New York

Non-Competes

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Return to book table of contents

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1. Enforcement - General

Under what circumstances will a New York court enforce a non-compete agreement?

In New York, the law looks with disfavor upon restrictive covenants-not-to-compete because they inhibit free competition. As a result, courts carefully scrutinize covenants-not-to-compete and narrowly construe them to limit their broad enforcement.

To determine the validity of an employee agreement not to compete, New York courts have adopted the modern, prevailing common-law standard of reasonableness, which applies a three-pronged test. A restraint is reasonable only if it: (1) is *no greater* than is required for the protection of the *legitimate interest* of the employer, (2) does not impose undue hardship on the employee, and (3) is not injurious to the public. *BDO Seidman v. Hirshberg*, 93 N.Y.2d 382, 388-89, 690 N.Y.S.2d 854 (1999); *Riedman Corp. v. Gallager*, 48 A.D.3d 1188, 852 N.Y.S.2d 510, 511-12 (4th Dep't 2008). A violation of any prong renders the covenant invalid.

Thus, "a restrictive covenant will only be subject to specific enforcement to the extent that it is reasonable in time and area, necessary to protect the employer's legitimate interests, not harmful to the general public and not unreasonably burdensome to the employee." *BDO Seidman*, 93 N.Y.2d at 389, citing *Reed, Roberts Associates v. Strauman,* 40 N.Y.2d 303, 307, 386 N.Y.S.2d 677 (1976); *Zinter Handling, Inc. v. Britton*, 46 A.D.3d 998, 1001, 847 N.Y.S.2d 271, 274 (3d Dep't 2007). Courts must therefore consider the type and breadth of the restriction, as well as the nature of the business or service involved. *Arthur Young & Co. v. Galasso,* 142 Misc.2d 738, 743, 538 N.Y.S.2d 424, 428 (Sup.Ct., New York County 1989).

2. Protectable interests

Define the legitimate or protectable interests that give rise to enforcement of a non-compete agreement or other restrictive covenant.

Provided that a court determines a restrictive covenant is reasonable, it will typically address two competing interests: 1) the protection of the employer, and the employer's good faith in training or sharing secrets with the employee; and 2) the employee's ability to work in his or her chosen field of endeavor.

Employer-employee relationship

New York courts have held that an employer generally has three protectable interests that, if present, will render a restrictive covenant not to compete valid.

First, an employer has a legitimate interest in preventing the disclosure or use of trade secrets or confidential information. *BDO Seidman*, 93 N.Y.2d at 389; *Reed, Roberts Associates*, 40 N.Y.2d at 307; *Riedman Corp.,* 48 A.D.3d at 1188, 852 N.Y.S.2d at 512. A trade secret has been defined as "any formula, pattern, device or compilation of information which is used in one's business, and which gives him [or her] an opportunity to obtain an advantage over competitors who do not know or use it." *Moser v. Devine Real Estate, Inc. (Florida)*, 42 A.D.3d 731, 736, 839 N.Y.S.2d 843, 849 (3d Dep't 2007), citing, *Ashland Management, Inc. v. Janien*, 82 N.Y.2d 395, 407, 604 N.Y.S.2d 912 (1993).

In determining what information constitutes a trade secret, New York courts consider six factors: (1) the extent to which the information is known outside of the business; (2) the extent to which it is known by employees and others involved in the business; (3) the extent of measures taken by the business to guard the secrecy of the information; (4) the value of the information to the business and its competitors; (5) the amount of effort or money expended by the business in developing the information; and (6) the ease or difficulty with which the information could be properly acquired or duplicated by others. *Ashland Management*, 82 N.Y.2d at 407.

Implicit in the aforementioned analysis, is the premise that an employer cannot restrict information that is easily accessible or commonly known. For example, customer lists will not typically qualify as protectable interests or trade secrets, at least where such customers are readily ascertainable from sources outside the former employee's business. *Briskin v. All Seasons Services, Inc*., 206 A.D.2d 906, 615 N.Y.S.2d 166, 167 (4th Dep't 1994).

Second, an employer may legitimately seek to protect itself from competition by a former employee where the employee's services are unique or extraordinary. *BDO Seidman*, New York's leading case on restrictive covenants, notes that an employee's services are to be deemed "unique or extraordinary" in

this context only where it "appear(s) that his services are of such character as to make his replacement impossible or that the loss of such services would cause the employer irreparable injury." 93 N.Y.2d at 389; see *Purchasing Associates, Inc. v. Weitz*, 13 N.Y.2d 267, 274, 246 N.Y.S.2d 600 (1963).

Third, an employer may seek to protect the "good will" which an employee develops with the employer's clients or customers during the course of his or her employment. *BDO Seidman*, 93 N.Y.2d at 392; *Gundermann & Gundermann Insurance v. Brassill*, 46 A.D.3d 615, 616, 853 N.Y.S.2d 82, 83 (2d Dep't 2007); *Marsh USA Inc. v. Karasaki*, 2008 U.S. Dist. LEXIS 90986 (S.D.N.Y. Oct. 30, 2008). This is because an employer has a legitimate interest in preventing former employees from exploiting or appropriating the goodwill of a client or customer, which had been created and maintained at the employer's expense, to the employer's competitive detriment. *BDO Seidman*, 93 N.Y.2d at 392; *Gundermann*, 46 A.D.3d at 616, 853 N.Y.S.2d at 83; *Johnson Controls, Inc. v. A.P.T. Critical Systems, Inc.*, 323 F.Supp.2d 525 (S.D.N.Y. 2004) (employers may protect their relationships with long-term clients through use of restrictive covenants).

New York courts have also recognized that an employer's interest in protecting client relationships developed by a former employee extends to other employees who were supervised by the former employee. *Marsh USA Inc.*, 2008 U.S. Dist. LEXIS 90986, at *52. The protection of client relationships, however, does not justify enforcement of a non-compete clause prohibiting the solicitation of potential clients of the employer who are merely solicited at the direction of the former employee. *Id*. at *53.

Learned professions

New York courts generally give wider latitude to covenants between members of a learned profession. For instance, courts give greater weight to the interest of the employer in restricting competition within a confined geographical area when looking at agreements not to compete between professionals. *BDO Seidman*, 93 N.Y.2d at 390. Courts also uphold restrictive covenants between members of the "learned professions" with their former employers without regard to the existence of trade secrets or confidential information. *Arthur Young v. Galasso, supra*, 142 Misc.2d at 744, 538 N.Y.S.2d at 429. This differential application is because professionals are deemed to provide "unique or extraordinary" services. *BDO Seidman,* 93 N.Y.2d at 389, 690 N.Y.S.2d at 857.

The learned professions are typically considered to be those which require extensive formal learning and training, licensure, and regulation, indicating a qualification to practice, a code of conduct imposing standards beyond those accepted in the marketplace, and a system of discipline for violation of those standards. *Chase Scientific Research v. NIA Group*, 96 N.Y.2d 20, 29, 725 N.Y.S.2d 592 (2001); *BDO Seidman*, 93 N.Y.2d at 389. A professional relationship is one of trust and confidence, carrying with it a duty to counsel and advise clients. *Chase Scientific Research*, 96 N.Y.2d at 29. Such professionals include: accountants, lawyers, engineers, architects, and doctors. See, *e.g. BDO Seidman*, 93 N.Y.2d at 389, 609 N.Y.S.2d at 857; *Matter of Freeman*, 34 N.Y.2d 1, 7, 355 N.Y.S.2d 336 (1974). However, courts have held they do not include insurance brokers and agents. See*, e.g., Chase Scientific Research*.

Sale of a business or other transaction

In New York, when the goodwill of an established business is sold, an implied covenant will automatically arise, restricting the seller from soliciting his or her former customers after purporting to transfer their goodwill to the purchaser. See *Mohawk Maintenance Co. v. Kessler*, 52 N.Y.2d 276, 284, 437 N.Y.S.2d 646 (1981). Such a covenant is not limited in duration.

Alternatively, if a contract for the sale of a business contains an express covenant not to compete, which relates to the seller's duty to refrain from competing with the purchaser, the express covenant takes precedence, and the implied covenant is inapplicable. For example, where parties to a sale of a business have specifically negotiated a restriction on the seller's solicitation to a narrow set of customers for a limited time period as part of the sale, the implied blanket restriction of non-solicitation is inapplicable. *MGM Court Reporting Service v. Greenberg*, 143 A.D.2d 404, 532 N.Y.S.2d 553 (2d Dep't 1988), *aff'd,* 74 N.Y.2d 691 (1989); *Mitel Telecommunications Systems v. Napolitano*, 226 A.D.2d 165, 640 N.Y.S.2d 113 (1st Dep't 1996). The parties to an express covenant effectively opt out of the implied duty of non-solicitation provided by common law. Some courts have recently suggested, however, that the duty implied in common law is not exonerated if the sale contract expressly includes "good will." *Misys International Banking*

Systems v. TwoFour Systems, 6 Misc.3d 1004A, 800 N.Y.S.2d 350 (table), 2004 Westlaw 3058144 (Sup.Ct. New York County).

As noted above, if an express covenant is present, it will be enforced to the extent it is reasonable in geographic scope and duration. See *Mohawk Maintenance,* 52 N.Y.2d at 283-84; see also, *Reed, Roberts Associates*, 40 N.Y.2d at 307. Additionally, a non-competition covenant relating to the sale of a business will still be enforced if it does not seek to protect any confidential information even though it would not be enforced if it arose out of an employment contract. *Sager Spuck Statewide Supply Co. v. Meyer*, 273 A.D.2d 745, 746, 710 N.Y.S.2d 429, 432 (3d Dep't 2000).

3. Reasonableness

What factors might a New York court consider in determining whether the scope of a restriction is reasonable in time, geography, or with respect to the type of activity prohibited?

In New York, most importantly the covenant not to compete must be reasonable in duration and geographic area. In other words, the longer an employee is prevented from competing in a given field of employment, the more apt a court will be to void the covenant. By the same token, the wider the geographic area that is the scope of the covenant, the less likely the covenant will be enforceable.

In further determining which restrictions are reasonable, New York courts look to the specific circumstances and context of each individual case, making the cases very fact-specific. New York courts have considered the following factors to determine whether restrictions are reasonable:

- former employee continues receiving full salary during a specified period;
- there is potential for disclosure of trade secrets;
- former employee's inability to work could alienate a new employer;
- former employee can work without disclosing trade secrets;
- former employee provided unique services or had a special relationship with the former employer's customers;
- former employee and its prospective new employer have acted in good faith in connection with their activities before the former employee's acceptance of new employment and at trial;
- even assuming the best of good faith, there is a low probability that the former employee could completely separate himself from knowledge of the former employer's trade secrets in his work for a new employer;
- reasonableness of temporal limitations and geographic scope of the agreement;
- covenant covers unspecified prospective products and unspecified prospective customers;
- there is unequal bargaining power between the parties; and
- limit on duration compares favorably with similar limitations in other covenants executed by the same employer.

Lumex, Inc. v. Highsmith, 919 F.Supp. 624, 632 (E.D.N.Y. 1996); *Ivy Mar Co. v. C.R. Seasons Ltd.*, 907 F.Supp. 547, 555 (E.D.N.Y. 1995); *Misys International Banking Systems, Inc. v. TwoFour Systems, LLC*, 6 Misc.3d 1004(A), 800 N.Y.S.2d 350 (table), 2004 Westlaw 3058144 (Sup.Ct., New York County); *Columbia Ribbon & Carbon Manufacturing Co. v. A-1-A Corp.*, 42 N.Y.2d 496, 398 N.Y.S.2d 1004, 1006 (1977).

Examples of reasonable covenants

New York courts have held that restrictive covenants are reasonable in scope where they only prohibit an employee from competing for up to five years at specified locations or within a specified radius. See, *e.g., Crown IT Services v. Koval-Olsen*, 11 A.D.3d 263, 264, 782 N.Y.S.2d 708, 710-11 (1st Dep't 2004) (non-compete clause which only prohibited former employees from servicing employer's former clients for one year at the client location, was reasonable in time and area); *Westcom Corp. v. Dedicated Private Connections, LLC*, 9 A.D.3d 331, 781 N.Y.S.2d 322 (1st Dep't 2004) (18-month restriction on competition was reasonable); *Battenkill Veterinary Equine P.C. v. Cangelosi*, 1 A.D.3d 856, 768 N.Y.S.2d 504 (3d Dep't 2003) (three-year restriction on competition within 35 miles of former employer's clinic was reasonable); *Good Energy, L.P. v. Kosachuk*, 49 A.D.3d 331, 853 N.Y.S.2d 75 (1st Dep't 2008) (five-year restriction on competition was reasonable).

Examples of unreasonable covenants

New York courts have rejected restrictive covenants as overly broad where they do not impose a geographic or durational limitation, bar the

employee from soliciting clients that the employee never acquired a relationship with through his or her employment, or bar the employee from providing services to personal clients recruited through the employee's independent efforts.[1] See, *e.g., Scott, Stackrow & Co., C.P.A.'s, P.C. v. Skavina*, 9 A.D.3d 805, 806, 780 N.Y.S.2d 675, 677 (3d Dep't 2004) (covenant invalid where agreement contained no geographic limitations); *Zinter Handling, Inc. v. Britton*, 46 A.D.3d 998, 847 N.Y.S.2d 271 (3d Dep't 2007) (non-compete covenant was overly broad where it sought to bar defendants from soliciting customers with whom it never had an established relationship and clients recruited through defendants' independent efforts); *Genesis II Hair Replacement Studio Ltd. v. Vallar*, 251 A.D.2d 1082, 674 N.Y.S.2d 207, 208, (4th Dep't 1998) (50-mile radius non-competition covenant executed by a beautician employed by a hair salon specializing in hair loss treatment was rendered unenforceable).

4. Customer non-solicitation agreements

Do New York courts enforce covenants not to solicit customers more liberally than covenants not to compete?

Generally, covenants not to solicit customers are treated similarly to covenants not to compete. Courts look at covenants on a case-by-case basis and will uphold their validity only if they are reasonable in time and area, necessary to protect the employer's legitimate interests, not harmful to the general public, and not unreasonably burdensome to the former employee. *BDO Seidman*, 93 N.Y.2d at 389.

5. Blue-Penciling

If the restrictions are overly broad or unreasonable, is the court permitted to modify the covenant and enforce it as modified?

New York courts can in effect "re-write" overly broad restrictive covenants to make them reasonable in scope. When determining whether an unreasonable aspect of an overbroad employee restrictive covenant should be cured through partial enforcement or severance, New York courts conduct a case-specific analysis focusing on the conduct of the employer in imposing the terms of the agreement. *BDO Seidman*, 690 N.Y.S.2d at 860. Partial enforcement of a covenant may be justified if the employer demonstrates "an absence of overreaching, coercive use of dominant bargaining power, or other anti-competitive misconduct, but has in good faith sought to protect a legitimate business interest, consistent with reasonable standards of fair dealing." *Id*. at 861; *Scott, Stackrow*, 9 A.D.3d at 806, 780 N.Y.S.2d at 677.

Courts may reject partial enforcement of a covenant in connection with hiring or continued employment—as opposed to, for example, imposition in connection with a promotion to a position of responsibility and trust—the existence of coercion or a general plan of the employer to forestall competition, and the employer's knowledge that the covenant was overly broad. *Scott, Stackrow*, *supra*.

6. Defenses to enforcement

Failure of consideration. What constitutes sufficient consideration to support the enforcement of a non-compete agreement?

Is signing as a condition of initial, at-will employment sufficient?

Is signing as a condition of continued at-will employment sufficient?

Have courts specifically held that other forms of consideration are sufficient or insufficient?

Entering into a contract or a relationship constitutes adequate consideration for a covenant to be valid. For example, at-will employment sufficiently qualifies as such a relationship for purposes of consideration. *Zellner v. Stephen D. Conrad, M.D., P.C.* 183 A.D.2d 250, 250, 589 N.Y.S.2d 903, 906 (2d Dep't 1992). Likewise, the signing of the covenant not to compete at the inception of the employment relationship provides sufficient consideration to support the covenant. *Mallory Factor, Inc. v. Schwartz*, 146 A.D.2d 465, 536 N.Y.S.2d 752 (1st Dep't 1989).

New York courts have also held that when an employee or an independent contractor signs a restrictive covenant as a condition of continued at-will employment it will provide sufficient consideration to support a covenant not to compete entered into after the employment relationship has begun. See

Gazzola-Kraenzlin v. Westchester Medical Group, P.C., 10 A.D.3d 700, 702, 782 N.Y.S.2d 115, 117 (2d Dep't 2004); *International Paper Co. v. Suwyn*, 951 F.Supp. 445, 448 (S.D.N.Y. 1997).

Unclean hands/Prior material breach. If the employer fails to compensate the employee or provide benefits as agreed, or as provided under the law, will the covenant be enforced?

In New York, if the employer breaches an employment contract, a covenant not to compete will generally not be enforced. *Millet v. Slocum*, 4 A.D.2d 528, 167 N.Y.S.2d 136 (4th Dep't 1957) (defendants' demand for plaintiff's resignation and subsequent expulsion constituted a breach of the employment agreement vitiating the defendants' right to the equitable relief of injunction or to enforce the restrictive covenant not to compete). *Horne v. Radiological Health Services, P. C.*, 83 Misc.2d 446, 456, 371 N.Y.S.2d 948, 962 (Special Term, Suffolk County 1975).

Involuntary termination of employment. If the employer terminates the employment relationship, will the covenant be enforced?

Under New York law, a restrictive covenant is unenforceable where the employer terminates the employment relationship without cause because his "action necessarily destroys the mutuality of obligation on which the covenant rests." *Post v. Merrill Lynch, Pierce, Fenner & Smith, Inc.,* 48 N.Y.2d 84, 89, 421 N.Y.S.2d 847 (1979). See *Scott v. Beth Israel Medical Center, Inc.*, 41 A.D.3d 222, 224, 838 N.Y.S.2d 521, 523 (1st Dep't 2007). The reason for this rule is that the discharge of an employee without cause before the employee's contract term expires constitutes a breach of the contract by the employer, and deprives the employee of the right to enforce the conditions of the contract. *Borne Chemical Co. v. Dictrow*, 85 A.D.2d 646, 649, 445 N.Y.S.2d 406, 412 (2d Dep't 1981).

Recently, New York courts have recognized an exception to the general disfavor in the way with which they permit enforcement of non-compete clauses executed as part of an employee compensation plan without regard to their reasonableness. *Morris v. Schroder Capital Management International,* 7 N.Y.3d 616, 825 N.Y.S.2d 697 (2006). This exception, known as the "employee choice" doctrine, applies in cases where an employer conditions receipt of post-employment benefits upon compliance with a restrictive covenant. The doctrine rests on the premise that if the employee is given the choice of preserving his rights under his contract by refraining from competition or risking forfeiture of such rights by exercising his right to compete, there is no unreasonable restraint upon an employee's liberty to earn a living. 7 N.Y.3d at 621.

Although a restrictive covenant will be enforceable without regard to reasonableness if an employee leaves his job voluntarily, a court must still determine whether forfeiture is "reasonable" if the employee was terminated involuntarily and without cause. *Id.* at 621. For instance, if an employee is constructively discharged by his or her employer by intentionally making the employee's work environment so intolerable that it compels him to leave, an employer cannot enforce an unreasonable non-compete clause and simultaneously deny the employee his benefits under the guise of the employee choice doctrine. *Id*. at 622.

7. Assignment

Are covenants not to compete generally assignable by the employer? Is the covenant enforceable in the event the employer sells its stock to, or merges with, another entity? Would a different result obtain in the case of an asset sale?

In New York, a covenant not to compete in an employment agreement is freely assignable unless the agreement contains a clear and unambiguous prohibition against assignment. *Special Products Manufacturing, Inc. v. Douglass*, 159 A.D.2d 847, 848, 553 N.Y.S.2d 506, 508 (3d Dep't 1990) (covenants not to compete contained in two employment agreements were enforceable by the corporation that purchased all assets and contractual rights of the former employer, including two employment agreements made between employees and former employer).

8. Interpreting the covenant

In the absence of a specific choice of law provision, to which state's law or Restatement principles do New York courts look in interpreting the enforceability of an agreement not to compete?

Generally, New York recognizes the right of contracting parties to choose the law to be applied to their contracts. *State-Wide Capital Corp. v. Superior Bank FSB*, 1999 U.S.Dist.LEXIS 6159 (S.D.N.Y.). New York courts will enforce a choice of law provision in a contract unless the application of the provision would be contrary to a fundamental policy of the state that has a materially greater interest than the contractually selected state. *Transperfect Translantions International, Inc. v. Merrill Corp*., 2004 U.S.Dist.LEXIS 24014 (S.D.N.Y.).

If a contract has no choice-of-law provision, New York courts will apply the law of the state that has the most significant relationship with the occurrences giving rise to the cause of action. To determine which state has the most significant relationship, New York courts consider (1) the place of contracting; (2) the place of the contract negotiations; (3) the place of the performance of the contract; (4) the location of the subject matter of the contract; and (5) the domicile, residence, nationality, places of incorporation, and places of business of the parties. *Philips Credit Corp. v. Regent Health Group, Inc.*, 953 F.Supp. 482, 502-03 (S.D.N.Y. 1997).

9. Anti-Raiding

Are covenants not to solicit or hire employees enforceable?

Covenants not to solicit or hire employees are enforceable under New York law. *Natsource LLC v. Paribello*, 151 F.Supp.2d 465, 469 (S.D.N.Y. 2001); *Global Telesystems, Inc. v. KPNQwest, N.V.*, 151 F.Supp.2d 478 (S.D.N.Y. 2001) ("New York recognizes the enforceability of covenants not to solicit employees"). In *Veraldi v. American Analytical Laboratories, Inc.*, 271 A.D.2d 599, 706 N.Y.S.2d 158 (2d Dep't 2000), the Appellate Division court upheld the district court's denial of plaintiff's motion to dismiss, holding that the defendant's claim to recover damages for breach of contract based upon the plaintiff's alleged solicitation of plaintiff's employees was a cause of action for which relief may be granted.

New York courts have generally approached covenants not to solicit under the *BDO Seidman* reasonableness standard. However, only one court has actually recognized that a "covenant not to solicit former co-employees is a species, albeit a limited one, of a covenant not to compete in the broad sense and is governed by the three-part test of reasonableness articulated in *B.D.O. Seidman*." *Lazer Inc. v. Kesselring*, 13 Misc.3d 427, 431, 823 N.Y.S.2d 834 (Sup.Ct., Monroe County 2005).

10. Duty of loyalty

Do rank-and-file employees owe a common law or statutory duty of loyalty to their employers?

In New York, "an employee is prohibited from acting in any manner inconsistent with his or her employment and must exercise good faith and loyalty in performing his or her duties [and] may not use his or her principal's time, facilities or proprietary secrets to build [a] competing business." *Mega Group Inc. v. Halton*, 290 A.D.2d 673, 736 N.Y.S.2d 444 (3d Dep't 2002), citing *Chemfab Corp. v Integrated Liner Technologies Inc.,* 263 A.D.2d 788, 789-90, 693 N.Y.S.2d 752 (3d Dep't 1999). This premise is an offshoot of the stronger fiduciary obligation held by more valuable and/or managerial employees. *Laro Maintenance Corp. v. Culkin*, 267 A.D.2d 431, 433, 700 N.Y.S.2d 490, 492 (2d Dep't 1999).

Endnote

[1] Provided, in some instances, the employee did not solicit the customer in his/her new employment. See *BDO Seidman v. Hirshberg , supra.*

Return to book table of contents