

OAJ Article on Non-Compete Agreements

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Approximately 30 million (8 percent) of American workers are presently subject to non-competition agreements (non-competes¹).² Around 40 percent of U.S. employees were subject to a non-competesome point during their careers.³ These were previously limited to fields like technology, engineering, and sales, or higher-ranking, highly-compensated employees, such as executives. Today, employees in a wide variety of industries and across the economic spectrum have been subject to non-competes.⁴ About 15 percent of American employees without a college degree, and a similar percentage of workers earning an annual income under \$40,000, are bound by [non-competes].”⁵

A non-competes prohibits an employee from working for a competitor, or starting his/her own competing business, within a specific geographic area during a specific time period, after the employment relationship ends. It might contain or be presented in conjunction with additional complex agreements, such as confidentiality or non-disclosure (employee cannot disclose employer’s confidential or proprietary information to a third-party) and non-solicitation clauses (employee cannot contact or solicit employer’s clients, customers, or employees).

Since overly-broad non-competes restrict commerce⁶ and significantly hinder (or completely bar) an employee’s ability to earn a living, an agreement must contain reasonable geographic and temporal restrictions to be enforceable.⁷ In *Raimonde v. VanVlerah*⁸, the Ohio Supreme Court established a three-part reasonableness test: the agreement must be one that “(1) is no greater than is required for the protection of the employer, (2) does not impose undue hardship on the employee, and (3) is not injurious to the public.” If a non-competes fails to meet these criteria, Ohio courts are empowered to modify or amend the agreement to make it reasonable, which is within the court’s discretion. *Id.* *Raimonde* also provided additional considerations to determine whether a non-competes is reasonable and therefore enforceable.⁹

¹ May also be known as non-competes clauses or provisions, covenants not to compete, restrictive covenants, etc.

² U.S. Department of the Treasury, Office of Economic Policy (March 2016), “Non-Competes Contracts: Economic Effects and Implications,” <https://www.treasury.gov/resource-center/economic-policy/Documents/UST%20Non-competes%20Report.pdf>.

³ The Economist, Leaders Section, May 19, 2018, “Restrain the Restraints: The Case Against Non-Competes Clauses,” <https://www.economist.com/leaders/2018/05/19/the-case-against-non-competes-clauses>.

⁴ Steven Greenhouse, The New York Times, June 8, 2014, “Non-Competes Clauses Increasingly Pop Up in Array of Jobs,” https://www.nytimes.com/2014/06/09/business/noncompetes-clauses-increasingly-pop-up-in-array-of-jobs.html?_r=0&module=inline.

⁵ The Economist, Leaders Section, May 19, 2018, “Restrain the Restraints: The Case Against Non-Competes Clauses,” <https://www.economist.com/leaders/2018/05/19/the-case-against-non-competes-clauses>.

⁶ Matthew Rossetti, Forbes, “Non-Competes: Useful or Futile?,” <https://www.forbes.com/sites/forbeslegalcouncil/2018/01/30/non-competes-useful-or-futile/#a6b6bd265813>.

⁷ *Lake Land Empl. Group of Akron*, 101 Ohio St.3d 242, 245, 804 N.E.2d 27, ¶ 9; see also, *Briggs v. Butler* (1942), 140 Ohio St. 499, 507, 45 N.E.2d 75.

⁸ *Raimonde v. VanVlerah*, 42 Ohio St. 2d 21, 25-26, 325N.E.2d 544 (1975).

⁹ (1) absence or presence of limitations as to time and space; (2) whether the employee represents the sole contact with the customer; (3) whether or not the employee has confidential information or trade secrets; (4) whether the agreement seeks to eliminate competition which would be unfair to the employer or merely seeks to eliminate ordinary competition; (5) whether the agreement seeks to stifle the inherent skill and experience of the employee; (6) whether the benefit to the employer is disproportional to the detriment to the employee; (7)

This highly fact-specific analysis could consider the agreement's language; the employment circumstances, job duties, and experience; the line of business; the overall industry, among other factors. A reasonable non-compete in one employee's circumstances may not be reasonable when applied to another employee. The employer has the burden to demonstrate the non-compete is reasonable.

A non-compete should restrain unfair competition, not ordinary competition. An agreement is enforced only to the extent the imposed restrictions are reasonably necessary to protect the employer's legitimate business interests.¹⁰ "The law values free mobility of employees and free, but fair, competition,"¹¹ but it is a difficult balance of protecting the employer's business, with the employee's livelihood in the field he/she is trained, educated, and has invested significant time and resources in his/her livelihood. "Although non-competes can play a beneficial role when used in a limited way, evidence suggests that in certain cases, non-competes can reduce the welfare of workers and hamper the efficiency of the economy as a whole by depressing wages, limiting mobility, and inhibiting innovation."¹²

A non-compete is not a binding contract unless supported by consideration.¹³ Ohio employment is at-will—either party may legally terminate the employment relationship at any time, for any reason. The Ohio Supreme Court has held that continued employment is sufficient consideration to enforce a non-compete.¹⁴ Generally, employment itself for new hires, or continued employment for current employees, is valid consideration because an employer is not legally required to hire or retain an at-will employee.

Common scenarios, however, raise concerns about fairness. An employer presents a new employee with a non-compete after accepting a job offer or onset of work. The agreement is buried in a stack of new hire paperwork, a separate document or a clause in a more comprehensive employment contract. She might not even be aware that she has signed, let alone understand the complex legal language nor realize its implications. Reliant on the income and having rejected other opportunities, she will lose this job prospect without agreeing to the terms. Similarly, a current employee who has dedicated years to a company is suddenly thrust into a situation where he is at risk of losing his livelihood and inability to meet financial obligations if he refuses to sign. The second scenario in particular may be perceived as an adhesion contract—grossly inequitable and one-sided.

whether the agreement operates as a bar to the employee's sole means of support; (8) whether the employee's talent which the employer seeks to suppress was actually developed during the period of employment; and (9) whether the forbidden employment is merely incidental to the main employment. *Id.* at 25.

¹⁰ *UZ Engineered Prods. Co. v. Midwest Motor Supply Co.*, 147 Ohio App.3d 382, 770 N.E.2d 1068 (10th Dist. 2001).

¹¹ Wayne N. Outten, Anne Golden, & Nantiya Ryan, Outten & Golden LLP, "Non-Compete Agreements: Emerging Issues from the Perspective of Employee's Counsel,"

¹² The White House, May 2016, "Non-Compete Agreements: Analysis of the Usage, Potential Issues, and State Responses," <https://millerlawpc.com/wp-content/uploads/2017/01/White-House-Report-on-Non-Compete-Agreements.pdf>.

¹³ Consideration may consist of either a detriment to the promisee or a benefit to the promisor. A benefit may consist of some right, interest, or profit accruing to the promisor, while a detriment may consist of some forbearance, loss, or responsibility given, suffered, or undertaken by the promisee.

¹⁴ *Lake Land Empl. Group LLC v. Columber* (1994), 101 Ohio St.3d 242, Ohio 786.

Ohio employers may also enforce a non-compete against an employee who is not involuntarily discharged and even terminated without cause. “Strict considerations of fairness suggest that it is antithetical to allow an employer to terminate an employee *and* prevent him from working in his chosen profession.”¹⁵ This is a fact-specific determination based on the circumstances. For instance, does the agreement’s language state it is only valid if the employee is fired for cause, or is enforceable regardless of which party separates the employment and the reason(s) for separation? “Most employment agreements fail to make a distinction as to how a restrictive covenant is to operate when the employee is discharged, whether for cause or without cause. Instead, most contracts place resignation and termination for any reason together in one governing clause.”¹⁶

While reasonable non-competes are necessary in some instances, it is important to consider the implications that overly-restrictive agreements have on both individual employees and the overall workforce. Research also demonstrates that employees subject to non-competes are increasingly likely to take “career detours—that is, they involuntarily leave their technical fields to avoid a potential lawsuit.”¹⁷ “Some workers end up idle, collecting unemployment and using programs like Medicaid. Many others take jobs well below their means, robbing the nation of their skills ... By giving companies huge power to dictate where and for whom their employees can work next, non-competes take a person’s greatest professional assets—years of hard work and earned skills—and turn them into a liability.”¹⁸

¹⁵ Kenneth J. Vanko, DePaul Business and Commercial Law Journal, Volume 1—Issue 1—Article 2 (Fall 2002), “You’re Fired! And Don’t Forget Your Non-Compete”: The Enforceability of Restrictive Covenants in Involuntary Discharge Cases,” <https://via.library.depaul.edu/cgi/viewcontent.cgi?referer=https://www.google.com/&httpsredir=1&article=1267&context=bclj>.

¹⁶ *Id.*

¹⁷ Matt Marx, American Sociological Review 76(5), 695-712 (2011), “The Firm Strikes Back: Non-Compete Agreements and the Mobility of Technical Professionals,” https://media.wix.com/ugd/30296c_24d90c6ee5de4e0297b9485347f726ca.pdf.

¹⁸ Connor Dougherty, The New York Times (May 13, 2017), “How Non-Compete Clauses Keep Workers Locked In,” <https://www.nytimes.com/2017/05/13/business/noncompete-clauses.html>.