

LEX MUNDI
PUBLICATION



Lex Mundi Labor and Employment Non-competition Survey

**The Lex Mundi Non-Competition Survey was prepared by the
Lex Mundi Labor and Employment Practice Group**



About Lex Mundi

Lex Mundi is the world's leading association of independent law firms. Lex Mundi facilitates the exchange of information regarding the local and global practice and development of law and improves the ability of its members to serve their respective clients. Lex Mundi has member law firms in 99 countries. Lex Mundi firms have adopted uniform standards of client service and are comprehensively and periodically reviewed to ensure continued adherence to Lex Mundi's standards of excellence.

The worldwide coverage of Lex Mundi's membership provides Lex Mundi the unique ability to conduct and facilitate surveys of local law and procedure on a global scale. Lex Mundi member firms cooperated with the World Bank, Harvard University and Yale University to complete the most comprehensive comparative study of litigation ever undertaken. Lex Mundi member firms are currently working with the same organizations on a comparative study of the rights of minority shareholders.



About this Survey

This Lex Mundi multi-jurisdictional survey sets out the salient rules and regulations for agreeing and enforcing non-competition clauses in the designated jurisdictions. Each Lex Mundi member firm was asked to respond to a series of questions, regarding their jurisdiction.

The descriptions set forth below are intended only as a general overview of the law as of March 2008. No summary can be complete, and the following is not intended to constitute legal advice as to any specific case or factual circumstance. Readers requiring legal advice on any of the specific case or circumstance should consult with counsel admitted in the relevant jurisdiction.

The lead editors for this survey are Claus Juel Hansen, the Chair of Lex Mundi's Labor and Employment Law Group and a partner of Kroman Reumert; Denmark and Barry Waters, Chair-elect of the Lex Mundi Labor and Employment Law Group and a partner of Murtha Cullina LLP; New Haven, Connecticut. The survey's coordinator is Jami de Lou, Lex Mundi's Practice Group Coordinator.

This multi-jurisdictional survey will be updated from time to time. For the most up to date information, please go the Lex Mundi web site (www.lexmundi.com) and access the Labor and Employment Non-competition Survey from the Labor and Employment Law Group web page or from the Publication and Resources page. If you need assistance, please contact the Lex Mundi office 1.713.626.9393.



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Labor and Employment Practice Group Non-Competition Survey

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1. Are there classes of employees against whom restrictive covenants may not be enforced? Explain.

No, there are no personal limitations. All employees must keep confidentiality and not to have a conflict of interest with their employers (e.g., not to compete). For post-employment non-competition enforceability, however, case law has created certain additional requirements (i.e., time limitation and compensation).

2. Does a change in position, salary or responsibilities affect enforceability?

Adverse modifications of labor conditions may lead to labor risks (e.g., constructive dismissal and/or legal actions). However, restrictive covenants, such as confidentiality or non-competition should not be affected as long as employment and post-employment requirements are met.

3. Are there any requirements for compensation payable in order for the non-competition clause to be enforceable?

During the labor relationship there is no compensation requirement. The regular salary is considered sufficient compensation for such obligation. For post-employment cases, a compensation ranging between 40 and 60% of the last monthly salary has been considered reasonable by case law. There is no specific regulation for post-employment covenants.

4. What legal consideration is necessary for enforcement?

During the labor relationship there is no specific aspects to be considered, as the statute so provides. For post-employment clauses, case law has considered reasonable to include: a time limitation of up to 3 years and a compensation ranging between 40 and 60% of the last monthly salary.

5. What employer interests (e.g. trade secrets, customer goodwill) will the court protect?

Under Argentine law, trade secrets and any other confidential information is fully protected during and after employment. Customer goodwill belongs to the employer and gives rise to certain special compensation only in the case of special salesmen protected by a specific statute.

6. What interests of the employee will balance the employer's interest?

During the labor relationship, the salary paid to the employee is considered sufficient consideration to balance the employer's interest and the obligation to keep confidentiality and not to compete. After employment termination, confidentiality remains valid with no compensation and other restrictive covenants require compensation and time limit.

7. Will the court limit enforcement to a "reasonable" geographic area and/or time frame?

Yes.

8. Please comment on what is considered "reasonable".

As to time limitation, case law has considered reasonable up to 3 years. Geographic limitation has not been extensively treated and will depend on each case.

9. Will the court more readily enforce a customer-specific restriction rather than a broader non-competition? Please explain.

The more limited the restriction the higher chances of enforceability because objections to non-competition clauses relate to the former employee's constitutional right to work.

10. Are there any limitations on enforcing the non-competition clause depending on the cause for termination of employment?

No, there are no limitations, especially considering that there are no regulations of post-employment non-competition clauses.

11. List the necessary language requirements.

There are no language requirements to implement non-competition clauses. However, if these clauses must then be filed in court, they will have to be presented in Spanish. If the original document is only executed in English, a translator will have to translated, which implies risk of mistranslation. Upon doubt, judge must decide employee's favor.

12. List any other requirements of importance.

As mentioned above, employment non-competition and confidentiality are required by law. Post-employment confidentiality has no additional requirements and non-competition requires compensation and time limitation.



Labor and Employment Practice Group Non-Competition Survey

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Australia**

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1. Are there classes of employees against whom restrictive covenants may not be enforced? Explain.

There are no classes of employees against whom restrictive covenants may not be enforced in Australia. Enforcements will depend upon the particular facts and circumstances of each case.

2. Does a change in position, salary or responsibilities affect enforceability?

Employees sometimes assert that a fundamental change in position, salary or responsibility means that their original contract of employment no longer applies. If the original contract of employment contains a post employment restraint, then for the same reason it may be asserted that the post employment restraint also ceases to apply.

3. Are there any requirements for compensation payable in order for the non-competition clause to be enforceable?

An employer is not required to pay any "compensation" in order for the non-competition clause to be enforceable. However, consideration is required.

4. What legal consideration is necessary for enforcement?

Yes, legal consideration is necessary for enforcement, but it only needs to be sufficient. Consideration can be the actual employment provided to employees at the commencement of

the employment relationship. Consideration for a restraint during the employment relationship is required, and "continuing employment" may not suffice as consideration.

5. What employer interests (e.g. trade secrets, customer goodwill) will the court protect?

The court will protect the employer's legitimate business interests. An employer will need to point to either protectable trade secrets or confidential information and/or demonstrate customer connections/goodwill.

6. What interests of the employee will balance the employer's interest?

The interests of the employee to earn a living and to be able to apply his or her trade do apply.

7. Will the court limit enforcement to a "reasonable" geographic area and/or time frame?

Yes.

8. Please comment on what is considered "reasonable".

"Reasonable" is determined by whether the restraint goes no further than to protect an employer's legitimate business interests. In doing so, the court will also consider the geographic operation, the duration of the restraint and the activities sought to be restricted.

9. Will the court more readily enforce a customer-specific restriction rather than a broader non-competition? Please explain.

Yes. The broader the restraint the more likely the court will determine that the post employment restraint is enforceable. Customer specific restrictions will be more readily enforced.

10. Are there any limitations on enforcing the non-competition clause depending on the cause for termination of employment?

The cause for termination of employment should not be relevant if the restraint simply operates from the date of "termination" of employment, however caused. There is however

some case law to the effect that an employer's repudiation of an employment contract may render the post employment restraint void.

11. List the necessary language requirements.

There are no requirements that an employment contract be in any particular language in Australia, although for obvious reasons, English is preferable.

12. List any other requirements of importance.

It is important to determine the State or Territory in Australia in which the employee is employed. This is because in NSW the Restraints of Trade Act (1976) will apply, and the Supreme Court of NSW may be able to read down an otherwise unreasonable restraint.



Labor and Employment Practice Group Non-Competition Survey

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1. Are there classes of employees against whom restrictive covenants may not be enforced? Explain.

Non-compete clauses are basically enforceable against both white collar and blue collar employees. Such clause is, however, void if it was agreed in connection with an employment relationship where the last monthly wage before termination did not exceed €2176 (as of 2007) or where temporary workforce is concerned.

2. Does a change in position, salary or responsibilities affect enforceability?

As outlined above, with regard to the monetary limit, the last month before termination is decisive. It is therefore conceivable that the clause is enforceable when agreed but becomes void because of a reduction of salary before termination. A change of position could affect enforceability if the concerned individual ceases to be an employee.

3. Are there any requirements for compensation payable in order for the non-competition clause to be enforceable?

Only if the employer terminates the employment relationship without good cause but nevertheless wants to keep the terminated employee bound by the non-compete clause.

4. What legal consideration is necessary for enforcement?

In general, the clause is limited up to a maximum of one year after termination and to the field of business of the employer. Compared to the interests of the employer, it must not unnecessarily impede the advancement of the employee.

5. What employer interests (e.g. trade secrets, customer goodwill) will the court protect?

The clause, for the agreed period and geographic area and under the above outlined conditions forbids all (professional) activities of the employee in the field of business of the employer.

6. What interests of the employee will balance the employer's interest?

Respecting the interest of the employer in the enforceability of the clause, it must nevertheless not unnecessarily impede the advancement of the employee. Factors to be considered are the agreed geographic area, whether competition actually occurs, other job opportunities in like/kind professions, marital status, child custody obligations, etc

7. Will the court limit enforcement to a "reasonable" geographic area and/or time frame?

Yes.

8. Please comment on what is considered "reasonable".

This will differ from case to case. Geographically, it will very much depend on the position of the employee but also on the nature of the business. As concerns the time frame, a maximum of one year is mandated by law, though. The judge may hold that the agreed geographic area/ time frame are too extensive under the given circumstances.

9. Will the court more readily enforce a customer-specific restriction rather than a broader non-competition? Please explain.

As such restriction will impede the advancement of the employee to a lesser degree; it is indeed likely that a court will more readily enforce a customer-specific restriction.

10. Are there any limitations on enforcing the non-competition clause depending on the cause for termination of employment?

Yes. As already mentioned, the clause will not be enforceable if the employer terminates the employment without good cause (unless further paying the salary) or the employee resigns for good cause.

11. List the necessary language requirements.

Not applicable

12. List any other requirements of importance.

If it was agreed that in case of a violation of the clause, the employee shall pay liquidated damages, the employer may neither demand damages in excess of the agreed amount nor request a cease and desist order. Finally, a non competition clause may not be agreed with a minor.



Labor and Employment Practice Group Non-Competition Survey

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Brazil

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1. Are there classes of employees against whom restrictive covenants may not be enforced? Explain.

No, according with the Brazilian Legislation there is no restriction based on classes of employees in order to establish a non-competition obligation.

2. Does a change in position, salary or responsibilities affect enforceability?

No, a change in position, salary or responsibilities does not affect enforceability of a previously agreed non-competition obligation, except if in the non-competition agreement it is expressly written that the restriction is related to the employee's position, salary or responsibilities.

3. Are there any requirements for compensation payable in order for the non-competition clause to be enforceable?

There is no specific legal provision for compensation. Due to the controversial aspects involving the enforceability of a non-competition obligation based on some Courts decisions requiring the existence of a compensation in order for the non-competition being enforceable, it is recommendable to have a compensation.

4. What legal consideration is necessary for enforcement?

The existing court decisions point to a trend of considering the non-compete clause valid provided that it includes (reasonable) limitations of time; territory; core business, and financial compensation for the non-competition.

5. What employer interests (e.g. trade secrets, customer goodwill) will the court protect?

The court will protect the interests agreed between the employer and the employee regarding restrictions covenants, such as trade secrets, non-solicitation, customer goodwill, that have being subject of a written agreement between the employer and employee.

6. What interests of the employee will balance the employer's interest?

It is of the employees' interest to be paid a compensation for being prevented from working to other companies operating in the same line of business as their employers. On the other hand, the employers will be certain that the employees will not compete within their line of business.

7. Will the court limit enforcement to a "reasonable" geographic area and/or time frame?

Yes.

8. Please comment on what is considered "reasonable".

Time frame: the non competition limitation takes around a one year period; Geographic frame: the restriction has to be limited to the territory under which the employee used to act, regarded that extending the territory can be questioned in court.

9. Will the court more readily enforce a customer-specific restriction rather than a broader non-competition? Please explain.

Yes, the higher the limitations to the Constitutional right to freedom of working, the higher the risks of questioning at the Brazilian courts.

10. Are there any limitations on enforcing the non-competition clause depending on the cause for termination of employment?

No, the cause for termination of the employment agreement wouldn't affect a non-competition obligation agreed between the employer and the employee.

11. List the necessary language requirements.

The general rule in Brazil is that any documents presented in court should be in Portuguese. If the company executes a non-competition agreement with an employee in English and need to submit this document to the Brazilian courts, then the document need to be submitted along with a sworn translation into Portuguese.

12. List any other requirements of importance.

(Did not answer)



Labor and Employment Practice Group Non-Competition Survey

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- 1. Are there classes of employees against whom restrictive covenants may not be enforced? Explain.**

No.

- 2. Does a change in position, salary or responsibilities affect enforceability?**

No.

- 3. Are there any requirements for compensation payable in order for the non-competition clause to be enforceable?**

No

- 4. What legal consideration is necessary for enforcement?**

According to the Bulgarian Law and the established practice non-competition clause could be enforced during the existence of the employment relationships. Non-competition clause could not be enforced after the termination of the employment contract as far as the right of work is constitutional right.

5. What employer interests (e.g. trade secrets, customer goodwill) will the court protect?

The employer is entitled to claim before the court compensation for the damages incurred as a result of the employees acts or omissions.

6. What interests of the employee will balance the employer's interest?

There is no obstacle the parties to agree that the employer shall pay compensation to the employee for his/her loyalty.

7. Will the court limit enforcement to a "reasonable" geographic area and/or time frame?

Yes

8. Please comment on what is considered "reasonable".

(Did not answer)

9. Will the court more readily enforce a customer-specific restriction rather than a broader non-competition? Please explain.

(Did not answer)

10. Are there any limitations on enforcing the non-competition clause depending on the cause for termination of employment?

No.

11. List the necessary language requirements.

(Did not answer)

12. List any other requirements of importance.

(Did not answer)



Labor and Employment Practice Group Non-Competition Survey

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- 1. Are there classes of employees against whom restrictive covenants may not be enforced? Explain.**

No, but restrictive covenants will not be enforced unless the employer can show a "protectable business interest" that is not adequately protected by the prohibition against the use of confidential information. So, as a practical matter, restrictive covenants will not be enforceable against an "ordinary employee" who is neither in management or sales

- 2. Does a change in position, salary or responsibilities affect enforceability?**

Restrictive covenants should be tailored to the position, so the answer is yes. Such clauses should be reviewed when there are changes in position and responsibilities.

- 3. Are there any requirements for compensation payable in order for the non-competition clause to be enforceable?**

No, unless an employer is trying to introduce covenants during the employment relationship. Continued employment is not consideration so some other consideration must be offered to obtain an enforceable covenant. It is not required that the employee be paid through the non-compete period, but it is a factor that the courts can consider.

4. What legal consideration is necessary for enforcement?

The following are examples of sufficient legal consideration: an offer of employment; an offer of a (genuine) promotion; an offer of stock options; a cash payment or salary increase that was not otherwise due to the employee. As noted above, continued employment is not consideration in Canada.

5. What employer interests (e.g. trade secrets, customer goodwill) will the court protect?

The use of trade secrets and other confidential information will be protected, as will customer relationships that have been developed during employment (if there is an enforceable non-solicit). Our courts have expressed a strong preference for enforcing non-solicitation clauses over non-compete clauses, the latter being only rarely enforced.

6. What interests of the employee will balance the employer's interest?

The interests of the employee to be free to choose to work for another employer, even in a competing business. The interests of the employee in using the general knowledge, skills and expertise that they have developed over the course of their employment.

7. Will the court limit enforcement to a "reasonable" geographic area and/or time frame?

No.

8. Please comment on what is considered "reasonable".

(Did not answer)

9. Will the court more readily enforce a customer-specific restriction rather than a broader non-competition? Please explain.

Yes, absolutely. In fact, the restriction does not have to be customer specific, as long as it goes no further than to restrict solicitation of customers with whom the employee had material business contact (usually also limited by a 1 or 2 year look back.)

10. Are there any limitations on enforcing the non-competition clause depending on the cause for termination of employment?

In Quebec, yes. Restrictive covenants are not enforceable if employment is terminated without cause. In the other Canadian provinces, no. However, the courts will not be very sympathetic to an employer who has breached the contract of employment by terminating without notice/pay in lieu and wants to enforce a non-compete clause.

11. List the necessary language requirements.

In Quebec only, certain contractual obligations must be written in French, unless the contracting parties agree in writing that English can be used in the contract.

12. List any other requirements of importance.

The threshold requirement is that the company establishes a "protectable business interest" that supports the need for any post-employment restriction. In addition, however, each clause must be no broader than is absolutely necessary to protect that interest with respect to: scope of activities, time, and place. Blue penciling is not permitted.



Labor and Employment Practice Group Non-Competition Survey

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- 1. Are there classes of employees against whom restrictive covenants may not be enforced? Explain.**

In Québec, restrictive covenants must be reasonable in view of the employees' tasks. It may accordingly be difficult to enforce restrictive covenants against clerical employees or employees who do not have access to any confidential information.

- 2. Does a change in position, salary or responsibilities affect enforceability?**

Only in that it can affect the determination as to whether the clause is reasonable in view of the position held by the employee.

- 3. Are there any requirements for compensation payable in order for the non-competition clause to be enforceable?**

No.

- 4. What legal consideration is necessary for enforcement?**

None. In Quebec, the clause will be valid if there is a cause for the employee to sign it. The employee's employment can be conditional on the employee accepting to be bound by a restrictive covenant.

5. What employer interests (e.g. trade secrets, customer goodwill) will the court protect?

The Civil Code refers to the employer's legitimate business interests, which includes trade secrets and goodwill.

6. What interests of the employee will balance the employer's interest?

The right for the employee to obtain alternate gainful employment using his experience, training and abilities.

7. Will the court limit enforcement to a "reasonable" geographic area and/or time frame?

No

8. Please comment on what is considered "reasonable".

(Did not answer)

9. Will the court more readily enforce a customer-specific restriction rather than a broader non-competition? Please explain.

In Quebec, the clause will not be enforceable if it is not reasonable. It is obviously easier to argue that a clause is reasonable when it is restricted to specific customers or to a limited territory.

10. Are there any limitations on enforcing the non-competition clause depending on the cause for termination of employment?

In Québec, a restrictive covenant because null and void by effect of the law if an employee is terminated without cause.

11. List the necessary language requirements.

Must be drafted in French, unless the employee request that another language be used and the employee consent thereto

12. List any other requirements of importance.

Must be limited as to scope, territory and duration.



Labor and Employment Practice Group Non-Competition Survey

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1. Are there classes of employees against whom restrictive covenants may not be enforced? Explain.

No. A non-competition covenant of a former employee of any class may be difficult to enforce on grounds that it prevents the employee from engaging in a lawful activity. It would probably be considered breaching the Constitution which provides that a person may engage in any economic activity unless prohibited by law and the freedom to work.

2. Does a change in position, salary or responsibilities affect enforceability?

No. Such a covenant may be binding to the extent it is (a) limited in: (i) time; (ii) scope; and (iii) geographically; and (b) it is entered into under circumstances which a reasonably prudent person would deem justifiable in equity. A non-competition covenant by a key manager is probably more justifiable than that of a regular employee.

3. Are there any requirements for compensation payable in order for the non-competition clause to be enforceable?

No, there are no such requirements. Such compensation may help in enforcing such a covenant provided other elements are met.

4. What legal consideration is necessary for enforcement?

See above.

5. What employer interests (e.g. trade secrets, customer goodwill) will the court protect?

A court would look at the employer interest such as trade secrets and customer goodwill and balance them against the employee interests mentioned below. From a labor point of view, the court will generally seek first to protect employee interests.

6. What interests of the employee will balance the employer's interest?

The constitutional right of any person to engage in any economic activity unless prohibited by law and the constitutional freedom to work.

7. Will the court limit enforcement to a "reasonable" geographic area and/or time frame?

Yes.

8. Please comment on what is considered "reasonable".

It will depend greatly on the circumstances. A geographic location should be specific, not open. Terms such as "worldwide" would probably be deemed excessive. As to time, it will probably be difficult for a court to accept anything higher than 5 years, although a lower time frame is more common.

9. Will the court more readily enforce a customer-specific restriction rather than a broader non-competition? Please explain.

For the reasons indicated above, it is likely a court would enforce a customer-specific restriction rather than a broader non-competition.

10. Are there any limitations on enforcing the non-competition clause depending on the cause for termination of employment?

There are no specific limitations. The cause for termination may be another element for the court to consider. If the cause for termination is one that does not generate severance

payment, a labor court may find such a covenant more difficult to enforce, although this will depend on the cause itself.

11. List the necessary language requirements.

Although there are no necessary language requirements, any documents submitted to the court must be in Spanish. If they are in any other language, the documents would need to be translated by a court-appointed translator. It is recommendable to draft the documents in Spanish beforehand.

12. List any other requirements of importance.

It would be preferable to submit any no-competition covenant to arbitration. Probably, an arbitrator would tend to view the no-competition clause in light of the overall transaction.



Labor and Employment Practice Group Non-Competition Survey

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1. Are there classes of employees against whom restrictive covenants may not be enforced? Explain.

Non-competition clauses are not enforceable in Colombia. This type of stipulation restricts the social obligation to work contained in article 17 of the Political Constitution, attempting against the fundamental right to the work and the freedom to exert profession or office

2. Does a change in position, salary or responsibilities affect enforceability?

The employer has the power to modify the work conditions concerning amount, location and schedule due to the subordinating power he exerts upon the employees. The use of this power will be measured in terms of the reasonable needs of the employer, and must preserve the employee's honor, dignity, and constitutional rights.

3. Are there any requirements for compensation payable in order for the non-competition clause to be enforceable?

Non-competition clauses are not enforceable in Colombia. The risk of conveying these provisions is that they will be susceptible to be revoked by means of a protection action, considering that they directly harm the fundamental rights before mentioned.

4. What legal consideration is necessary for enforcement?

Non-competition clauses are not enforceable in Colombia. The Colombian Constitution protects the freedom to choose a trade and occupation, and guarantees the right to work, and non-competition clauses have been regarded as restrictive of such freedom.

5. What employer interests (e.g. trade secrets, customer goodwill) will the court protect?

The Court will protect trade secrets, customer goodwill, confidential information (i.e. internal financial statements and analysis, personnel files and evaluations, internal pricing and cost information, etc), as long as the parties agree these covenants in their labor agreements or addendums of their contracts.

6. What interests of the employee will balance the employer's interest?

Labor laws in Colombia are generally very pro-employee. Even though the employer has the subordination power to modify the work conditions concerning amount, location and schedule, said power must preserve the employee's honor, dignity, and constitutional rights e.g. equality and fair remuneration, among others.

7. Will the court limit enforcement to a "reasonable" geographic area and/or time frame?

Yes.

8. Please comment on what is considered "reasonable".

The employer possesses the subordinating power towards his employees, but the use of this faculty and authority will always have to preserve the employee's honor, decorum, and constitutional rights e.g. equality and fair remuneration.

9. Will the court more readily enforce a customer-specific restriction rather than a broader non-competition? Please explain.

Since non-competition clauses, are not enforceable in Colombia, the Court will by no means apply these type of provisions. The Court would probably and more readily enforce customer-specific restrictions.

10. Are there any limitations on enforcing the non-competition clause depending on the cause for termination of employment?

Non-competition clauses are not enforceable in Colombia.

11. List the necessary language requirements.

Non-competition clauses are not enforceable in Colombia.

12. List any other requirements of importance.

Non-competition clauses are not enforceable in Colombia.



Labor and Employment Practice Group Non-Competition Survey

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1. Are there classes of employees against whom restrictive covenants may not be enforced? Explain.

A non-compete clause or covenant may be declared void by court or limited in scope, depending on its reasonableness. It could be argued that a restraint undertaken by high ranking officers who, though employees, are not in a weak bargaining position, would bear more weight than a similar restraint being accepted by low ranking employees.

2. Does a change in position, salary or responsibilities affect enforceability?

No, unless the changes are such so as to constitute a new agreement the terms of which could be negotiated between the employer and the employee perhaps on a more equal footing than before, e.g. promotion to higher position.

3. Are there any requirements for compensation payable in order for the non-competition clause to be enforceable?

No.

4. What legal consideration is necessary for enforcement?

The covenants exchanged by the parties under the contract of employment

5. What employer interests (e.g. trade secrets, customer goodwill) will the court protect?

The Court may protect trade secrets, soliciting customers, and marketing strategies. These interests are generally confidential and/or sensitive information.

6. What interests of the employee will balance the employer's interest?

The restraint clause should not restrict the employee's ability to earn a living. Possibly, health, age, family/dependants, career, etc. may also be taken into consideration.

7. Will the court limit enforcement to a "reasonable" geographic area and/or time frame?

Yes

8. Please comment on what is considered "reasonable".

A restraint clause will be unreasonable if it goes beyond what is reasonably necessary for the protection of the affected persons' interest in point of space, time or subject matter. The reasonableness depends upon the facts of each case. Time, space, employment sector and bargaining position are factors taken into account.

9. Will the court more readily enforce a customer-specific restriction rather than a broader non-competition? Please explain.

Although there is no precedent, a court is more likely to uphold a narrower customer specific restriction as it will be easier to prove to the court that it is indeed confined to protecting the employer's interest.

10. Are there any limitations on enforcing the non-competition clause depending on the cause for termination of employment?

In our opinion, such clauses would not survive unfair or illegal termination by the employer.

11. List the necessary language requirements.

(Did not answer)

12. List any other requirements of importance.

(Did not answer)



Labor and Employment Practice Group Non-Competition Survey

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- 1. Are there classes of employees against whom restrictive covenants may not be enforced? Explain.**

A non-competition clause may only be undertaken by an employee who holds a particularly responsible position.

- 2. Does a change in position, salary or responsibilities affect enforceability?**

If an employee loses his status as an employee holding a particularly responsible position an agreed non-competition clause will become unenforceable.

- 3. Are there any requirements for compensation payable in order for the non-competition clause to be enforceable?**

A non-competition clause is only valid if the employee, during the entire period (after termination of the employment) in which the clause applies, receives compensation of at least 50% of the salary as per the date of termination of his employment.

- 4. What legal consideration is necessary for enforcement?**

None.

5. What employer interests (e.g. trade secrets, customer goodwill) will the court protect?

Trade secrets, customer goodwill, market development.

6. What interests of the employee will balance the employer's interest?

N/A

7. Will the court limit enforcement to a "reasonable" geographic area and/or time frame?

Yes

8. Please comment on what is considered "reasonable".

A non-competition clause is not enforceable against the employee to the extent the clause is more restrictive than necessary to protect the employer or if the clause prevents the employee from doing business in an unreasonable way or is unreasonable in any other way.

9. Will the court more readily enforce a customer-specific restriction rather than a broader non-competition? Please explain.

A customer specific restriction may be more easily enforced but is only valid to the extent it covers customers of the employer for the last 18 months (i) with whom the employee has personally worked or (ii) which appears on a list given to the employee prior to a notice of termination being given

10. Are there any limitations on enforcing the non-competition clause depending on the cause for termination of employment?

A non-competition clause cannot be asserted towards an employee where the employer dismisses the employee without the employee having given reasonable cause therefore, or where the employee resigns from his position and the employer's omission to perform his obligations has given the employee reasonable cause for resignation.

11. List the necessary language requirements.

None. However, the information must be provided in a language that is understandable to the employees, i.e. Danish or possibly English.

12. List any other requirements of importance.

Both the clause and the right to compensation shall be agreed on in writing.



Labor and Employment Practice Group Non-Competition Survey

Step toe & Johnson LLP
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England

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1. Are there classes of employees against whom restrictive covenants may not be enforced? Explain.

Yes- Less senior employees who have little or no direct contact with the customers and suppliers or access to trade secrets and confidential information are rarely subject to restrictive covenants.

2. Does a change in position, salary or responsibilities affect enforceability?

Yes The more senior the employee the greater the likelihood of the restrictions being enforced but equally a sales person who has daily contact with the employer's clients and suppliers and who may be in receipt of a modest salary will also be subject to reasonable restrictions provided the employer has legitimate interests to protect.

3. Are there any requirements for compensation payable in order for the non-competition clause to be enforceable?

No compensation can be paid but it will not affect the enforceability of the non-compete clause.

4. What legal consideration is necessary for enforcement?

The restrictive covenants are most often contained in the employee's contract of employment and no additional consideration is paid for these. Alternatively they can be included in a binding settlement agreement at the end of the employment relationship in which case the employee often receives a modest payment for accepting the restrictions.

5. What employer interests (e.g. trade secrets, customer goodwill) will the court protect?

The court protects connections with clients and prospective clients, connections with suppliers, and stability of the workforce Trade secrets and confidential information.

6. What interests of the employee will balance the employer's interest?

The employee's right to work and need to work the public interest in healthy competition.

7. Will the court limit enforcement to a "reasonable" geographic area and/or time frame?

Yes.

8. Please comment on what is considered "reasonable".

This will depend on the type of business. In some cases a worldwide restriction will be reasonable and in other cases the restriction which is limited to say 5 miles from the employee's previous place of work will be too wide. Restrictions for more than 12 months' duration will rarely if ever be held to be reasonable.

9. Will the court more readily enforce a customer-specific restriction rather than a broader non-competition? Please explain.

Yes Generally the Courts prefer that the public interests are best served by encouraging competition. However the Court will recognize that an employer has a legitimate interest in protecting the goodwill and business revenue which he has invested in and built up over a period of time with his customer base.

10. Are there any limitations on enforcing the non-competition clause depending on the cause for termination of employment?

Yes, if the contract of employment has been terminated wrongfully or the employer is in breach of contract then all or any of the restrictive covenants will not be enforceable against the employee.

11. List the necessary language requirements.

The covenants must be clear and certain. Words used are given their ordinary and natural meaning. Extravagant interpretations will be ignored but the restrictions will be interpreted in the context of the agreement or contract as a whole.

12. List any other requirements of importance.

The reasonableness of the restriction is judged at the time the contract is entered into taking into account the reasonable expectations of the parties. The court has no power to rewrite the restriction but can sever parts of it.



Labor and Employment Practice Group Non-Competition Survey

Lepik & Luhaäär LAWIN Estonia

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- 1. Are there classes of employees against whom restrictive covenants may not be enforced? Explain.**

Not in general, but the restrictions must be justified taking account the position of the employee.

- 2. Does a change in position, salary or responsibilities affect enforceability?**

The change in position and salary may change the enforceability of restrictive covenants - in case the position is changed then the restriction may be justified. Only in case extra remuneration is paid then it is possible to enforce the non-compete obligation after the termination of the employment agreement

- 3. Are there any requirements for compensation payable in order for the non-competition clause to be enforceable?**

Yes, non-competition clause after the termination of the employment agreement is enforceable in case the employer pays extra remuneration. The agreement about non-competition may not be too broad that it would restrict the rights of the employee unjustifiably.

4. What legal consideration is necessary for enforcement?

During the term of the employment agreement the obligation to keep business secret and obligation not to compete must be stipulated in the agreement. After the termination of the agreement extra remuneration must be paid and the parties must have an agreement about the obligations.

5. What employer interests (e.g. trade secrets, customer goodwill) will the court protect?

The court will protect the employer's business secrets that may be stipulated in the agreement between the employer and employee. The employee and the employer will have to agree what is understood by business secret as the term is not defined by legal acts.

6. What interests of the employee will balance the employer's interest?

The right to have reasonable fee for the obligation not to compete with the employer after the termination of the agreement and the right to choose work that may restricted in case extra remuneration is paid.

7. Will the court limit enforcement to a "reasonable" geographic area and/or time frame?

Yes.

8. Please comment on what is considered "reasonable".

(Did not answer)

9. Will the court more readily enforce a customer-specific restriction rather than a broader non-competition? Please explain.

Usually the restriction is industry specified and is specified. The agreement must stipulate who are the competitor and the area where the restriction is enforced.

10. Are there any limitations on enforcing the non-competition clause depending on the cause for termination of employment?

No.

11. List the necessary language requirements.

All the employment relationship related information must be available for the employee in Estonian.

12. List any other requirements of importance.

(Did not answer)



Labor and Employment Practice Group Non-Competition Survey

Gide Loyrette Nouel
France

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1. Are there classes of employees against whom restrictive covenants may not be enforced? Explain.

Amongst other conditions, restrictive covenants must be necessary to protect the rightful interests of the company and must allow the employee to perform a professional activity in line with his skills normally afterwards. Therefore, a restrictive covenant may appear to be difficult to enforce against low-qualified employees.

2. Does a change in position, salary or responsibilities affect enforceability?

Changes in position, salary or responsibilities are subject to the employee's approval but do not affect the enforceability of the restrictive covenants unless its content is no longer relevant or if the legal and applicable collective bargaining agreement requirements are no longer met.

3. Are there any requirements for compensation payable in order for the non-competition clause to be enforceable?

The non-competition clause must include financial compensation in return for this obligation. Failing such, the clause is considered null and void. A derisory financial compensation may also render the clause unenforceable. Collective bargaining agreements often provide for financial compensations.

4. What legal consideration is necessary for enforcement?

If legal and collective bargaining agreement requirements are met, restrictive covenants apply as soon as the contract is terminated. If the employee is released from working his notice period, restrictions apply from the day of his departure. Restrictive covenants remain enforceable even if the dismissal is ruled without real and serious cause.

5. What employer interests (e.g. trade secrets, customer goodwill) will the court protect?

The courts will usually condemn the hiring of the employee by a competitor of the former employer, the creation of a competing business or the acquisition of shares in a competing company. Restrictive covenants may include confidentiality clauses to protect trade secrets during or after employment.

6. What interests of the employee will balance the employer's interest?

The court will balance both interests and try and protect the employee's right to find a new job that is in keeping with his/her professional career and his/her professional skills and specialization.

7. Will the court limit enforcement to a "reasonable" geographic area and/or time frame?

Yes.

8. Please comment on what is considered "reasonable".

The area must correspond to the territory in which the employee's new activity could be liable to compete with that of the former employer. The parties must take into account the length of the interdict, the nature of the activity and the specificities of the functions held by the employee. Generally, the time-frame is limited to one or two years.

9. Will the court more readily enforce a customer-specific restriction rather than a broader non-competition? Please explain.

Although there is no such general requirement, it appears that a customer-specific restriction is necessarily more in line with the general principles of the restrictive covenants meant to limit the scope of a clause than a broader non-competition restriction.

10. Are there any limitations on enforcing the non-competition clause depending on the cause for termination of employment?

The non-competition clause must define the different termination scenarios giving rise to the application of the non-compete obligation. If the clause is worded in a general fashion, it applies no matter what the means of termination of the employment contract, the circumstance of this termination and its author.

11. List the necessary language requirements.

No particular language requirements.

12. List any other requirements of importance.

(Did not answer)



Labor and Employment Practice Group Non-Competition Survey

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- 1. Are there classes of employees against whom restrictive covenants may not be enforced? Explain.**

Minors, § 74 a Sec. 2 HGB; apprentices for the time after the apprenticeship, § 12 BBiG, trainees, §§ 26, 12 BBiG.

- 2. Does a change in position, salary or responsibilities affect enforceability?**

According to § 74 a Sec. 1 HGB no enforceability as far as it is not covered by a justified business interest of the employer. If the new position of the employee differs significantly from the former background and circumstances underlying the clause, that clause would have to be amended. For changes in salary see below Sec. 8 and 9.

- 3. Are there any requirements for compensation payable in order for the non-competition clause to be enforceable?**

Yes, according to § 74 Sec. 2 HGB compensation has to be paid for the duration of the non-competition clause. If no compensation is paid, the clause is invalid. For managing directors it is arguable, whether and how much compensation has to be paid.

- 4. What legal consideration is necessary for enforcement?**

According to § 74 Sec. 2 HGB at least half of the remuneration lastly received by the employee has to be paid during the non-compete. The term remuneration comprises all

contractual wages, benefits and allowances in kind (including value of company car, bonus claims etc.).

5. What employer interests (e.g. trade secrets, customer goodwill) will the court protect?

Business and trade secrets, dates of customers and suppliers, customer goodwill as well as any kind of competition in the area of the business of the employer.

6. What interests of the employee will balance the employer's interest?

Interest professional advancement of the employee, in particular freedom to choose a new place of employment.

7. Will the court limit enforcement to a "reasonable" geographic area and/or time frame?

Yes

8. Please comment on what is considered "reasonable".

A too extensive non-competition clause remains valid in so far as it is covered by a legitimate business interest of the employer, § 74 a Sec. 1 HGB. It remains enforceable as regards region and content in areas where the employer entertains businesses or where businesses are foreseeable. Time limit is a maximum of two years.

9. Will the court more readily enforce a customer-specific restriction rather than a broader non-competition? Please explain.

Both restrictions can be enforced if they are formulated precisely and are covered by sufficient employer's interests. Also, a customer-specific restriction has to comply with § 74 a HGB. It must not exceed the legitimate interests of the employer and is in general restricted to customers with which the employee dealt in the last two years.

10. Are there any limitations on enforcing the non-competition clause depending on the cause for termination of employment?

If employee terminates employment for good cause because of a breach of contract by employer or if employer terminates employment, employee can declare the non-compete as

non binding, unless termination is caused by reasons in the person of employee or if employer is prepared to pay the full last remuneration.

11. List the necessary language requirements.

The clause has to be in writing and has to be formulated very thoroughly and precisely with respect to content and regional extent.

12. List any other requirements of importance.

The employer has to hand over to the employee a signed version of the non-competition clause.



Labor and Employment Practice Group Non-Competition Survey

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1. Are there classes of employees against whom restrictive covenants may not be enforced? Explain.

Although not specifically provided for in the law, the non-competition obligation derives from the general duty of loyalty of the employee towards the employer. Such duty applies to all employment relationships without distinction.

2. Does a change in position, salary or responsibilities affect enforceability?

It is generally accepted that higher-rank employees are more bound by the non-competition obligation due to their higher degree of responsibility, increased salary etc. Therefore, any upgrade of the employee's status as regards his position, salary or responsibilities would enhance the enforceability of the non-competition obligation.

3. Are there any requirements for compensation payable in order for the non-competition clause to be enforceable?

There is no such express requirement provided for in the law. However, the payment of a non-competition fee - for the non-competition period post termination - is one of the main factors that would be taken into consideration by the courts in determining the enforceability of the non-competition clause (along with the geographic and time scope, the

4. What legal consideration is necessary for enforcement?

Although no specific law provision exists, such consideration would normally range between 50 to 75% of the employee's salary at the time of termination (depending also on the circumstances).

5. What employer interests (e.g. trade secrets, customer goodwill) will the court protect?

In principle, the courts would take into consideration the reasonable business interests of the employer. Namely, the protection would cover the employer's know-how, trade secrets, customer goodwill, confidential and privileged information as well as the protection of the employer against unfair competition by the employee or his subsequent employer.

6. What interests of the employee will balance the employer's interest?

The above-mentioned employer's interests would be balanced against the protection of the employee's personality, the freedom of employment and economic freedom which are also protected by the Greek Constitution.

7. Will the court limit enforcement to a "reasonable" geographic area and/or time frame?

Yes.

8. Please comment on what is considered "reasonable".

The court would not enforce a non-competition clause to the extent that the obligations imposed by it are considered to be abusive or overly restricting the employee's freedom of work.

9. Will the court more readily enforce a customer-specific restriction rather than a broader non-competition? Please explain.

Yes. Generally speaking, a customer-specific restriction would be seen as less restrictive of the employee's rights and would therefore be easier to enforce.

10. Are there any limitations on enforcing the non-competition clause depending on the cause for termination of employment?

Although, as mentioned above, the enforceability of the clause would depend on the overall circumstances, in general terms the clause would be easier to enforce in case of resignation of the employee (especially, if the reason for the termination is that the employee has found new employment with a competitor).

11. List the necessary language requirements.

The non-competition clause must include a clear and specific description of the scope of the prohibition (geographic scope, time frame, list of competitors etc.). In principle, such clause should be drafted in Greek, unless the employee has sufficient knowledge of the language used (especially, in cases where such foreign language is used in the co

12. List any other requirements of importance.

It is usually advisable to provide for a (monetary) penalty for any breach of the non-competition obligation as this would enhance the enforceability of the clause. In absence of such penalty clause, the employer would only be entitled to claim damages upon submission, of course, of the required evidence.



Labor and Employment Practice Group Non-Competition Survey

Nagy és Trócsányi Hungary

Orsolya Kovács

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- 1. Are there classes of employees against whom restrictive covenants may not be enforced? Explain.**

No.

- 2. Does a change in position, salary or responsibilities affect enforceability?**

No.

- 3. Are there any requirements for compensation payable in order for the non-competition clause to be enforceable?**

The compensation must be adequate and proportionate - generally it is equal with the half amount of the salary to be paid for the respective period

- 4. What legal consideration is necessary for enforcement?**

There is no such consideration.

- 5. What employer interests (e.g. trade secrets, customer goodwill) will the court protect?**

As general rule, the rightful economic interests of the employer are protected (for example business secrets and any information of fundamental importance pertaining to the employer or its activities).

6. What interests of the employee will balance the employer's interest?

There is no such interest.

7. Will the court limit enforcement to a "reasonable" geographic area and/or time frame?

Yes

8. Please comment on what is considered "reasonable".

Such non-competition clause can only be effective for max. 3 years as of the day when the employment relationship ceased. As per the territorial scope, the compensation must be proportionate to the extent of the employee's difficulties arising from searching a new job and lower living standards.

9. Will the court more readily enforce a customer-specific restriction rather than a broader non-competition? Please explain.

(Did not answer)

10. Are there any limitations on enforcing the non-competition clause depending on the cause for termination of employment?

No.

11. List the necessary language requirements.

There is no requirement to formulate the non-competition clause in Hungarian if the employee understands the language of the clause and he/she confirms it.

12. List any other requirements of importance.

The restricted activity, the territorial scope, the term and the compensation must be duly determined in the non-competition clause.



Labor and Employment Practice Group Non-Competition Survey

Abdullah Kh. Al-Ayoub & Associates Kuwait

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1. Are there classes of employees against whom restrictive covenants may not be enforced? Explain.

There are no classes of employees against whom restrictive covenants may not be enforced. There are no specific provisions under Kuwait laws pertaining to restrictive covenants.

2. Does a change in position, salary or responsibilities affect enforceability?

A change in position, salary or responsibility may affect enforceability depending upon the restrictive covenants contained in the contract between the employer and the employee.

3. Are there any requirements for compensation payable in order for the non-competition clause to be enforceable?

No, there are no requirements for compensation payable in order for the non-competition clauses to be enforceable.

4. What legal consideration is necessary for enforcement?

Article 196 of the Civil Law No. 67/1980 stipulates the general principle that a contract is the law of the contracting parties and neither party thereto may separately rescind or amend its stipulation except to the limits allowed by agreement or where the law provides otherwise. Evidence as to breach of contract is essential for enforcement.

5. What employer interests (e.g. trade secrets, customer goodwill) will the court protect?

The employer's interests will depend on the conditions expressly agreed to by the employer and employee in the employment contract. The interests of the employer such as trade secrets; customer goodwill etc can be enforced provided the employer and employee have agreed to such conditions in the employment contract.

6. What interests of the employee will balance the employer's interest?

Employer cannot enforce any restrictive covenants that are not expressly agreed to in the employment contract.

7. Will the court limit enforcement to a "reasonable" geographic area and/or time frame?

Yes

8. Please comment on what is considered "reasonable".

Based on our previous experience, the court will limit enforcement of the restrictive covenants up to a maximum period of 2 to 3 years. An indefinite restriction will not be enforceable. However, the restriction can cover the entire geographic area as Kuwait is a very small country.

9. Will the court more readily enforce a customer-specific restriction rather than a broader non-competition? Please explain.

The court will enforce the specific restrictions contained in the contract if the conditions provided therein are clear. However, if the conditions contained therein are non-specific, the court will consider the same as per its discretion based on equity and good conscience.

10. Are there any limitations on enforcing the non-competition clause depending on the cause for termination of employment?

No, the cause of termination of employment has no relation in respect of enforcing the non-competition clause unless specifically provided in the contract of employment.

11. List the necessary language requirements.

The employment contract may be in any language. However, the document (work permit) issued by the Ministry of Social Affairs and Labor is necessarily in Arabic and supplements the employment contract.

12. List any other requirements of importance.

In the absence of an employment contract the work permit which contains all pertinent terms and conditions constitutes the contract. If there is an employment contract in addition to the work permit, the terms and conditions of the employment contract will be binding upon the parties except those that are against public order, law or morality.



Labor and Employment Practice Group Non-Competition Survey

Lideika, Petrauskas, Valiunas ir partner Lithuania

Ramunas Petravicius

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1. Are there classes of employees against whom restrictive covenants may not be enforced? Explain.

Lithuanian labor law is silent concerning non-compete clauses and there are no listed classes of employees against whom the restrictive covenants may not be enforceable. However, following practices of the Supreme Court, such restrictions should be reasonable, and applicable only if it is really required to protect the employer's business.

2. Does a change in position, salary or responsibilities affect enforceability?

A change in position, salary or responsibilities normally does not affect enforceability, until non-compete restrictions remain reasonable and really required to protect the employer's business.

3. Are there any requirements for compensation payable in order for the non-competition clause to be enforceable?

Following practices of the Supreme Court, the compensation must be paid for the period after employment termination in order for the non-competition clause to be enforceable.

4. What legal consideration is necessary for enforcement?

The law does not regulate compensation amount. We normally advise establishing a compensation amounting from 40% to 60% of former salary.

5. What employer interests (e.g. trade secrets, customer goodwill) will the court protect?

The court should protect interests, agreed to be protected by the non-compete agreement or the employment contract, as long as applicable restrictions remain reasonable and fair. In our view, trade secrets would be protected, but customer goodwill is not tested by Lithuanian court practice.

6. What interests of the employee will balance the employer's interest?

Non-compete restrictions must be limited in time (by analogy, the courts apply maximum limit of 2 years, applied for self-employed trade agents under the Civil Code), reasonable, fair, and applicable only to the extent necessary to protect the employer's business. The employee must be paid a compensation for the period after employment termination.

7. Will the court limit enforcement to a "reasonable" geographic area and/or time frame?

Yes.

8. Please comment on what is considered "reasonable".

There is no uniform definition of "reasonable" or "unreasonable". Non-compete limitations shall be reasonable in case they do not create unnecessary restrictions for employee, and sufficient for the employer's business protection. The court decides what is "reasonable" or not on case to case basis.

9. Will the court more readily enforce a customer-specific restriction rather than a broader non-competition? Please explain.

In our view, the court would be more readily to enforce a customer-specific restriction rather than a broader non-competition, because customers are primarily important for the protection of employer's legitimate business' interests.

10. Are there any limitations on enforcing the non-competition clause depending on the cause for termination of employment?

No, there are no such limitations in Lithuania developed by the court practice so far.

11. List the necessary language requirements.

In our view, good non-compete agreements have language that should include the following terms: competing business definition, geographical area, applicable non-compete restrictions, non-solicitation of employees and customers, term of restrictions' validity, compensation for employee, liability in case of breach, applicable law and jurisdiction.

12. List any other requirements of importance.

Not applicable.



Labor and Employment Practice Group Non-Competition Survey

**Bonn Schmitt Steichen
Luxembourg**

Alex Schmitt

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1. Are there classes of employees against whom restrictive covenants may not be enforced? Explain.

Non-competition clauses are deemed null and void if the employee at the time of signature of the employment contract is under the age of 18 and/or if the annual gross salary of the employee at the time he/she leaves the employer does not exceed EUR 46.708,56.- (index 685,17).

2. Does a change in position, salary or responsibilities affect enforceability?

Obviously, if the employee has a change in his/her position and/or responsibilities and the salary is increased in order to reach or to exceed the amount of EUR 46.708,56.- (index 685,17), the non-competition clause becomes enforceable against him/her.

3. Are there any requirements for compensation payable in order for the non-competition clause to be enforceable?

Labor Code does not foresee any requirements for compensation payable in order for the non-competition clause to be enforceable. However, parties may provide in the employment contract such a clause which will be valid unless it is less favorable for the employee. In such case, the clause will be deemed null and void.

4. What legal consideration is necessary for enforcement?

The non-competition clause will only be effective if the restriction (i) applies to a specific professional sector and to similar activities to those carried out by the former employer, (ii) does not exceed 12 months, (iii) is limited to a geographical area where the employee would be in a position to effectively compete with his former employer.

5. What employer interests (e.g. trade secrets, customer goodwill) will the court protect?

The court will protect activities performed by the employer including confidential information such as identity of customers, suppliers, trade secrets, etc...

6. What interests of the employee will balance the employer's interest?

Only the employee's interests as defined by the Labor Code will balance the employer's interest. For example, if restrictions provided for by a non-competition clause exceed those foreseen by the Labor Code and are hence less favorable to the employee, then the employee's interest will prevail.

7. Will the court limit enforcement to a "reasonable" geographic area and/or time frame?

Yes.

8. Please comment on what is considered "reasonable".

Under Luxembourg legal provisions, the non-competition clause will be effective only if it has been limited to a geographical area which must be within the territory of the Grand-Duchy of Luxembourg. This means that the employer cannot impose the restriction to the employee for a geographical area which is not inland.

9. Will the court more readily enforce a customer-specific restriction rather than a broader non-competition? Please explain.

The court will rather enforce a non-competition clause which shall state restrictions as provided by law and which has been explained above (i.e. similar activities, duration of the restriction and geographical area).

10. Are there any limitations on enforcing the non-competition clause depending on the cause for termination of employment?

A non-competition clause is not enforceable when the employer has terminated the employment contract in violation of the legal provisions applicable to immediate termination on account of a gross misconduct or if the employer does not respect the legal notice period.

11. List the necessary language requirements.

For example, the non-competition clause can be stated as follows: "the employee undertakes not to carry out any activity of a similar nature of his employer, for the benefit of his own undertaking or for the benefit of a competing undertaking, and not to interfere with his employer's interests during twelve months after the date of the termination"

12. List any other requirements of importance.

Compensatory lump sums to be paid by the employee to the employer in the event of non-compliance with the non-compete obligations; can be foreseen in the non-competition clause. Such compensation for damages could be provided without prejudice to the right of the employer to request full compensation for the damages incurred.



Labor and Employment Practice Group Non-Competition Survey

Ganado & Associates Malta

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- 1. Are there classes of employees against whom restrictive covenants may not be enforced? Explain.**

No the principles at law apply across the board. Following a recent judgment of the court of appeal in Malta however, restrictive covenants are deemed to be almost unenforceable against all classes of employees.

- 2. Does a change in position, salary or responsibilities affect enforceability?**

Not at the moment. Prior to the decision of the court of appeal, each case was examined in terms of the test of reasonableness.

- 3. Are there any requirements for compensation payable in order for the non-competition clause to be enforceable?**

Judgments prior to the recent court of appeal judgment mentioned that on the basis of equity, an employee needed to be compensated for respecting a non competition clause; however this reasoning has been declared to go against Maltese public policy.

- 4. What legal consideration is necessary for enforcement?**

Enforcement is only possible if a real damage is created against the ex-employer. Without evidence of real damage however, little action may be brought against the ex-employee.

5. What employer interests (e.g. trade secrets, customer goodwill) will the court protect?

The court will only protect the employer if the employer can prove that a real damage is being incurred and that the latter needs to be stopped all employer interests, if they are the cause for damage will be protected by the court.

6. What interests of the employee will balance the employer's interest?

The courts have now held that an employee cannot be restrained in any way unless he is damaging the employer and the employer can prove this.

7. Will the court limit enforcement to a "reasonable" geographic area and/or time frame?

No.

8. Please comment on what is considered "reasonable".

(Did not answer)

9. Will the court more readily enforce a customer-specific restriction rather than a broader non-competition? Please explain.

No. courts tend not to enforce non competition clauses but only protect employers once the damage has been done.

10. Are there any limitations on enforcing the non-competition clause depending on the cause for termination of employment?

This is a moot point under Maltese law, as non competition clauses are deemed to be unenforceable.

11. List the necessary language requirements.

None.

12. List any other requirements of importance.

None.



Labor and Employment Practice Group Non-Competition Survey

**Houthoff Buruma
Netherlands**

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- 1. Are there classes of employees against whom restrictive covenants may not be enforced? Explain.**

No, but depending on circumstances

- 2. Does a change in position, salary or responsibilities affect enforceability?**

Yes.

- 3. Are there any requirements for compensation payable in order for the non-competition clause to be enforceable?**

No.

- 4. What legal consideration is necessary for enforcement?**

If the employee feels, after termination of his employment agreement, too much bound by the non-compete, he/she could go to court to have the non-compete clause annulled or suspended. Furthermore, the court could also mitigate the scope of the non-compete and/or award compensation if the employee remains bound by the clause.

5. What employer interests (e.g. trade secrets, customer goodwill) will the court protect?

All employer interest covered by the clause.

6. What interests of the employee will balance the employer's interest?

Employability.

7. Will the court limit enforcement to a "reasonable" geographic area and/or time frame?

Yes.

8. Please comment on what is considered "reasonable".

In case the employee breaches the non-compete, of course the employer could go to court to get a decision of the court that prohibits the further breach. In general non-compete clauses are accepted if they are bound to a certain geographical area (depending on the scope of the clause) and for a maximum period of two years.

9. Will the court more readily enforce a customer-specific restriction rather than a broader non-competition? Please explain.

Yes.

10. Are there any limitations on enforcing the non-competition clause depending on the cause for termination of employment?

No

11. List the necessary language requirements.

In writing! The employee should be able to understand what he is signing

12. List any other requirements of importance.

(Did not answer)



Labor and Employment Practice Group Non-Competition Survey

Thommessen Krefting Greve Lund AS Norway

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- 1. Are there classes of employees against whom restrictive covenants may not be enforced? Explain.**

According to the Agreement Act section 38: Restrictive covenants are recognized only to the extent it is necessary in order to protect against competition (and is not unreasonably restricting his possibilities of work). Consequently: Restrictive covenants cannot be enforced against employees in subordinate positions.

- 2. Does a change in position, salary or responsibilities affect enforceability?**

Change in position/responsibility may change the restrictive covenant, but to be on the safe side, the restrictive covenant should be made a part of the new employment contract that has to be issued when there is a change in position or responsibility.

- 3. Are there any requirements for compensation payable in order for the non-competition clause to be enforceable?**

Compensation is not required, but the right to compensation is an element which will be taken into account when deciding whether the covenant should be considered reasonable according to the Agreement Act.

4. What legal consideration is necessary for enforcement?

A non-competition clause is enforceable if the employment agreement is terminated by the employee or termination is justified on the basis of circumstances relating to the employer. A non-competition clause cannot be enforced if termination is unjust or justified on basis of circumstances relating to the undertaking, e.g. reduction of workforce.

5. What employer interests (e.g. trade secrets, customer goodwill) will the court protect?

The court will protect the employer against competition if the non competition agreement between employer and employee (not subordinate) is reasonable. The court will protect trade secrets and even "know how" independent of whether there is a clause protecting trade secrets in the employment contract or not. There is no definition "know how".

6. What interests of the employee will balance the employer's interest?

The employee's interests in and possibilities of obtaining a position relevant to his education and experiences

7. Will the court limit enforcement to a "reasonable" geographic area and/or time frame?

Yes.

8. Please comment on what is considered "reasonable".

In order to protect the employer against competition, up to one year of restriction would usually be acceptable. More than two years will hardly be acceptable. However, an employee who has taken up position with a competitor, cannot use business secrets (or know how) obtained through his former employment.

9. Will the court more readily enforce a customer-specific restriction rather than a broader non-competition? Please explain.

A customer specific restriction will be more readily enforced, as a "tailor made" restriction will be less extensive and make it easier for employee to obtain a relevant position/do relevant work. Such restriction will also convey the impression of being more relevant in order to protect the former employer's interests.

10. Are there any limitations on enforcing the non-competition clause depending on the cause for termination of employment?

A non competition clause cannot be enforced if the termination of the employment contract has been justified on the basis of circumstances relating to the undertaking, such as restructuring or lack of work.

11. List the necessary language requirements.

No special language requirements, but the clause must be understood by the employee(s).

12. List any other requirements of importance.

The enforcement of a non competition clause is based on a concrete assessment of the interests of the employer against the interests of the employee.



Labor and Employment Practice Group Non-Competition Survey

Rizvi, Isa, Afridi & Angell Pakistan

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- 1. Are there classes of employees against whom restrictive covenants may not be enforced? Explain.**

Under Pakistan law, every agreement by which any one is restrained from exercising a lawful profession, trade or business of any kind, is to that extent void. However, a seller of good will of a business can agree with the buyer to refrain from carrying on a similar business within specified local limits

- 2. Does a change in position, salary or responsibilities affect enforceability?**

No; not as general rule. However, since reasonable restriction of prevention from using confidential information can be enforced. In such cases, change in position would be relevant.

- 3. Are there any requirements for compensation payable in order for the non-competition clause to be enforceable?**

No.

- 4. What legal consideration is necessary for enforcement?**

The courts balance the rights of the employer to confidential information or proprietary trade information against the employee's right to freedom of trade/profession/business and will

enforce non-competition clause only in such cases where it is clear that the former employee is in breach of his reasonable contractual commitment.

5. What employer interests (e.g. trade secrets, customer goodwill) will the court protect?

The courts will protect only proprietary information: these may include trade secrets and customer information not publicly available.

6. What interests of the employee will balance the employer's interest?

The employee has a right to work for any competitor as long as he does not use the proprietary information of the former employer.

7. Will the court limit enforcement to a "reasonable" geographic area and/or time frame?

Yes.

8. Please comment on what is considered "reasonable".

"Reasonable" is vague concept which is yet developing in Pakistan. For instance, due to internet, physical geographical limits are no longer relevant in determining "reasonable". Courts tend to penalize employees who "steal" from their employers, and employers who seek to fetter the personal development of their employees.

9. Will the court more readily enforce a customer-specific restriction rather than a broader non-competition? Please explain.

No: to the contrary. Customer specific restriction would only be relevant if the employee only dealt with that particular customer.

10. Are there any limitations on enforcing the non-competition clause depending on the cause for termination of employment?

No

11. List the necessary language requirements.

(Did not answer)

12. List any other requirements of importance.

(Did not answer)



Labor and Employment Practice Group Non-Competition Survey

Wardynski & Partners Poland

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- 1. Are there classes of employees against whom restrictive covenants may not be enforced? Explain.**

Generally no.

- 2. Does a change in position, salary or responsibilities effect enforceability?**

No.

- 3. Are there any requirements for compensation payable in order for the non-competition clause to be enforceable?**

Yes, at least 25% of employee's salary during a period equal to the duration of post-employment non-competition clause.

- 4. What legal consideration is necessary for enforcement?**

1. Separate agreement in writing. 2. Access to confidential information. 3. Duration.

- 5. What employer interests (e.g. trade secrets, customer goodwill) will the court protect?**

Wide catalogue of interests: trade secrets, customer goodwill, etc. covered.

6. What interests of the employee will balance the employer's interest?

1. Right to the compensation. 2. Too wide definition of competitive activities might be considered as an abuse of the right to work.

7. Will the court limit enforcement to a "reasonable" geographic area and/or time frame?

Yes.

8. Please comment on what is considered "reasonable".

Case by case assessment, market practice also taken into account.

9. Will the court more readily enforce a customer-specific restriction rather than a broader non-competition? Please explain.

Yes.

10. Are there any limitations on enforcing the non-competition clause depending on the cause for termination of employment?

No.

11. List the necessary language requirements.

It is required that it be in Polish.

12. List any other requirements of importance.

Limitations regarding releasing employee from obligation not to compete after employment ends.



Labor and Employment Practice Group Non-Competition Survey

Maclay Murray & Spens LLP Scotland

Jane Fraser

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1. Are there classes of employees against whom restrictive covenants may not be enforced? Explain.

No. However, the lower an employee's grade or seniority, the more difficult the enforcement of restrictive covenants becomes (and, indeed, the less likely it is that restrictive covenants will be included in the contract of employment in the first place).

2. Does a change in position, salary or responsibilities affect enforceability?

Yes, particularly if any of these are down-graded (see answer above). Where an employee is promoted or changes responsibilities, restrictive covenants should be reviewed to ensure they provide adequate protection for confidential information & trade connections to which the employee may now be privy because of their elevated or changed status.

3. Are there any requirements for compensation payable in order for the non-competition clause to be enforceable?

Restrictive covenants are most commonly enforced by means of an interdict to prevent an individual from acting in contravention of them. It is not necessary to also make a claim for damages; however, in most cases a damages action will also be raised. Quantification of a damages claim is difficult and will depend on the circumstances of each case.

4. What legal consideration is necessary for enforcement?

Where restrictive covenants are included in a contract from commencement, no specific consideration need be given for them to be enforceable. If amending a contract during employment, continuation of employment can be sufficient consideration, but most often, consideration in the form of a pay rise or payment of a cash sum will be necessary.

5. What employer interests (e.g. trade secrets, customer goodwill) will the court protect?

The primary areas that employers seek to protect are trade connections, customers/clients and suppliers; goodwill; their own workforce; and trade secrets / confidential information. The employer must have a legitimate business interest to protect and the covenant must be no broader than is reasonably necessary for protection of that interest.

6. What interests of the employee will balance the employer's interest?

Covenants not to compete, the sole aim of which is to completely restrict competition, are likely to be unenforceable as contrary to public policy. An employee should not be restricted from using their skills and experience gained while employed.

7. Will the court limit enforcement to a "reasonable" geographic area and/or time frame?

Yes.

8. Please comment on what is considered "reasonable".

The courts will not re-write restrictive covenants found to be too wide in order to make them enforceable. Therefore, consideration needs to be given to geographical scope and time-frame when drafting the restrictions. What is reasonable will depend on the circumstances but broadly, the wider the area the shorter the time limit, & vice versa.

9. Will the court more readily enforce a customer-specific restriction rather than a broader non-competition? Please explain.

Yes. When considering the reasonableness of a restrictive covenant, the court needs to be satisfied that the restriction is no wider than necessary to protect the employer's legitimate interests. Therefore, the narrower the restriction, the more likely it is to be enforced.

10. Are there any limitations on enforcing the non-competition clause depending on the cause for termination of employment?

If the contract is terminated as a result of the employer's breach, the employer can no longer rely on that contract and the employee is released from any restrictive covenants. E.g., it may be that the employer has wrongfully dismissed an employee, or has acted in such a way that the employee is entitled to resign and claim constructive dismissal

11. List the necessary language requirements.

(Did not answer)

12. List any other requirements of importance.

(Did not answer)



Labor and Employment Practice Group Non-Competition Survey

Uría Menéndez
Spain

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- 1. Are there classes of employees against whom restrictive covenants may not be enforced? Explain.**

No .

- 2. Does a change in position, salary or responsibilities affect enforceability?**

Depending whether such change is considered essential or not, its enforceability can be challenged by the employees before the labor courts if they consider that there are not legal reasons to implement the change.

- 3. Are there any requirements for compensation payable in order for the non-competition clause to be enforceable?**

Yes. An adequate compensation must be agreed for the validity of the obligation. The amount of the compensation must be precise and therefore cannot be included within the severance package without a clear breakdown.

- 4. What legal consideration is necessary for enforcement?**

The legal requirements are the following: (i) an actual industrial or commercial interest of the employer; (ii) to agree a concrete duration of the obligation (no more than two years for

qualified employees and six months for non-qualified employees); and (iii) to pay an adequate compensation.

5. What employer interests (e.g. trade secrets, customer goodwill) will the court protect?

Any business interest like: trade secrets, know-how, goodwill and confidential information.

6. What interests of the employee will balance the employer's interest?

Really, if the employer's interests exist and the obligation complies with the legal requirements (adequate compensation in favor of the employee and a limited duration) these covenants are usually declared valid.

7. Will the court limit enforcement to a "reasonable" geographic area and/or time frame?

No.

8. Please comment on what is considered "reasonable".

(Did not answer)

9. Will the court more readily enforce a customer-specific restriction rather than a broader non-competition? Please explain.

Depending on the circumstances, both types of restrictions are declared enforceable. However, it is always advisable to adapt the agreement to specific restrictions instead of drafting a broader one without a clear connection with the employer's interest.

10. Are there any limitations on enforcing the non-competition clause depending on the cause for termination of employment?

No.

11. List the necessary language requirements.

There is not any legal obligation of drafting the agreement in Spanish. However, when using a different language, it will be important to prove that the employee is fluent in such a language to understand its terms and implications.

12. List any other requirements of importance.

(i) The employer cannot unilaterally waive to the enforceability of the obligation. Therefore, it is desirable to avoid the insertion of such obligations as a general practice (ii) It is advisable to agree on the consequences arisen from the breach by the employee establishing an indemnity in favor of the employer.



Labor and Employment Practice Group Non-Competition Survey

F. J. & G. De Saram
Sri Lanka

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- 1. Are there classes of employees against whom restrictive covenants may not be enforced? Explain.**

No, the employment laws in Sri Lanka do not differentiate between classes of workmen. Restrictive covenants on any type of employment are enforceable only on the circumstances of each case. For example unreasonable restrictions will not be enforceable.

- 2. Does a change in position, salary or responsibilities affect enforceability?**

Not applicable/ as explained above the enforceability of non competition clauses/ agreements will depend on the circumstances of the case and the reasonableness of the restriction.

- 3. Are there any requirements for compensation payable in order for the non-competition clause to be enforceable?**

No

- 4. What legal consideration is necessary for enforcement?**

The same consideration necessary for any contract which is defined as a 'right, interest, profit or benefit accruing to one party or some forbearance, detriment, loss or responsibility given suffered or undertaken by the other'.

5. What employer interests (e.g. trade secrets, customer goodwill) will the court protect?

A trade secret that is so important so as to affect the business of the employer could be protected by the court. However such a restraint will only be valid in cases where the nature of employment is such that the customers will either learn to rely upon the skill or judgment of the employee or where the customer deals with him directly and personally.

6. What interests of the employee will balance the employer's interest?

None stipulated by law or case law.

7. Will the court limit enforcement to a "reasonable" geographic area and/or time frame?

Yes.

8. Please comment on what is considered "reasonable".

Generally 3 to 6 months of a specific restriction are enforceable depending on the circumstances of each case. General restrictions are generally unenforceable. Accordingly the test of the validity of a condition in restraint of trade is whether the restraint in the particular employee is general or particular, is or is not reasonable.

9. Will the court more readily enforce a customer-specific restriction rather than a broader non-competition? Please explain.

Yes, the court will more readily enforce a custom specific restriction, this restriction too must be reasonable so as to permit freedom of trade, and the ability for the employee to use his skills.

10. Are there any limitations on enforcing the non-competition clause depending on the cause for termination of employment?

None .

11. List the necessary language requirements.

None

12. List any other requirements of importance.

Courts will not enforce a clause that is so general that it prevents an employee from taking up employment with another employer.



Labor and Employment Practice Group Non-Competition Survey

**Vinge KB, Advokatfirman
Sweden**

Charlotte Johansson
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1. Are there classes of employees against whom restrictive covenants may not be enforced? Explain.

Yes. Typically, restrictive covenants may only be enforced against e.g. CEOs and certain other key employees with specific and unusual access to sensitive information.

2. Does a change in position, salary or responsibilities affect enforceability?

Yes, a change in position can render the clause unenforceable.

3. Are there any requirements for compensation payable in order for the non-competition clause to be enforceable?

Yes. The individual must typically be guaranteed at least 60% of his former salary from the company for the duration of the non-competition undertaking.

4. What legal consideration is necessary for enforcement?

The courts will only enforce reasonable clauses. Reasonability may depend on topical and geographic scope of the clause, the extent to which compensation is being paid, the length of the undertaking, the position of the employee etc.

5. What employer interests (e.g. trade secrets, customer goodwill) will the court protect?

Trade secrets, technical information about the processes etc.

6. What interests of the employee will balance the employer's interest?

The interest to be free to use one's knowledge and experience elsewhere.

7. Will the court limit enforcement to a "reasonable" geographic area and/or time frame?

Yes.

8. Please comment on what is considered "reasonable".

Please see earlier response.

9. Will the court more readily enforce a customer-specific restriction rather than a broader non-competition? Please explain.

Yes. With respect to non-solicitation of customers and colleagues, the court is much more employer-friendly. As long as the undertaking is not extreme in terms of time, no compensation is required for it to be enforced.

10. Are there any limitations on enforcing the non-competition clause depending on the cause for termination of employment?

Typically, non-competition clauses are not enforced in a redundancy situation, or when the contract is terminated by the employee due to a breach of contract on part of the employer.

11. List the necessary language requirements.

There is no specific language requirement.

12. List any other requirements of importance.

Limited time period (typically 12 months, but in extreme cases up to 24 months).
Compensation guarantee of 60% of former salary.



Labor and Employment Practice Group Non-Competition Survey

Pekin & Pekin Turkey

Gulnisa - Coskun

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- 1. Are there classes of employees against whom restrictive covenants may not be enforced? Explain.**

No, there are not any classes of employees set forth under the Turkish Labor Law against whom restrictive covenants may not be enforced. Furthermore, there are not any specific provisions envisaged under the said law regarding restrictive covenants.

- 2. Does a change in position, salary or responsibilities affect enforceability?**

N/A

- 3. Are there any requirements for compensation payable in order for the non-competition clause to be enforceable?**

Subject to the provisions of the Code of Obligations, there are some conditions for the validity of a non-competition clauses (for example, there should be (a) a common understanding that the employee knows the customers and confidential information, (b) a risk that the employee may cause a considerable loss, (c) a reasonable limitation(2 years).

- 4. What legal consideration is necessary for enforcement?**

Same as the requirements as stated above.

5. What employer interests (e.g. trade secrets, customer goodwill) will the court protect?

Customer and confidential information (including trade secrets).

6. What interests of the employee will balance the employer's interest?

N/A

7. Will the court limit enforcement to a "reasonable" geographic area and/or time frame?

Yes.

8. Please comment on what is considered "reasonable".

Under the common practices of the Turkish Competition Board, non-competition provisions may be inserted into the employment contracts for a maximum period of 2 (two) years. The Code of Obligations also stipulates that the prohibition on competition shall be made in writing as a validity condition. (Article 350).

9. Will the court more readily enforce a customer-specific restriction rather than a broader non-competition? Please explain.

No.

10. Are there any limitations on enforcing the non-competition clause depending on the cause for termination of employment?

A non-competition clause shall terminate upon determination of the non-existence of any interest of the employer worthy of such protection. Besides, if the employment contract has been terminated by the employer on invalid and unjustifiable grounds, no lawsuit can be filed against the employee for breach of such clause.

11. List the necessary language requirements.

There is not any specific language or any specific wording requirements. The main issue is to have a written non-competition clause. However, the agreements between Turkish parties have to be in Turkish language as a validity condition.

12. List any other requirements of importance.

Please note since the non-competition covenants are not regulated by the Turkish Labor Law, the relevant provisions of the Code of Obligations shall apply and in some cases, such clauses may be weak to protect the employer's interest.



Labor and Employment Practice Group Non-Competition Survey

Maynard, Cooper & Gale, P.C.
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Warren Lightfoot

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- 1. Are there classes of employees against whom restrictive covenants may not be enforced? Explain.**

Yes, professionals and individuals who perform only simple labor skills.

- 2. Does a change in position, salary or responsibilities affect enforceability?**

Not sure how to interpret this. To the extent it relates to consideration, continued employment is adequate consideration to support a covenant in Alabama so additional consideration should only strengthen enforceability.

- 3. Are there any requirements for compensation payable in order for the non-competition clause to be enforceable?**

No, continued employment is adequate consideration in Alabama.

- 4. What legal consideration is necessary for enforcement?**

Continued employment.

5. What employer interests (e.g. trade secrets, customer goodwill) will the court protect?

Trade secrets/confidential information and customer goodwill/relationships are the two most prevalent protectable interests. Significant employee training can also be a protectable interest but it usually overlaps with the first two.

6. What interests of the employee will balance the employer's interest?

A factor in enforceability is whether enforcement will cause "undue hardship" to the employee, meaning whether they have any transferable skills, whether they have only worked in 1 industry, age, family obligations, other available jobs outside the restriction, how long they were employed, what they brought to the table when employed, etc.

7. Will the court limit enforcement to a "reasonable" geographic area and/or time frame?

Yes.

8. Please comment on what is considered "reasonable".

That is determined on a case by case basis. Sometimes that is a tow county or 50 mile radius, sometimes it is statewide, and it could even be a nationwide enforcement. The key is how far the employer's protectable interests go.

9. Will the court more readily enforce a customer-specific restriction rather than a broader non-competition? Please explain.

Yes. Courts much prefer to enforce a non-solicitation agreement than a non-compete agreement because it gives the employee a chance to still make a living in his or her chosen industry.

10. Are there any limitations on enforcing the non-competition clause depending on the cause for termination of employment?

Technically, no. Practically speaking, it makes a court more likely to want to enforce any covenant in a way that is more employee friendly.

11. List the necessary language requirements.

There is no magic language required in Alabama.

12. List any other requirements of importance.

In the employee/employer context, the agreement must be signed during the employment relationship, but not before it starts to be enforceable.



Labor and Employment Practice Group Non-Competition Survey

**Rose Law Firm
U.S.A., Arkansas**

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- 1. Are there classes of employees against whom restrictive covenants may not be enforced? Explain.**

The right of a lawyer to practice law cannot be restricted by a covenant not to compete.

- 2. Does a change in position, salary or responsibilities affect enforceability?**

No.

- 3. Are there any requirements for compensation payable in order for the non-competition clause to be enforceable?**

No.

- 4. What legal consideration is necessary for enforcement?**

Employment, when a covenant is signed at inception of employment, and continued employment, when covenant is signed after employment relationship has begun, have both been held to be sufficient consideration for a covenant not to compete.

- 5. What employer interests (e.g. trade secrets, customer goodwill) will the court protect?**

In Arkansas, covenants not to compete are enforceable only if they protect a legitimate business interest. Customer lists, trade secrets, special training, and confidential business information are considered legitimate business interests.

6. What interests of the employee will balance the employer's interest?

An Arkansas court may consider the employee's ability to earn a living and the extent of the restraint on that ability. The employee's education level, length of time in the relevant line of work, and other factors affecting the employee's ability to do other work may be considered.

7. Will the court limit enforcement to a "reasonable" geographic area and/or time frame?

Yes.

8. Please comment on what is considered "reasonable".

Arkansas courts examine the entire agreement to determine its reasonableness. Courts, however, routinely reject duration restrictions of more than two years. Courts also consider whether a geographical restraint is greater than the area in which the employee worked and if it exceeds the employers' trade area

9. Will the court more readily enforce a customer-specific restriction rather than a broader non-competition? Please explain.

Generally, a covenant should contain a geographic limitation. Courts have, however, allowed customer restrictions to replace geographic limitations in some circumstances.

10. Are there any limitations on enforcing the non-competition clause depending on the cause for termination of employment?

If the employer terminates the employee without cause, the covenant may be unenforceable. The Arkansas Supreme Court has stated that "an employer cannot use this type of contract as a subterfuge to rid himself of a possible future competitor."

11. List the necessary language requirements.

There is no specific language that Arkansas requires before a covenant not to compete is enforceable. However, if the covenant as drafted by the parties is unenforceable, Arkansas courts will not alter a covenant not to compete to make it enforceable.

12. List any other requirements of importance.

In Arkansas, covenants not to compete are analyzed on a case-by-case basis.



Labor and Employment Practice Group Non-Competition Survey

**Murtha Cullina LLP
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- 1. Are there classes of employees against whom restrictive covenants may not be enforced? Explain.**

No however, the more specialized and highly-paid the employee, the greater the prospects that a court will find a "protectable interest" justifying enforcement.

- 2. Does a change in position, salary or responsibilities affect enforceability?**

Generally no however, one CT case recently cited MA law for the proposition that a change in position may make the original agreement unenforceable.

- 3. Are there any requirements for compensation payable in order for the non-competition clause to be enforceable?**

Not at the time of termination. However, there must be "consideration", which can be the job itself at the time of hire, and a later bonus or other incentive pay during employment and at the time the non-compete is entered into. There is a split in CT on whether continuing the employment relationship is sufficient consideration.

- 4. What legal consideration is necessary for enforcement?**

See above.

5. What employer interests (e.g. trade secrets, customer goodwill) will the court protect?

CT courts do not dwell on a "protectable interest" analysis but customer relationship, goodwill, trade secrets are recognized interests. More generally, CT courts enforce covenants that are reasonable in geographical and time constraints, given the market the employer operates in.

6. What interests of the employee will balance the employer's interest?

The former employee has a right to make a living. If the restriction renders her virtually unemployable in her chosen field or profession, and she would not likely find other work at a similar compensation level, the restriction won't likely be enforced.

7. Will the court limit enforcement to a "reasonable" geographic area and/or time frame?

Yes.

8. Please comment on what is considered "reasonable".

The reasonableness of the geographic restriction depends on the employer's market for its products or services. The restriction must match the market area the company operates in. Generally, a time restriction of 12-18 months will be enforced and sometimes longer. There is a two year restriction on soliciting the employer's customers only are likely enforced.

9. Will the court more readily enforce a customer-specific restriction rather than a broader non-competition? Please explain.

Yes. See above.

10. Are there any limitations on enforcing the non-competition clause depending on the cause for termination of employment?

No.

11. List the necessary language requirements.

Not applicable.



Labor and Employment Practice Group Non-Competition Survey

Richards, Layton & Finger, P.A.
U.S.A., Delaware

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1. Are there classes of employees against whom restrictive covenants may not be enforced? Explain.

Yes, physicians. (24 Del. C. Sec. 1761). Any restrictive covenant for physicians is void. A liquidated damages provision may exist that provides for damages if a physician practices in a restricted area. Also, restrictive covenants are not routinely enforced against entry-level employees with very little access to confidential information.

2. Does a change in position, salary or responsibilities affect enforceability?

It can. Whether a restrictive covenant is enforceable assuming it is included in an otherwise valid contract, depends on its scope in terms of geography, length of time, and whether enforcement advances a legitimate economic interest of the party seeking enforcement. It is a question of reasonableness in relation to the facts and agreed upon terms.

3. Are there any requirements for compensation payable in order for the non-competition clause to be enforceable?

No; not in Delaware. However, compensation may be a factor in determining reasonableness.

4. What legal consideration is necessary for enforcement?

In general, a change in the terms and/or conditions of employment constitutes sufficient consideration. Also, employment and continued employment are sufficient legal consideration for enforcement of a restrictive covenant against an at-will employee. In addition, a merit bonus or an annual increase constitutes sufficient consideration.

5. What employer interests (e.g. trade secrets, customer goodwill) will the court protect?

Generally, Delaware courts will protect the employer's trade secrets, customer good will, customer list, and other proprietary information in which the employer has a legitimate economic interest. Delaware has a specific trade secret act. 6 Del. C. Sec. 2001 et seq.

6. What interests of the employee will balance the employer's interest?

These interests (i.e., trade secrets, good will, customer list, etc.) will be balanced against the employee's need to earn a livelihood.

7. Will the court limit enforcement to a "reasonable" geographic area and/or time frame?

Yes.

8. Please comment on what is considered "reasonable".

Reasonableness depends on the circumstances. The courts will look at the legitimate economic interests of the employer. If an employer's client base is international, it may be reasonable for the employee to be restricted from working for any direct competitor anywhere for a certain period of time (e.g., up to 2 years is usually reasonable).

9. Will the court more readily enforce a customer-specific restriction rather than a broader non-competition? Please explain.

Both can be enforceable if otherwise reasonable. Customer-specific restrictions may make it easier to prove reasonableness or, at a minimum, may reduce disputes between the parties.

10. Are there any limitations on enforcing the non-competition clause depending on the cause for termination of employment?

Generally no; rather, it will usually depend on the terms of the restrictive covenant.

11. List the necessary language requirements.

There is no specific language requirement. The restrictive covenant must (1) meet general contract law requirements, (2) be reasonable geographically and temporally, (3) advance a legitimate economic interest of the party that seeks to enforce the covenant, and (4) survive a balance of the equities test.

12. List any other requirements of importance.

Blue pencil provisions are generally advised, although Delaware courts have rewritten provisions to narrow the scope without specific language in the contract authorizing such.



Labor and Employment Practice Group Non-Competition Survey

**Akerman Senterfitt
U.S.A., Florida**

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1. Are there classes of employees against whom restrictive covenants may not be enforced? Explain.

Yes. Restrictive covenants may not be enforced against attorneys pursuant to the Florida Rules of Professional Conduct. Restrictive covenants may not be enforced against certified and court-appointed mediators pursuant to the Florida Rules for Certified and Court-Appointed mediators.

2. Does a change in position, salary or responsibilities affect enforceability?

Possibly. Florida courts must consider all pertinent legal and equitable defenses to the enforcement of a restrictive covenant pursuant to Florida Statute 542.335(1) (g). If, for example, such a change constitutes a breach of the employment agreement or causes the employee to resign, the change could affect enforceability.

3. Are there any requirements for compensation payable in order for the non-competition clause to be enforceable?

There is no such specific requirement. However, in order for a non-competition clause to be enforceable, mutual promises binding on both the employer and the employee (e.g., continued employment, salary increase, or agreement to pay commissions) must exist.

4. What legal consideration is necessary for enforcement?

The only legal consideration necessary for enforcement is the existence of binding mutual promises. For example, in an at-will situation, continued employment is sufficient consideration even if the restrictive covenant is entered into after the commencement of the employment relationship.

5. What employer interests (e.g. trade secrets, customer goodwill) will the court protect?

Under Florida statute 542.335(1) (b), courts will protect an employer's "legitimate business interests" which include but are not limited to: trade secrets; other valuable confidential business information; substantial relationships with specific prospective or existing customers; customer goodwill; and specialized training.

6. What interests of the employee will balance the employer's interest?

Courts will consider whether a restrictive covenant is overly broad or otherwise not reasonably necessary to protect the employer's legitimate business interests and whether the covenant contains reasonable geographic and time restrictions. Florida's statute also requires courts to consider the effect on public health, safety, and welfare.

7. Will the court limit enforcement to a "reasonable" geographic area and/or time frame?

Yes.

8. Please comment on what is considered "reasonable".

Under Florida's statute, covenants up to 6 months are presumed reasonable and unreasonable if they exceed 2 years. In a sale of business, covenants up to 3 years are presumed reasonable and unreasonable if they exceed 7 years. To protect trade secrets, covenants up to 5 years are presumed reasonable and unreasonable if they exceed 10 years.

9. Will the court more readily enforce a customer-specific restriction rather than a broader non-competition? Please explain.

There is no bright line rule in Florida. Instead, courts will focus on whether the non-competition clause is reasonable and, therefore, have allowed customer-specific restrictions to complement geographic restrictions. Florida courts will also limit an overly broad non-competition clause to certain geographic areas or customers.

10. Are there any limitations on enforcing the non-competition clause depending on the cause for termination of employment?

Yes. An employer who has breached the employment agreement may not enforce a non-competition clause against the employee. Florida courts have also held that an employer who wrongfully terminates an employee may not enforce a non-competition clause.

11. List the necessary language requirements.

There are no specific language requirements under the Florida non-compete statute.

12. List any other requirements of importance.

In a situation where an employer's assignee, successor, or third-party beneficiary seeks to enforce a restrictive covenant, Florida's non-compete statute states that the covenant must expressly authorize enforcement by the assignee, successor, or third-party beneficiary.



Labor and Employment Practice Group Non-Competition Survey

Blair Sterling Johnson Martinez & Leon G U.S.A., Guam

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- 1. Are there classes of employees against whom restrictive covenants may not be enforced? Explain.**

Under 18 GCA 88105 contracts by which anyone is restrained from exercising a lawful profession, trade or business of any kind is void and unenforceable, subject to limited exceptions. This statute was borrowed from former Cal Civ. C 1673 (now codified as Cal. B&P Code 16600). Guam courts look to California legal decisions for guidance.

- 2. Does a change in position, salary or responsibilities affect enforceability?**

No.

- 3. Are there any requirements for compensation payable in order for the non-competition clause to be enforceable?**

No; employee non-competition clauses generally illegal and unenforceable.

- 4. What legal consideration is necessary for enforcement?**

Not applicable.

- 5. What employer interests (e.g. trade secrets, customer goodwill) will the court protect?**

Trade secrets, confidential customer lists, arrangements with existing employees.

6. What interests of the employee will balance the employer's interest?

The right to engage in a lawful profession or trade will balance the interests of both parties.

7. Will the court limit enforcement to a "reasonable" geographic area and/or time frame?

No.

8. Please comment on what is considered "reasonable".

(Did not answer)

9. Will the court more readily enforce a customer-specific restriction rather than a broader non-competition? Please explain.

Possibly, if necessary to protect trade secrets other confidential information.

10. Are there any limitations on enforcing the non-competition clause depending on the cause for termination of employment?

No.

11. List the necessary language requirements.

Not applicable.

12. List any other requirements of importance.

As stated, employee non-compete clauses generally unenforceable.



Labor and Employment Practice Group Non-Competition Survey

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- 1. Are there classes of employees against whom restrictive covenants may not be enforced? Explain.**

Attorneys, pursuant to the Bar Rules.

- 2. Does a change in position, salary or responsibilities affect enforceability?**

Probably not but there is no case law directly on point.

- 3. Are there any requirements for compensation payable in order for the non-competition clause to be enforceable?**

No. Covenants may be made a condition of employment. Continued employment is probably sufficient consideration as well although there is no case that directly supports this.

- 4. What legal consideration is necessary for enforcement?**

Initial employment, continued employment, cash payments, salary increases, promotions, etc.

- 5. What employer interests (e.g. trade secrets, customer goodwill) will the court protect?**

Maine courts will protect an employer's "legitimate business interests."

6. What interests of the employee will balance the employer's interest?

Maine courts will enforce a covenant only to the extent it is reasonably necessary to protect legitimate business interests and will not enforce a covenant that deprives the employee of the ability to make a living.

7. Will the court limit enforcement to a "reasonable" geographic area and/or time frame?

Yes

8. Please comment on what is considered "reasonable".

Three years and 25 miles have been considered to be "reasonable" restrictions. The Maine courts also will enforce non-solicitation provisions in lieu of geographic or time restrictions and will enforce a restriction that is written in an unreasonable way so long as the enforcement effort is reasonable.

9. Will the court more readily enforce a customer-specific restriction rather than a broader non-competition? Please explain.

Yes. Customer-specific restrictions are readily enforceable. Maine courts will only enforce covenants to the extent that they are necessary to protect a legitimate business interest, and it is often easier to demonstrate the need for a customer-specific restriction than a broader non-compete.

10. Are there any limitations on enforcing the non-competition clause depending on the cause for termination of employment?

No.

11. List the necessary language requirements.

Restrictive covenants are interpreted in the same way as any other contract.

12. List any other requirements of importance.

None. Maine's law is fairly straight forward and comparable to generally accepted norms in other states.



Labor and Employment Practice Group Non-Competition Survey

Foley Hoag LLP U.S.A., Massachusetts

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1. Are there classes of employees against whom restrictive covenants may not be enforced? Explain.

In Massachusetts, non-competes are not enforceable against physicians, nurses and lawyers. See M.G.L. c. 112, s. 12X (physicians); M.G.L. c. 112, s. 74D (nurses); S.J.C. Rule 3:07 at 5.6; Meehan v. Shaughnessy, 404 Mass. 419 (1989) (lawyers). Broadcasting industry employees are also generally exempt from non-competes. See M.G.L. c. 149, s.186.

2. Does a change in position, salary or responsibilities affect enforceability?

It may. In three 2004 MA Sup. Ct. cases, non-compete agreements were not enforced against former employees because of changed jobs/responsibilities after the execution of the non-compete. See Cypress Group, Inc. v. Stride & Assoc., Inc., 17 Mass. L. Rep. 436; R.E. Moulton, Inc. v. Lee, 18 Mass. L. Rep.; Lycos, Inc. v. Jackson, 18 Mass. L. Rep. 256.

3. Are there any requirements for compensation payable in order for the non-competition clause to be enforceable?

In Massachusetts, there is no specific level of compensation required to ensure the enforceability of a non-compete agreement. There is also no general requirement that an employer provide a new employee signing a non-compete with any compensation above and beyond his/her wages/salary and benefits.

4. What legal consideration is necessary for enforcement?

In Massachusetts, a non-compete executed before or at the beginning of employment is generally supported by sufficient consideration (the consideration of employment). There is conflicting case law regarding whether or not continued employment pursuant to the same terms is sufficient consideration for a non-compete signed mid-employment.

5. What employer interests (e.g. trade secrets, customer goodwill) will the court protect?

In Massachusetts, employee non-competes are generally enforceable only to the extent they seek to protect (1) the employer's goodwill (which generally stems from customer relationships), (2) trade secrets, and/or (3) confidential information. Whether or not a customer list constitutes protectable confidential information is a fact-specific inquiry.

6. What interests of the employee will balance the employer's interest?

In Massachusetts, employees must be allowed to use general skills and knowledge acquired during their employment in a new job. Geographic restrictions that cover large areas and lengthy periods of restricted work activity are disfavored unless supported by specific evidence of employer need.

7. Will the court limit enforcement to a "reasonable" geographic area and/or time frame?

Yes

8. Please comment on what is considered "reasonable".

Whether or not a geographic restriction is reasonable is determined on a case-by-case basis. Generally the restriction must be limited to areas in which the former employer does business. Whether or not the restricted time period is reasonable is also a case-by-case inquiry. Restrictions lasting longer than 5 years are generally disfavored.

9. Will the court more readily enforce a customer-specific restriction rather than a broader non-competition? Please explain.

Massachusetts courts will enforce both customer-specific and geography based non-competes as long as they meet the following general criteria of enforceability: (1) necessary to protect a

legitimate business interest; (2) reasonable in scope and time; (3) supported by consideration; and (4) consistent with public interest.

10. Are there any limitations on enforcing the non-competition clause depending on the cause for termination of employment?

Massachusetts courts will determine whether the termination was conducted arbitrarily or in bad faith. A lawful termination of an at-will employee generally does not bar enforcement of a non-compete.

11. List the necessary language requirements.

There is no specific prescribed language for non-compete agreements. However, non-competes must be narrowly drafted to protect a legitimate employer interest.

12. List any other requirements of importance.

(Did not answer)



Labor and Employment Practice Group Non-Competition Survey

Butzel Long
U.S.A., Michigan

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- 1. Are there classes of employees against whom restrictive covenants may not be enforced? Explain.**

Attorney; this is governed by the Ethics Rules.

- 2. Does a change in position, salary or responsibilities affect enforceability?**

This issue has not been decided in Michigan; however, continuing employment constitutes sufficient consideration when the employer is not already contractually obligated to retain the employee.

- 3. Are there any requirements for compensation payable in order for the non-competition clause to be enforceable?**

No.

- 4. What legal consideration is necessary for enforcement?**

Continuation of at-will employment constitutes sufficient consideration.

- 5. What employer interests (e.g. trade secrets, customer goodwill) will the court protect?**

Legitimate business interests include: the protection of confidential information and trade secrets (e.g., customer lists, profit margins, pricing schemes, etc.), the protection of customer goodwill, and the prevention of former employees from soliciting the employer's customers.

6. What interests of the employee will balance the employer's interest?

In weighing the equities, the courts will consider the ability of the former employee to work and gain a livelihood. There is a Sixth Circuit decision (not from Michigan) suggesting that unclean hands (such as some sort of inequitable termination) on the employer's part may prevent the enforcement of a non-compete agreement.

7. Will the court limit enforcement to a "reasonable" geographic area and/or time frame?

Yes.

8. Please comment on what is considered "reasonable".

Restrictive covenants with durations of up to 3 years have been upheld; and covenants with unlimited, national and/or international geographic scope have been upheld where the evidence demonstrates that the employer's business is national and/or international in scope.

9. Will the court more readily enforce a customer-specific restriction rather than a broader non-competition? Please explain.

Yes. A reasonable customer-specific restriction would be deemed more tailored, and therefore more reasonable, in scope than a broader non-compete restriction.

10. Are there any limitations on enforcing the non-competition clause depending on the cause for termination of employment?

This remains an open issue with the appellate courts in Michigan. The courts have addressed the narrow issue of whether a restrictive covenant that only takes effect with "voluntary termination" could be applied to a terminated employee and have held that it could not be enforced against the terminated employee by its own language. (See also #11)

11. List the necessary language requirements.

It must include reasonable terms as to the duration and scope of activity or line of business from which the employee is restricted. Unlimited geographic scope is not detrimental to enforcement if the employer's business is national and/or international in scope. A reasonable customer restriction can take the place of the geographic restriction.

12. List any other requirements of importance.

If any of the requirements are deemed unreasonable by the courts, the courts have the discretion to modify those terms (e.g., geographic scope, activity limitation, or the duration) that are unreasonable in order to make them reasonable.



Labor and Employment Practice Group Non-Competition Survey

Baird Holm LLP
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1. Are there classes of employees against whom restrictive covenants may not be enforced? Explain.

Nebraska's rules of professional conduct preclude enforcement of a non-compete agreement against attorneys.

2. Does a change in position, salary or responsibilities affect enforceability?

A change in position, salary, or other term or condition of employment will supply sufficient consideration to support a non-compete agreement. *C&L Indus., Inc. v. Kiviranta*, 698 N.W.2d 240, 249 (Neb. 2005) (executed with pay increase and annual evaluation); *Dana F. Cole*, 211 Neb. 903, 320 N.W.2d 916 (1982) (signed when undertook management duties).

3. Are there any requirements for compensation payable in order for the non-competition clause to be enforceable?

No. Continued employment is sufficient consideration for a non-compete agreement. *Polly v. Ray. D. Hilderman & Co.*, 407 N.W.2d 751 (Neb. 1987); *Securities Acceptance Corp v. Brown*, 106 N.W.2d 456 (Neb. 1960); See also *Bargstadr v. Immanuel Medical Center*, 1992 WL 321721 at 4 (Neb. Ct. App. 1992 (unpublished)).

4. What legal consideration is necessary for enforcement?

See above.

5. What employer interests (e.g. trade secrets, customer goodwill) will the court protect?

An employer has a legitimate interest to protect confidential and trade secret information for its useful life. *Brockley v. Lozier Corp.*, 488 N.W.2d 556, 564 (Neb. 1992). The employer also may protect its good will in customer relationships from unfair competition. *C&L Indus., Inc. v. Kiviranta*, 698 N.W.2d 240, 249 (Neb. 2005).

6. What interests of the employee will balance the employer's interest?

An employer may not protect against "ordinary competition." It is critical that the non-compete agreement only restrict a former employee from soliciting or working with customers of the employer "with whom the former employee actually did business and had personal contact." *Terry D. Whitten, D.D.S., P.C. v. Malcolm*, 541 N.W.2d 45, 48 (1995).

7. Will the court limit enforcement to a "reasonable" geographic area and/or time frame?

Yes.

8. Please comment on what is considered "reasonable".

A customer rather than geographic limitation is the best way to ensure enforceability. Time limitations of one year are typically reasonable, two to three years less so. There are ten factors the court will consider to determine the reasonableness of time and geographic limits. *Mertz v. Pharmacists Mut. Ins. Co.*, 625 N.W.2d 197, 205-06 (2001).

9. Will the court more readily enforce a customer-specific restriction rather than a broader non-competition? Please explain.

Yes. Except in cases of the sale of a business, the Court will not enforce a non-compete agreement which extends to customers (or noncustomers) with whom the employee actually did business AND had personal contact.

10. Are there any limitations on enforcing the non-competition clause depending on the cause for termination of employment?

The courts have not addressed this issue. However, the Supreme Court of Nebraska held that an employer could state a claim for breach of a covenant not to compete against an employee whose employment it had terminated. *Professional Bus. Servs. Co. v. Rosno*, 589 N.W.2d 826, 828 (1999).

11. List the necessary language requirements.

See previous section.

12. List any other requirements of importance.

Nebraska courts will not blue pencil invalid non-compete agreements to make them enforceable. *Terry D. Whitten, D.D.S., P.C. v. Malcolm*, 541 N.W.2d 45, 47 (1995). Courts generally will not sever the unenforceable non-compete agreements from enforceable portions. *H&R Block Tax Ser. v. Circle A Ent.*, 693 N.W.2d 548, 543 (Neb. 2006).



Labor and Employment Practice Group Non-Competition Survey

Lynn, Jackson, Shultz & Lebrun, P.C.
U.S.A., South Dakota

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- 1. Are there classes of employees against whom restrictive covenants may not be enforced? Explain.**

No.

- 2. Does a change in position, salary or responsibilities affect enforceability?**

No.

- 3. Are there any requirements for compensation payable in order for the non-competition clause to be enforceable?**

No.

- 4. What legal consideration is necessary for enforcement?**

Ongoing employment is sufficient consideration.

- 5. What employer interests (e.g. trade secrets, customer goodwill) will the court protect?**

Courts will protect trade secrets, customer lists, goodwill, and other confidential or proprietary information. Generally, unless employee is terminated without cause, employer is not required to prove enforcement is reasonably necessary to protect business interests.

6. What interests of the employee will balance the employer's interest?

Absent terminations without cause, Court will generally enforce and no need for a balancing test. If employee is terminated without cause, Court will review whether provision is reasonable, considering the extent of restraints, nature of business involved, and public's interests in employee's being able to continue in that field.

7. Will the court limit enforcement to a "reasonable" geographic area and/or time frame?

No

8. Please comment on what is considered "reasonable".

(Did not answer)

9. Will the court more readily enforce a customer-specific restriction rather than a broader non-competition? Please explain.

Yes, but in most situations (absent termination without cause) Court will enforce either/both so long as provision complies with requirements of South Dakota's non-compete statute SDCL 53-9-11.

10. Are there any limitations on enforcing the non-competition clause depending on the cause for termination of employment?

Yes. If termination is without cause Court will go through a balancing test to determine if reasonable. *Central Monitoring Service v. Zakinski*, 553 NW2d 513 (SD 1996).

11. List the necessary language requirements.

Employee may agree before or during employment not to engage directly or indirectly in same business as that of his employer and not to solicit existing customers of the employer within a specified area for a period not exceeding two years from end of employment, if employer carries on a like business therein. SDCL 53-9-11.

12. List any other requirements of importance.

As you can probably tell, South Dakota is generally employer friendly on non-compete agreements.



Labor and Employment Practice Group Non-Competition Survey

Davis Wright Tremaine LLP U.S.A., Washington

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1. Are there classes of employees against whom restrictive covenants may not be enforced? Explain.

By state statute, non-compete restrictions may not be enforced against certain types of employees in the broadcasting industry. Otherwise, restrictive covenants may be enforced against most classes of employees as long as the employer has a legitimate protectable interest. That may be hard to prove with respect to lower-level employees.

2. Does a change in position, salary or responsibilities affect enforceability?

Generally not, as long as the covenant was supported by adequate consideration at the time it was initially entered into, it will be enforceable to some extent. Changes in the employee's position or responsibilities may, however, affect the extent to which the restrictions are deemed to be reasonable, which will impact enforceability.

3. Are there any requirements for compensation payable in order for the non-competition clause to be enforceable?

Non-competition clauses must either be entered into at the beginning of employment or otherwise supported by independent consideration to the employee --such as a promotion, bonus, or stock grant -- in order to be enforceable in Washington.

4. What legal consideration is necessary for enforcement?

Non-competition clauses must either be entered into at the beginning of employment or otherwise supported by independent consideration to the employee --such as a promotion, bonus, or stock grant -- in order to be enforceable in Washington.

5. What employer interests (e.g. trade secrets, customer goodwill) will the court protect?

Washington courts will recognize protection of trade secrets or other confidential or proprietary information, as well as customer goodwill and relationships, as legitimate interests which can be protected by restrictive covenants.

6. What interests of the employee will balance the employer's interest?

Any restrictions must be reasonable and no broader than necessary to protect the employer's legitimate interests. As a practical matter, the employee's ability to obtain other employment, the circumstances of his or her employment termination, and the extent to which the covenants imposes an undue hardship on the employee, will also be considered.

7. Will the court limit enforcement to a "reasonable" geographic area and/or time frame?

Yes

8. Please comment on what is considered "reasonable".

Generally, a time period of 1-2 years will be considered reasonable. Geographic restrictions must typically be limited to those areas where the former employer was doing business, and in some cases, where the former employee individually was working or had confidential information about.

9. Will the court more readily enforce a customer-specific restriction rather than a broader non-competition? Please explain.

Yes. Restrictions which prohibit the former employee from soliciting customers of the old employer, or alternatively those customers the former employee dealt with, are significantly more likely to be enforced than a broader clause which restricts any competition.

10. Are there any limitations on enforcing the non-competition clause depending on the cause for termination of employment?

If the employee's termination breaches an employment agreement, a non-competition clause will generally not be enforced.

11. List the necessary language requirements.

No specific language is required.

12. List any other requirements of importance.

None



Labor and Employment Practice Group Non-Competition Survey

Guyer & Regules Uruguay

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- 1. Are there classes of employees against whom restrictive covenants may not be enforced? Explain.**

No, there isn't. Books of authority assure that, non compete obligation to be enforced has to be specifically agreed by the parties, the employee must receive a compensation for such obligation, and the term of the non compete after termination of the labor relationship has to be no longer than 36 months.

- 2. Does a change in position, salary or responsibilities affect enforceability?**

No.

- 3. Are there any requirements for compensation payable in order for the non-competition clause to be enforceable?**

The compensation should be proportional to the duration of the non-compete obligation and to the employee's salary.

- 4. What legal consideration is necessary for enforcement?**

The above mentioned considerations.

5. What employer interests (e.g. trade secrets, customer goodwill) will the court protect?

Those that are specifically established by the parties in the non-compete agreement.

6. What interests of the employee will balance the employer's interest?

Idem.

7. Will the court limit enforcement to a "reasonable" geographic area and/or time frame?

Yes

8. Please comment on what is considered "reasonable".

A reasonable term is no more than 36 months. And reasonable geographic areas are countries of the same area than the one of the employer (i.e. for Uruguay the area may be Argentina, Brazil, Paraguay and Chile).

9. Will the court more readily enforce a customer-specific restriction rather than a broader non-competition? Please explain.

If the above mention consideration are fulfilled it will be the same.

10. Are there any limitations on enforcing the non-competition clause depending on the cause for termination of employment?

No.

11. List the necessary language requirements.

It has to be in Spanish.

12. List any other requirements of importance.

The agreement has to be signed at the time the employee is hired or at the time of termination. It is signed at the time of termination is convenient to include that the employee signs with the advice of his lawyer.



Labor and Employment Practice Group Non-Competition Survey

Hoet Pelaez Castillo & Duque Venezuela

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- 1. Are there classes of employees against whom restrictive covenants may not be enforced? Explain.**

Enforceability of restrictive covenant does not depend on the class of employee but rather on the terms of the covenant itself.

- 2. Does a change in position, salary or responsibilities affect enforceability?**

No.

- 3. Are there any requirements for compensation payable in order for the non-competition clause to be enforceable?**

No.

- 4. What legal consideration is necessary for enforcement?**

Non competition covenants are rarely enforced as they can be regarded as unconstitutional by a local court of law. Therefore, this type of covenant must be limited in time and scope.

- 5. What employer interests (e.g. trade secrets, customer goodwill) will the court protect?**

The court can protect trade secrets and customer goodwill.

6. What interests of the employee will balance the employer's interest?

The constitutional right to work.

7. Will the court limit enforcement to a "reasonable" geographic area and/or time frame?

Yes

8. Please comment on what is considered "reasonable".

The court will take in consideration the age of the employee, skills, position at the company.

9. Will the court more readily enforce a customer-specific restriction rather than a broader non-competition? Please explain.

Not applicable.

10. Are there any limitations on enforcing the non-competition clause depending on the cause for termination of employment?

No.

11. List the necessary language requirements.

No specific language requirement exists for restrictive covenants as long as the agreement of the employee can be evidenced.

12. List any other requirements of importance.

(Did not answer)