAT YOU NEED TO KNOW



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May 7, 2025

Non-Compete Agreements: What You Need to Know

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Key Points

- ◆ What Are Restrictive Covenants?
- ◆ What Are Finder's Fees?
- ◆ Best Practices.
- ◆ Keep Up-To-Date.



Employment Agreements/Restrictive Covenants



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Restrictive Covenants

- ◆ What is a restrictive covenant for a job?
 - ◆ An agreement between an employer and employee that restrict the activities of an employee following separation of employment.



Types of Restrictive Covenants

- ◆ Non-compete agreement
- ◆ Non-solicitation agreement
- ◆ Non-disclosure agreement



Some of the Most Common Job Classifications of Employees Who Have Restrictive Covenants

- ◆ Sales
- ◆ Marketing
- ◆ Research and Development
- ◆ High level executives



Some of the Most Common Professions that have Restrictive Covenants

- ◆ Physicians
- ◆ Physical Therapists
- ◆ Dentists
- ◆ Recruiters



Purpose of Restrictive Covenants

- ◆ Protect confidential information that could be used for personal gain if the employee left the employer



Employment Agreements/Restrictive Covenants

- ◆ At the time of hire you should ask prospective employees if they are subject to any restrictive covenants by prior employers.
- ◆ Various types of restrictive covenants are non-compete agreements, non-solicitation agreements and non-disclosure agreements.
- ◆ If a prospective employee tells you he has a restrictive covenant from his former employer, ASK TO SEE THE DOCUMENT!



Enforceability

- ◆ Must be reasonably tailored to protect an employer's legitimate business interest.
- ◆ Must be reasonable in terms of:
 - ◆ Duration
 - ◆ Scope of business limited
 - ◆ Geographic limitation



Duration

- ◆ Fact driven
- ◆ Courts have upheld 6 months to 3 years



Geographic Scope

- ◆ No geographic scope means worldwide
 - ◆ Court upheld 6 month limitation on worldwide non-compete in healthcare information systems case



Geographic Scope

The guiding principle is that the geographic limitation must be tailored so the scope of the agreement is no greater than reasonably necessary to protect the employer's legitimate business interests.



Business Interest

Because a prohibition on all competition is a restraint of trade, an employer's business interest must be greater than merely preventing competition.



Unfair Advantage

A restrictive covenant must protect against an employee gaining some unfair advantage.



Legitimate Business Interest

Confidential information is a legitimate business interest

- ◆ Good will
- ◆ Customer contact



Courts

Courts have upheld

- ◆ A non-compete provision prohibiting a former general manager's employment with any of the employer's competitors within 100 miles of any of employer's locations for a period of one year.
- ◆ A non-compete clause prohibiting a physician from practicing medicine within seven miles of his former medical office for a period of one year.
- ◆ A non-compete prohibiting a seller of furniture business from engaging in any office furniture business within a two state area for a period of five years.



Courts

- ◆ There has been a steady circuit court, federal court, and court of appeals enforcement of Michigan noncompetes where the 1987 statute's requirements are satisfied.
 - ◆ Recent trend where judges are less willing to enforce (at least by injunction) noncompetes against employees without substantial customer relationships or trade secrets that are threatened.



Courts

If the former employee did not have confidential information, a non-compete will not be upheld.

- ◆ The court did not uphold a non-compete that prohibited former employees of a title insurance company from engaging in the title insurance business for five years based on the conclusion that nothing about the employee's former employment would give them an unfair advantage in competing for clients who had never given business to the employer in the first place.
- ◆ The court did not uphold a covenant prohibiting former nursing services employees from performing any kind of services, including non-nursing services as too broad.
- ◆ The court found unreasonable a portion of a non-compete clause prohibiting a former employee from competing within 50 miles of the employer's Ann Arbor office because the employee was never involved in the line of business engaged in by that office.



How Are Non-Competes Enforced?

- ◆ Preliminary injunction



How is the Public Interest Served in Upholding a Non-Compete?

- ◆ Michigan legislature has provided that covenants not to compete should be enforced to the extent they are reasonable. MCL 445.774a.



What is Blue Lining?

- ◆ When a court re-writes the non-compete by changing the time, geographic scope or tailors what is protected.



What Consideration Does an Employer Have to Give to Get a Restrictive Covenant?

- ◆ A job
- ◆ If extensive time - payment



Can I Only Get a Restrictive Covenant When I Just Offer a Job?

No.

At any time and the
consideration is continued
employment.



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Are There Times When a Restrictive Covenant Will Not Be Enforced Even If It is Valid Under State Law?

Yes.

If the employer has a monopoly.
However, it may be enforced under anti-trust laws.



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When is the Best Time to Have Your Employees Sign a Non-Compete, Non-Solicitation or Non-Disclosure Agreement?

Before they leave your employ!



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Workforce Mobility Act

- ◆ Bipartisan act introduced in the U.S. House of Representatives.
 - ◆ Limit the use of noncompete agreements to instances of the sale of business or dissolution of partnership;
 - ◆ Provide FTC and U.S. Department of Labor dual enforcement authority, as well as a private cause of action in federal court;
 - ◆ Require employers to make their employees aware of the limitations on noncompete agreements; and
 - ◆ Require the FTC and DOL to submit reports to Congress on any enforcement actions.



Non-Compete Agreements

- ◆ Federal Trade Commission (FTC) enforces antitrust law.
- ◆ Proposed rule January 5, 2023, to ban non-compete agreements. Voted 3-1 along party lines.
- ◆ Rulemaking Authority.
 - ◆ Generally: addresses antitrust issues among corporations.
 - ◆ Here: expanding its scope to include between employee and corporation.



Pros/Cons to Non-Compete Agreements

◆ Pros:

- ◆ Protects businesses that depend on non-compete agreements such as small, emerging industries where non-disclosure agreements will not provide safeguards to trade secrets and other confidential information.

◆ Cons:

- ◆ Stifle competition, restrict wages, limit job growth, inconsistent with free, open labor market.



Ban On Non-Compete Agreements

- ◆ Broadly prohibit non-compete agreements.
- ◆ Defines a non-compete as a contract formed between employer and employee.
- ◆ Prevent employers from entering into non-compete agreements with employees.
- ◆ Rescind existing non-compete agreements and provide notice that these clauses are no longer in effect.
- ◆ What about independent contractors?
- ◆ What about non-disclosure and non-solicitation agreements?



What If Found Unconstitutional?

- ◆ Is it the end?
- ◆ Michigan Legislature and Governor's office: introduce legislation to ban or limit non-compete agreements?
- ◆ 2023-2024. Why are these two years relevant?
- ◆ Issues with a ban in Michigan?



Possible State Intervention

- ◆ Different forms from outright ban to severe limitations such as:
 - ◆ Salary restrictions.
 - ◆ Consideration requirement.
 - ◆ A requirement such as that in California that requires the involvement of an employee's counsel to make adoption and enforcement legal.
 - ◆ Follow Massachusetts statute:
 - “Garden Leave”
 - Prohibits certain categories of employees from entering into noncompete agreements
 - May be void depending on the reason for separation
 - Not retroactive
 - Must be reasonably tailored
 - Employer must provide fair and reasonable consideration after starting employment



Non-Compete Agreements

- ◆ Many States disfavor non-competes.
- ◆ July 1, 2023: Minnesota no longer enforceable against employees or independent contractors.
- ◆ December 23, 2023: NY Governor vetoed legislation proposing ban on all new non-compete agreements.
 - ◆ Left open the possibility for statewide restrictions on non-compete agreements for lower-wage workers.



Non-Compete Agreements

- ◆ Federal Trade Commission (FTC) enforces antitrust law.
- ◆ Rule was set to take effect on September 4, 2024.
- ◆ On August 20, 2024, a federal judge in Texas issued a nationwide injunction.
- ◆ On October 18, 2024, FTC filed an appeal.
- ◆ What next?



Finder's Fee

- ◆ What are they?
 - ◆ A commission or fee paid by a company to the recruitment agency for placing a candidate in a job.
 - ◆ Agency's services include finding and placing a suitable candidate for a job opening.
 - ◆ Typically a percentage of the candidate's first-year salary (15% to 25%).



Conversion Fee

- ◆ Conversion fee is a charge paid by a company to the agency when they hire the temporary employee permanently.
- ◆ Designed to compensate the agency for the services they provided, as well as to recoup costs associated with the temporary placement.
- ◆ Typically calculated as a percentage of the employee's first-year salary.
- ◆ Fee can be affected by the contract duration, employee's skill and experience, and agency's business model (flat rate or percentage based on salary).



Other Considerations

- ◆ Some agencies can offer fee structures, such as flat fees or tiered fees based on the complexity of the search.
- ◆ Fee structures can differ depending on the industry, the type of position, and the agency's reputation.
- ◆ Discuss the fee structure upfront with the agency to avoid any misunderstanding.
- ◆ What does the contract provide? Avoid any unexpected costs.



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Questions?



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The End



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