

# Non-Compete Agreements

A NON-COMPETE AGREEMENT (a.k.a. restrictive covenant) in the employment context is a promise by an employee not to compete with his/her employer after the employment ends. This can be embodied within a broad employment agreement or be the only provision in a stand-alone agreement. Generally, employment or continued employment is sufficient to support such agreements (i.e. employers need not pay “additional” compensation in exchange for the promise).

Restrictive covenants, by their very nature, restrain trade and negatively impact an employee’s ability to find subsequent employment. For these reasons, employees are often under the false impression that such agreements are “illegal” or otherwise “unenforceable.” As a general rule, they are enforceable under New Jersey law, provided that they are reasonable under the circumstances. A restrictive covenant is reasonable if it protects the legitimate interests of the employer, imposes no undue hardship on the employee, and is not injurious to the public.

**Legitimate Interest.** Legitimate interests of an employer that warrant protection by restrictive covenants include customer relationships, trade secrets and confidential information. To the contrary, the mere desire to prevent competition is not a legitimate interest.

**Undue Hardship.** A restrictive covenant will almost always impose some degree of hardship upon the employee. However, courts may enforce the covenant unless the hardship is undue. Courts will consider a number of factors when deciding whether a hardship is undue, including the impact on the employee’s ability to earn a livelihood. A restrictive covenant may be deemed to create an “undue” hardship where the restriction substantially limits or prevents an employee from engaging in his/her livelihood. In this context, courts consider the geographic scope of the limitation (i.e. the larger the geographic range of the restriction, the greater the burden) and temporal scope of the limitation (i.e. the longer the duration of the restriction, the greater the burden). Courts may also consider the reason for the termination (e.g. whether the termination resulted from the employer’s breach of an employment contract or from the employee’s desire to end the employment relationship).

**Public Interest.** A restrictive covenant may be contrary to public interest and, therefore, unenforceable. Examples of public interests include preventing monopolistic business practices and assuring the availability of goods and services. Restricting competition of professionals has been the focus of recent litigation. In some professions, restrictive covenants are expressly prohibited. For example, New Jersey’s Rules of Professional Conduct governing attorneys prohibit restrictive covenants except with respect to retirement. In contrast, physicians and accountants are not similarly regulated.

Numerous New Jersey cases have examined restrictive covenants. However, very few, if any, bright-line rules have emerged. Courts have acknowledged that restrictive covenant disputes are very fact-sensitive and will be decided on a case-by-case basis. Furthermore, courts have the power to reform (i.e. modify) a restrictive covenant so that it is “reasonable” under the circumstances. Thus, the law of restrictive covenants is dynamic and continues to evolve.

Please contact the author if you wish to discuss this article or his practice areas.

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