

## LAW

# Assure Enforceable Non-Competes

Today, more companies are requiring their employees to sign non-competition agreements, which generally prohibit employees from working in or setting up a competing business for a period following termination of employment.

Because these agreements affect an individual's ability to earn a living, they can be controversial and are frequently challenged in court.

Whether a non-competition agreement is enforceable depends on the law of each state.

Non-competes are generally enforceable by New England courts if they are supported by consideration; are reasonable in all respects, including scope and duration; and do not extend beyond that which is necessary to protect the employer's legitimate business interests.

### Supported by Consideration

An agreement not to compete must be supported by valid consideration. In most states where non-competition agreements are enforceable, the commencement of employment or the continuation of employment of an at-will employee constitutes adequate consideration to support a non-competition agreement.

If the employee is asked to execute a non-competition agreement after entering into an employment contract for a definite term, or upon or after termination of the employment relationship, the employer must provide some additional benefit to the employee at the time of execution of the agreement in



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order to ensure adequacy of consideration.

For example, an employer might offer a promotion, an increase in compensation, the payment of a bonus, new fringe benefits, stock or stock options, acceleration of an otherwise distant benefit, or a promise of severance pay or other benefits.

### Reasonable Restrictions

A non-competition agreement will be enforced only if it is reasonable in all respects. A determination of the reasonableness of the restrictive covenant requires a fact-sensitive inquiry.

In some states, including Massachusetts, if a covenant is too broad in its geographical scope, duration or any other respect, it will be enforced only to the extent that it is reasonable and to the extent that it is severable for the purposes of enforcement.

The restrictive covenant not to compete must be limited to the employer's actual geographic market area. A restraint broader than an employer's current geographic area of business, however, may be justified by particular circumstances – if the employer was actively expanding into a new area, for example, or such restraint was both reasonable and necessary to protect the goodwill of the employer.

The reasonableness of restrictions within a specific geographic area is particularly applicable to sales employees assigned to particular sales territories.

For non-sales employees, a similar reasonableness analysis also applies to the scope of restrictions other than geographic area, such as those restricting specific types of competitive activities, particular lines of business or other factors relevant to a particular employee.

Factors such as the highly competitive nature of the industry in question and the fact that the method by which a business operates is unique have been cited to justify the reasonableness of the scope of the restrictive covenant.

A restriction that is either too long or indefinite in duration is not reasonable and will not be enforceable.

In determining a reasonable duration of a restriction, courts will weigh all the circumstances, including the nature of the employer's business, the type of employment involved, the employer's legitimate business interests, and the employee's right to work and earn a living.

Covenants of up to five years have been specifically enforced, but a period

of two or three years is most likely to be upheld if the restrictions are otherwise reasonable under the circumstances.

Generally, the term of employment, whether determined by contract or the conduct of the parties, does not affect the reasonableness of the duration of the covenant. A particularly short term of employment, however, may be a factor in rendering a long-term restriction unreasonable.

### Protecting Business Interest

In states where non-competition agreements are valid and enforceable, they will be enforced only to the extent they are necessary to protect the legitimate business interests of a former employer.

The desire simply to avoid competition is not sufficient and, therefore, an employer is not permitted to contractually restrain ordinary competition from former employees.

The legitimate business interests that may be protected through the enforcement of restrictive covenants generally fall into three generic categories: trade secrets, confidential and proprietary information, and goodwill of the employer.

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able to demonstrate its efforts to keep that information secret.

### A Consonant With Public Policy

Where permitted, an agreement not to compete is enforceable to the extent it is consonant with the public interest.

It is in the public interest to allow an individual to participate in his or her trade freely and without monopolization.

In general, if the employer can show that the non-competition agreement does not unreasonably restrict employment, a court will likely find that there is no public policy against its enforcement.

Generally, however, courts will not enforce a non-competition agreement that substantially prevents the employee from gaining meaningful employment.

If, for example, an employee's skills

are so specialized that the employee is simply not employable in a field other than the one subject to the restrictive covenant, the courts are likely to sympathize with the employee and permit the competing employment.

A properly drafted non-competition agreement is essential to effective and successful enforcement. Its provisions should be narrowly tailored to the needs and operations of the individual employer and its scope should be limited to what is necessary to protect the employer.

The agreement should describe, in general terms, the legitimate business interests of the employer that are sought to be protected (i.e., trade secrets, confidential and proprietary information and/or goodwill).

It should also include a nondisclosure/nonuse provision, prohibiting the employee from disclosing or using confidential business information or trade secrets of the company while in the employ of the company and at all times thereafter.

A severability clause should also be included. The agreement should also specifically spell out the consideration supporting it.

In drafting these provisions, the employer should keep in mind that because of the disparity of bargaining power, in the event of a dispute, the non-competition agreement will be narrowly construed against it.

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