

Restrictive Covenants and Software Engineers

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Restrictive covenants in employment agreements generally fall into four categories:

1. Covenants not to compete with the business of the former employer
2. Covenants not to solicit business from or provide services to clients of the former employer
3. Covenants not to solicit business from or provide services to clients or customers with whom the employee had contact while employed by the former employer
4. Covenants not to solicit or hire employees of the former employer

Why do courts scrutinize restrictive covenants?

- One's right to earn a livelihood
- Our economy is based on competition

Factors Determining Enforceability

- Is designed to safeguard a protectable interest of the employer
- Is reasonable in its scope and duration
- Is not harmful to the general public
- Is not unreasonably burdensome to the employee

Protectable Interests

- Trade secrets
- Confidential Customer information
 - Customer Preferences and Ordering Patterns
 - Pricing Information
- Confidential customer lists
- Computer Software and Other Information Developed by the Company
- Goodwill of the business
- Employees' "unique or extraordinary" services, which, if lost, would expose the employer to special harm

Non-Solicitation of Employees

- Soliciting employees is an improper misuse of confidential information
 - What is solicitation?
- Copyright and Tortious Interference Concerns

Reasonableness

- Scope
- Geography
- Time

No hard and fast rules for determining
reasonableness.

Reasonable Restrictions

- *Three years into the litigation, the court found that the restriction was not reasonable and that the plaintiff was entitled to a permanent injunction. See *W. J. Williams & Gorman v. Williams*, 1972 WL 1000 (S.D. Cal. 1972). See also *W. J. Williams & Gorman v. Williams*, 1972 WL 1000 (S.D. Cal. 1972). See also *W. J. Williams & Gorman v. Williams*, 1972 WL 1000 (S.D. Cal. 1972).*

Unreasonable Restrictions

- **Covenant restricting an accountant from practicing in an accounting practice within a 45-mile radius for five years was an unreasonable duration, but the contract modified to a three-year duration was deemed reasonable.** *Holloway v. Faw, Casson & Co.*, 319 Md. 324 (1996). *Tawney v. Mutual System of Md., Inc.*, 186 Md. 508 (1946).

In determining the reasonableness of temporal and geographic restrictions, courts take into account whether:

- The court will inquire as to whether the restrictions are necessary to protect the prospective customer. *Gilby Commuter, 245 Md. 214 (1970)*; *Equipment Corp., 266 Md. 170 (1972)*; *Sammy's Barbecue, 269 Md. 450 (1973)*; *Eladition, Inc., 268 Md. 483 (1973)*.

Covenants restricting competition between software professionals

- More balance of bargaining power
- Higher salaries
- Access to confidential information
- Closer and/or stronger relationship with customers
- Importance of professional to a partnership or other organization

Harm to the General public

- Danger of a monopoly
- Level of competition in the business

Unreasonably Burdensome to the Employee

- *Debra Williams, City of Birch Grove, 591 F.2d 1032 (7th Cir. 1979)* (1979) (for and employee's reasonable choice to any other available job was unduly burdensome to the employee, in comparison to the benefit, to restrain from following the vocation for which employee had two of the most years of experience of limitations) "some 23 years in the grocery business has fitted him.")

Consideration

- Both the employee and employer must give something of value in the agreement for it to be enforceable
- Continued employment for a substantial period of time after execution is adequate consideration
 - Duress defense

Blue Penciling

- *Hebbey St. Mipudl System of Mch, Inc., 185 Md. App (1986) 1075* (contract did not remain in competition provisions an employment contract against including severability clause) (severability clause without effecting to be a severability clause)

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