

Non-Compete Agreements/Trade Secrets

A non-compete agreement (NCA) is defined as:

“[A]n agreement between an employer and an employee, or otherwise arising out of an existing or anticipated employment relationship, under which the employee or expected employee agrees that the employee will not engage in certain specified activities competitive with the employee’s employer after the employment relationship has ended[.]”

A NCA is basically an employer having a temporary monopoly on you. This ‘monopoly’ must be narrowly tailored to protect a legitimate business interest.

As of October 1, 2018 Massachusetts passed new laws in regard to NCAs.

- NCA will be more expensive to utilize by implementing the paid ‘garden leave’
- **Garden leave** = paid leave for the length of the restricted period of at least 50% of the employee’s highest paid salary during the 2 years prior
- If there is no garden clause then employers can negotiate “other mutually agreed upon consideration” as long as it’s specified in the NCA what that consideration is
- Cannot require all employees to sign NCAs
- Only applies to agreements entered into on/after October 1, 2018
- There needs to be fair and reasonable consideration
- Must be reasonably tailored
- This **does not apply** to non-solicitation of employees agreements, non-disclosure of confidential business information, and non-competition clauses related to the sale of business

Structural requirements in order to be enforceable:

1. Be in writing
2. Be signed by the employer and the employee
3. Expressly affirm the employee’s right to consult with counsel prior to signing
4. Notice of the agreement to the employee (if beginning of employment → the employer must provide a copy of the agreement before formal offer or 10 days before employee starts; if during employment → notice of agreement no less than 10 days before agreement would become effective)

Factors that are considered:

- a. Is it reasonable under the circumstances?
- b. Is it harmful to the public interest?
- c. Is it limited in scope and geography and
- d. Is it necessary to protect the legitimate interest of the employer?

Legal considerations:

1. Whether an employee position had materially changed

2. Whether employer has breached the agreement by failing to live up to its obligations
3. Whether employee has left with confidential information or trade secrets

A court will balance an employee's right to work in a chosen field against an employer's legitimate business needs. These disputes usually arise when an employee separates from employment. Unfortunately, once an individual's employment ends their best employment chances are often with a competitor. A court can strike the covenant, strike certain language, or re-draft the covenant. This is referred to as "Blue Pencil" the power of Massachusetts courts to reform the terms of the NCA so that unreasonable provisions are transformed to become reasonable. It is completely up to the court's discretion if they wish to utilize the 'Blue Pencil.'

Length:

Covenants can't be longer than 1 year in length following the end of employment except they can extend up to 2 years if employee breaches a fiduciary duty to the employer or unlawfully taken employer's property. These covenants should be no broader than necessary.

Defenses:

- Lack of consideration
- Overbroad in scope
- Absence of a legitimate business interest by an employer
- Ambiguity

Factors to consider under Common Law:

1. Reasonableness

- Tested on a fact by fact basis
- Cannot exceed reasonable duration (no greater than 1 year following the termination of the employee's employment unless fiduciary breach then extends to 2 years)
- Reasonable in geographic scope (limited to areas in which employee provided services or had material presence or influence within the last 2 years and limited to types of services the employee provided during the last 2 years of employment)

2. Legitimate Business Interest

- Certain recognized interests
- Protection of trade secrets
- Confidential information (client lists, computer data, business plans)
- Customer goodwill

3. Can't violate public interest (public policy favors employee's ability to move from one job to another without restriction)

4. Garden leave clause (mutually agreed to consideration for the employer to pay the employee at least 50% of his/her highest salary within the last 2 years during the duration of the non-compete period)



NCA are common for:

- a. Sale of business
- b. Tech companies
- c. Executives (due to their specialization and in depth knowledge)
- d. Franchise agreement (trade secrets and business plans)

NCAs are not allowed for:

- a. Lawyers
- b. Social workers
- c. Physicians
- d. Broadcasters
- e. Nurses

(in order to protect public health and the free flow of ideas)

Burden of proof?

- With the employer
- Employer must prove that the NCA satisfies the elements listed above and the employee signed the NCA

REMEDIES:

- Money damages (lost profits, out of pockets expenses, or other financial damages which result from breach)
- Injunction