# How To Beat A Non-Compete Agreement

## Five questions that might free you from a restrictive trade agreement

BY JOHN M. RICCIONE

In a nation that rewards competitiveness, non-compete agreements sound like an anomaly. While employers tend to favor them, anyone who has ever been asked to sign one will probably complain that they hinder the free and open competition that has made our economy prosper for 200-plus years.

Philosophical issues aside, what do you ***do*** if you ever have to deal with a non-compete? How might you negotiate a more favorable deal for yourself, prevail in court against one or, better yet, avoid the restrictions in the first place?

Dozens of state and federal court decisions, fortunately, suggest some practical answers. From these and the different restrictive trade statutes in the 18 states that have them, five key questions emerge that might help you beat a non-compete.

**Question 1. Is the non-compete's temporal scope *reasonable*?**

Depending on the circumstances, some courts and statutes have found that five years is too long of a restriction in a non-compete. A one-year restriction, however, would probably prevail in court.

The general rule is whether the time limit is restricted enough to protect the principal's legitimate business interests. You may, therefore, be able to defend by attacking the validity of a non-compete based upon its temporal scope.

**Remember:** Timing is everything. While a non-compete with a temporal scope of one year will likely be upheld, an agreement that contains a five-year restriction probably will not. A temporal scope between these two extremes might prevail, depending on the state statute, what the relevant courts have held and other factors.

**Question 2: Is the non-compete's geographic scope too broad?**

In legal challenges to non-competes, judges examine whether an agreement has the effect of freezing you out of competition in areas where you never actually did business. Some courts have held that agreements that are too broad geographically are invalid.

Most states are known as "blue pencil states," where the courts possess varying degrees of authority under varying circumstances to revise an agreement to make it more reasonable.

You are not necessarily in the clear, however, just because the non-compete appears to be too broad, since some states (including, Arizona, Nebraska, North Dakota, South Dakota, Utah, Virginia and Wisconsin) have enacted laws that ***do not*** allow courts to make changes to a non-compete. Most states are known as "blue pencil states," where the courts possess varying degrees of authority under varying circumstances to revise an agreement to make it more reasonable.

**Remember:** The chances are good that a court will favor an argument about the too-broad geography of your non-compete, provided you are in a blue-pencil state.

**Question 3: Was there adequate consideration given to you at the time you were asked to sign the non-compete?**

Some states (including, for example, Massachusetts and North Carolina) require principals to pay you something in exchange for agreeing to a non-compete if you did not sign it at or before the time you began working for the company. In Illinois and some other states, however, the courts have held that continued employment constitutes adequate consideration.

Arguing, therefore, that a principal offered you a "sign it or get out of here" ultimatum might not be enough alone for a court to side with you in a claim.

**Remember:** Depending on the state law that governs your principal, you may be required to receive a consideration in return for accepting a non-compete if you already work there.

**Question 4: Is the non-compete reasonably limited and necessary to protect a legitimate business interest of the principal?**

By and large, the courts came up with this criterion. In Illinois, for example, there is no Supreme Court case which sets forth this additional criterion. Several appellate courts have discarded it entirely and look only at the effective temporal and geographic scope of a non-compete.

Note, however, that a bill has been introduced in Illinois that would make a principal's legitimate business interests a condition relevant when litigating a non-compete.

What about the states where courts ***are*** allowed to consider this element? Some state legislatures have carved out exceptions to the predominant principles of open competition where the principal or employer can prove that it has something special to protect. Generally speaking, the courts in these states will uphold a non-compete if it protects the following:

- True trade secrets.
- Confidential information.
- Near-permanent relationships with customers that you would not have had without the relationship with the principal.

**Remember:** In the states where applicable, a non-compete's ***reasonable*** protections must meet specific criteria.

### Question 5: Does the restriction violate some established public policy or is it injurious to the public?

Is your service so necessary to the health and welfare of the public that prohibiting you to carry on your business would harm the community? For example, courts have held that if there are only two medical specialists in a large geographical area and one is frozen out because of a non-compete, the validity of the non-compete may be called into question.

**Remember:** Protecting public welfare might be grounds to contest a non-compete.

### Bottom line

If you are about to sign a non-compete, stop and ask these five key questions. If you have already signed one, you may be able to beat it or sidestep the otherwise ominous obligations contained in it, provided you plan carefully and have the right legal expert on your side.

### PS

California and some other states have outlawed non-compete agreements. That is no reason, however, to let down your guard.

In states where non-competes are not legal, there may still be close cousins. These include the equally stifling non-solicitation and confidentiality agreements and the Uniform Trade Secrets Act, which applies in more than 30 states.

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