Non-compete Laws: New York

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A Q&A guide to non-compete law in New York.

RELEVANT STATE LAW

1. If non-competes in your jurisdiction are governed by statute(s) or regulation(s), identify the state statute(s) or regulation(s) governing:

- Non-competes in employment generally.
- Non-competes in employment in specific industries or professions.

GENERAL STATUTE AND REGULATION

In New York, there is no statute or regulation governing non-competes in employment generally.

INDUSTRY- OR PROFESSION-SPECIFIC STATUTE OR REGULATION

Attorneys: Rule 5.6 of the New York Rules of Professional Conduct

Rule 5.6 of the New York Rules of Professional Conduct governs non-compete agreements in the legal industry *(22 N.Y. Comp. Codes R. & Regs. Part 1200.0, Rule 5.6).*

Financial Industry Employees: FINRA Rules 2140 and 11870

Financial Industry Regulatory Authority Rules 2140 and 11870 govern transfer of customer accounts, including in connection with the change in employment of the customer's registered representative (*FINRA Rules 2140 and 11870*).

2. For each statute or regulation identified in *Question 1*, identify the essential elements for non-compete enforcement and any absolute barriers to enforcement identified in the statute or regulation.

INDUSTRY- OR PROFESSION-SPECIFIC STATUTE AND REGULATION

Attorneys: Rule 5.6(a) of the New York Rules of Professional Conduct

A lawyer cannot offer or make a "partnership, shareholder, operating, employment, or other similar type of agreement" that restricts lawyers from practicing law after terminating the relationship, except for an agreement about retirement benefits *(22 N.Y. Comp. Codes R. & Regs. Part 1200.0, Rule 5.6(a)*).

Financial Industry Employees: FINRA Rules 2140 and 11870

A non-compete is not enforceable under Financial Industry Regulatory Authority (FINRA) Rules 2140 and 11870 if enforcement could prevent a customer from continuing to use the services of its registered representative if the registered representative leaves the employment of one FINRA member firm to join another (*FINRA Rules 2140 and 11870*). FINRA registered agents must help the transfer of a customer's account if that customer chooses to follow a registered representative to another broker, if the registered representative did not solicit the customer (*FINRA Rule 11870*). However, a covenant that prohibits the registered representative from soliciting customers may be enforceable.

ENFORCEMENT

3. If courts in your jurisdiction disfavor or generally decline to enforce non-competes, please identify and briefly describe the key cases creating relevant precedent in your jurisdiction.

New York law disfavors non-compete agreements as an unreasonable restraint of trade (*Reed, Roberts Assocs., Inc. v. Strauman, 40 N.Y.2d 303, 307 (1976)*).

Courts may enforce a non-compete if the restriction is reasonable. Although courts determine reasonableness on a case-by-case basis, a non-compete can be reasonable only if it:

- Is no greater than required to protect an employer's legitimate protectable interests.
- Does not impose undue hardship on the employee.
- Does not cause injury to the public.
- Is reasonable in:
  - duration; and
  - geographic scope.

(*BDO Seidman v. Hirshberg, 93 N.Y.2d 382, 388-89 (1999); Reed, Roberts, 40 N.Y.2d at 307; Scott, Stackrow & Co., C.P.A.'s, P.C. v. Skavina, 780 N.Y.S.2d 675 (App. Div. 3d Dept. 2004).*)

New York courts have recognized the following protectable interests that may be sufficient to support a non-compete:

- The employer's trade secrets or confidential information.
- The employer's goodwill.
- The employer's interest in preventing loss to a competitor of an employee whose services are special, unique or extraordinary.

(*Ticor Title Inc. Co. v. Cohen, 173 F.3d 63, 70 (2d Cir. 1999); BDO Seidman, 93 N.Y.2d 382.*)

4. Which party bears the burden of proof in enforcement of non-competes in your jurisdiction?

The party seeking enforcement of the non-compete (typically, the employer) has the burden of proof.

5. Are non-competes enforceable in your jurisdiction if the employer, rather than the employee, terminates the employment relationship?

Whether an employee was terminated or voluntarily resigned is irrelevant for purposes of enforcing a non-compete agreement. However, if the termination constitutes a breach of contract by the employer, the non-compete in that agreement may not be enforced by the breaching employer (*Cornell v. T.V. Dev. Corp., 17 N.Y.2d 69, 75 (1966)*).

Relying on *Post v. Merrill Lynch*, employees have argued that a non-compete is unenforceable if the employee was involuntarily terminated without cause (*Post v. Merrill Lynch, Pierce Fenner & Smith, Inc., 48 N.Y.2d 84, 88 (1979)*). However, an involuntary termination without cause does not necessarily preclude enforcement of a non-compete (*Wise v. Transco, Inc., 425 N.Y.S.2d 434 (App. Div. 4th Dept. 1980)*).

6. Do courts in your jurisdiction interpreting non-competes have the authority to modify (or blue pencil) the terms of the restrictions and enforce them as modified?

New York courts may blue pencil a non-compete agreement to make it enforceable if it is overbroad (*BDO Seidman, 93 N.Y.2d at 394*). However, courts are not required to blue pencil overbroad non-compete agreements. For example, where an overly broad non-compete is evidence of overreaching by the employer, a court may decline to blue pencil the non-compete and instead find that it is unenforceable (*Scott, Stackrow, 780 N.Y.S.2d 675*).

To minimize the risk of a court declining to blue pencil an overbroad non-compete agreement, best practice is to include an express blue pencil provision in the agreement. This should include an acknowledgment by both the employer and the employee that the parties intend for the non-compete to be enforced to the maximum extent permitted by law. For a sample severability provision including blue pencil language, see *Standard Document, Employee Non-Compete Agreement: Severability (www.practicallaw.com/7-502-1225)*.

7. Will choice of law provisions contained in non-competes be honored by courts interpreting non-competes in your jurisdiction?

New York courts enforce choice-of-law provisions if both:

- The selected forum has a substantial relationship to the:
  - parties; or
  - transaction.
- Application of the selected forum's law does not run contrary to a fundamental policy of a state with materially greater interest than the forum state.

(Marine Midland Bank, N.A. v. United Missouri Bank, N.A., 643 N.Y.S.2d 528 (App. Div. 1st Dept. 1996).)

REASONABLENESS OF RESTRICTIONS

8. What constitutes sufficient consideration in your jurisdiction to support a non-compete agreement?

Sufficient consideration to support a non-compete agreement comes in many forms, including:

- Initial employment and, under certain circumstances, continued employment.
- Payments to the employee.
- Intangibles, including the employee's receipt of increased:
  - knowledge;
  - skill; or
  - professional status.

9. What constitutes a reasonable duration of a non-compete restriction in your jurisdiction?

When determining whether a non-compete agreement is reasonable in duration, New York courts focus on the particular facts and circumstances of each case. This is a highly fact-specific inquiry conducted on a case-by-case basis.

Courts have repeatedly held time restrictions of six months or less are reasonable (*Ticor, 173 F.3d at 70; Natsource LLC v. Paribello, 151 F. Supp. 2d 465, 470-471 (S.D.N.Y. 2001)*). Courts also have found longer restrictions to be both reasonable and unreasonable depending on the specific facts of a particular case.

10. What constitutes a reasonable geographic non-compete restriction in your jurisdiction?

When determining whether a non-compete agreement is reasonable in its geographic reach, New York courts focus on the particular facts and circumstances of each case. This is a highly fact-specific inquiry conducted on a case-by-case basis.

Examples of geographic restrictions found to be reasonable and unreasonable include:

- Five counties specified in a non-compete were found to be reasonable in light of the employee's profession (*Karpinski v. Ingrasci, 28 N.Y.2d 45 (1971)*).
- 50-mile radius found to be unreasonable (*Genesis II Hair Replacement Studio, Ltd. v. Vallar, 674 N.Y.S.2d 207 (App. Div. 4th Dept. 1998)*).
- Syracuse-area hospitals found to be unreasonable (*Muller v. N.Y. Heart Center Cardiovascular Specialists P.C., 656 N.Y.S.2d 464 (App. Div. 3rd Dept. 1997)*).
- Metropolitan areas of New York, Los Angeles, Toronto and London, and Continental Europe found to be reasonable considering the:
  - non-compete lasted six-months; and
  - employer was required to pay the employee his base salary during the non-compete.

(Maltby v. Harlow Meyer Savage, Inc. 633 N.Y.S.2d 926 (Sup. Ct. N.Y. Co. 1995).)

Citing advances in technology and recognizing that employers increasingly compete nationally or globally, New York courts have enforced broad geographic restrictions when they are:

- Required to protect the employer's legitimate protectable interests.
- Reasonable in light of other provisions in the non-compete (for example, duration).

*(GFI Brokers LLC v. Santana, No. 06 Civ. 3988 (GEL), 2008 U.S. Dist. LEXIS 59219, at *24 (S.D.N.Y. Aug. 6, 2008).)*

However, courts also have found these broad geographic restrictions to be unreasonable in other cases.

In New York, a non-compete without a geographic restriction may be enforceable if it is reasonable in light of the circumstances of the case. However, it will not be enforceable if it is unreasonable.

11. Does your jurisdiction regard as reasonable non-competes that do not include geographic restrictions, but instead include other types of restrictions (such as customer lists)?

For example, one court enforced a non-compete restricting a former employee from working on a competitive product because it was reasonable in light of other factors, including the:

- Restriction was for six months.
- Employee was paid his salary and benefits during the restricted period.
- Employee likely would inevitably disclose his previous employer's trade secrets if he began work at the new employer.

(Lumex, Inc. v. Highsmith, 919 F. Supp. 624 (E.D.N.Y. 1996).)

12. Does your jurisdiction regard as reasonable geographic restrictions (or substitutions for geographic restrictions) that are not fixed, but instead are contingent on other factors?

In New York, a non-compete with geographic restrictions that are contingent on other factors may be enforceable if it is reasonable in light of the circumstances of the case. However, it will not be enforceable if it is unreasonable.

For example, one court considered a non-compete with a geographic restriction applying to:

- New York City.
- Any area within a 100-mile radius of New York City.
- Anywhere within any other marketing area currently serviced by the employer or that later would come under the employee's supervision or responsibility.

Noting that the employer in that case serviced accounts across the country, the court found that the geographic restriction was unreasonable because it covered too large an area.

(Unisource Worldwide, Inc. v. Valenti, 196 F. Supp. 2d 269, 277 (E.D.N.Y. 2002).)

13. If there is any other important legal precedent in the area of non-compete enforcement in your jurisdiction not otherwise addressed in this survey, please identify and briefly describe the relevant cases.

DUTY OF LOYALTY

In New York, employees cannot compete with their employer during the employment relationship. Employees have a duty of loyalty to their employer and must exercise the utmost good faith, loyalty and obedience during the employment relationship (*Duane Jones Co. v. Burke, 306 N.Y. 172 (1954)*). To comply with the duty of loyalty, an employee cannot, for example:

- Compete with his employer.
- Solicit co-workers to leave his current employer to work for a competitor.
- Solicit clients or customers to follow him to a competitor.
- Use or disclose his employer's confidential or trade secret information other than:
  - in the performance of his job duties and responsibilities; or
  - as otherwise authorized by his employer.

The duty of loyalty ends when the employment relationship terminates. However, the employee remains bound to keep confidential the employer's trade secrets and confidential information, but may use the skills and experience he gained during employment.

EMPLOYEE CHOICE DOCTRINE

New York courts recognize the employee choice doctrine, under which courts will analyze a non-compete as a contract and not inquire into the reasonableness of a non-compete provision if the employee has a choice of either:

- Working for a competitor and forfeiting certain benefits.
- Accepting the benefits and not working for a competitor.

(Murphy v. Gutfreund, 583 F. Supp. 957, 962-65 (S.D.N.Y. 1984).)

FINANCIAL INDUSTRY EMPLOYEES: PROTOCOL FOR BROKER RECRUITING

In the financial services industry, several employers are signatories to the Protocol for Broker Recruiting (Broker Protocol), which sets out procedures applicable when a registered representative of one signatory firm departs for another signatory firm. Under the Broker Protocol, both the departing employee and his new employer will have no monetary or other liability if the departing employee both:

- Is leaving one signatory firm to join another signatory firm.
- Follows the procedures set out in the Broker Protocol.

The Broker Protocol, however, does not protect a signatory firm against claims that it raided the employees or clients of another signatory firm or related liability.

14. What remedies are available to employers enforcing non-competes?

REMEDIES

An employer's remedies for an employee's breach of a non-compete may include:

- Injunctive relief (see *Question 15*).
- Monetary damages.

Lost profits is the proper measure of monetary damages for an employee's breach of a non-compete (*Earth Alterations, LLC v. Farrell, 800 N.Y.S.2d 744 (App. Div. 2d Dept. 2005); Barone v. Marcisak, 96 A.D.2d 816, 816 (App. Div. 2d Dept. 1983)*). However, if lost profits cannot be determined, an employer may only be entitled to nominal monetary damages (*Borne Chemical Co., Inc. v. Dictrow, 85 A.D.2d 646, 651 (App. Div. 2d Dept. 1981)*).

15. What must an employer show when seeking a preliminary injunction for purposes of enforcing a non-compete?

In New York courts, to obtain a preliminary injunction enforcing a non-compete, an employer must prove:

- A likelihood of success on the merits.
- The employer will be irreparable injured if the injunctive relief is not granted.
- The balance of equities weighs in favor of the employer.

(Doe v. Axelrod, 73 N.Y.2d 748, 750 (1988).)

If the non-compete agreement provides for an award of liquidated damages in the event of a breach, courts have declined to provide injunctive relief because the liquidated damages suggest that the injuries are compensable by monetary damages and are not irreparable. However, at least one court held that a liquidated damages provision did not foreclose injunctive relief (*Zellner v. Conrad, 183 A.D.2d 250, 254 (App. Div. 2d Dept. 1992)*).

OTHER ISSUES

16. Apart from non-competes, what other agreements are used in your jurisdiction to protect confidential or trade secret information?

NON-SOLICITATION PROVISIONS

Non-solicitation provisions are subject to the same analysis as non-competes, but are enforced more frequently (*Mallory Factor, Inc. v. Schwartz, 146 A.D.2d 465 (App. Div. 1st Dept. 1989)*).

CONFIDENTIALITY AND NON-DISCLOSURE PROVISIONS

Confidentiality and non-disclosure provisions are another form of protection available to employers in New York. The purpose of a confidentiality and non-disclosure agreement differs from that of a non-compete because it prevents only the use or disclosure of trade secret and confidential information acquired by the former employee during employment.

Confidentiality and non-disclosure provisions usually do not expand the employee's confidentiality obligations beyond the duty of loyalty in a significant way. However, they can:

- Clarify an employee's confidentiality obligations.
- Provide notice to the employee of his confidentiality obligations.
- Deter the employee from breaching his confidentiality obligations.
- Be evidence of the employer's efforts to maintain the confidentiality and secrecy of confidential and trade secret information.

Because confidentiality and non-disclosure agreements are less likely to be a restraint of trade, they are treated differently than non-competes under New York law and are more readily enforceable (*U.S. Re Companies, Inc. v. Scheerer, 838 N.Y.S.2d 37 (App. Div. 1st Dept. 2007)*).

17. Is the doctrine of inevitable disclosure recognized in your jurisdiction?

New York courts recognize the inevitable disclosure doctrine. However, courts rarely enforce a non-compete based on inevitable disclosure of trade secrets when there is no evidence of actual misappropriation of trade secrets by the departing employee.

When determining whether inevitable disclosure is sufficient to enforce a non-compete, courts consider whether the:

- Employers are direct competitors that provide the same or similar products or services.
- Employee could not reasonably be expected to perform his new job responsibilities without using his former employer's trade secrets because his new position is nearly identical to his old one.
- Trade secrets in dispute are highly valuable to both employers.

(Earthweb, Inc. v. Schlack, 71 F. Supp. 2d 299, 310 (S.D.N.Y. 1999).)