

COVENANTS NOT TO COMPETE

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1. To be enforceable, a covenant not to compete must be reasonable.

“In order to be valid and binding, a covenant which restricts the activities of an employee following the termination of his employment must be partial and restricted in its operation ‘in respect either to time or place, . . . and must be reasonable — that is, it should afford only a fair protection to the interest of the party in whose favor it is made and must not be so large in its operation as to interfere with the interests of the public....’ The interests of the employee himself must also be protected, and a restrictive covenant is unenforceable if by its terms the employee is precluded from pursuing his occupation and thus prevented from supporting himself and his family.” Scott v. General Iron & Welding Co., 171 Conn. 132, 137 (1976) (citations omitted).

2. The Five Factor test of reasonableness.

“The five factors to be considered in evaluating the reasonableness of a restrictive covenant ancillary to an employment agreement are: 1) the length of time the restriction operates;(2) the geographical area covered; (3) the fairness of the protection accorded to the employer; (4) the extent of the restraint on the employee's opportunity to pursue his occupation; and (5) the extent of interference with the public's interests.” Robert S. Weiss & Associates v. Wiederlight, 208 Conn. 525, 529 n.2 (1988).

The five factor test is disjunctive, rather than conjunctive; a finding of unreasonableness in any one of the criteria is enough to render the covenant unenforceable. New Haven Tobacco Co. v. Perrelli, 18 Conn. App. 531, 534, *cert. denied*, 212 Conn. 809 (1989).

3. The party challenging the validity of a covenant not to compete bears the burden of establishing that it is unreasonable. Scott, 171 Conn. at 139; Milaneseo v. Calvanese, 92 Conn. 641, 642 (1918); Pediatric Occupational Therapy Services, Inc. v. Town of Wilton, 2004 Ct. Sup. 5230, 5242 (Conn. Super. 2004); Access America, LLC v. Mazzotta, 2005 Ct. Sup. 12982, 12986 (Conn. Super. 2005).

4. An anti-sales or anti-solicitation restriction need not contain an explicit geographic limitation. New Haven Tobacco Co., 18 Conn. App. at 534-535.

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5. A confidentiality agreement that has the same effect as a non-competition agreement may be judged by the same standards as a non-competition agreement.

NewInno, Inc. v. Peregrim Development, Inc., 2003 Ct. Sup. 7852, 7853-7854 (Conn. Super. 2003) (“[T]here can be no doubt that the enforceability of confidentiality agreements must be guided by the same considerations that govern the validity of non-compete agreements.”)

6. There is a split of authority as to whether continued employment alone is sufficient consideration for a covenant not to compete that is entered into after the beginning of employment.

Compare, e.g., Artman v. Output Technologies Solutions Eastern Region, Inc., 2000 Ct. Sup. 8003, 8007 (Conn. Super. 2000) (“[I]t is well settled law in Connecticut that continued employment is not consideration for a covenant not to compete entered into after the beginning of employment.”); Timenterial, Inc. v. Dagata, 29 Conn. Sup. 180, 185-186 (Conn. Super. 1971) (employment contract with restrictive covenant signed after employment commenced was invalid because past consideration is insufficient), *with* NewInno, Inc. v. Peregrim Development, Inc., 2002 Ct. Sup. 15209, 15220 (Conn. Super. 2002) (continued at-will employment is sufficient consideration for a confidentiality agreement); Sartor v. Town of Manchester, 312 F.Supp. 2d 238, 245 (D. Conn. 2004) (“Connecticut recognizes that continued employment is sufficient consideration to support non-compete covenants with at-will employees.”); Roessler v. Burwell, 119 Conn. 289 (1934) (restrictive covenant was “founded upon an adequate consideration given” when contained in a written agreement, entered into 3 years after employment commenced, under which employer agreed to employ employee “indefinitely”).

7. A change in the terms and conditions of employment can provide sufficient consideration to support a covenant not to compete that is entered into after an employment relationship has commenced. Van Dyck Printing Co. v. DiNicola, 43 Conn. Sup. 191, 196 (Conn. Super. 1993), *aff'd*, 231 Conn. 272 (1994).

8. The “Blue Pencil” Rule – modification of a restrictive covenant to make it enforceable.

Beit v. Beit, 135 Conn. 195, 205 (1948) (citations omitted): “ ‘A restrictive covenant which contains or may be read as containing distinct undertakings bounded by different limits of space or time, or different in subject-matter, may be good as to part and bad as to part. But this does not mean that a single covenant may be artificially split up in order to pick out some part of it that can be upheld. Severance is permissible only in the case of a covenant which is in effect a combination of several distinct covenants.’ Where the covenant is intended by the parties to be an entirety, it cannot properly be so divided by a court that it will be held good for a certain area but invalid for another; indeed, as the trial court well states in its memorandum of decision, this would be to make an agreement for the parties into which they did not voluntarily enter.”

One interpretation of the “blue pencil” rule is that it can only be applied if a restrictive covenant can be made enforceable by striking out language in a contract that makes the restriction unreasonable. See Timenterial, 29 Conn. Sup. at 184-185.

Another interpretation of the “blue pencil” rule is that a court can modify a covenant not to compete to make it enforceable when the agreement at issue contains a provision authorizing such a modification. NewInno, Inc. v. Peregrin Development, Inc., 2003 Ct. Sup. 7852, 7858 (Conn. Super. 2003) (Based upon the language of an agreement, “the court may have the authority to “blue pencil” the non-disclosure covenants to modify or eliminate unreasonable provisions of the contract.”); Gartner Group Inc. v. Mewes, 1992 Ct. Sup. 898 (Conn. Super. 1992) (one year restrictive covenant enforced as modified by the court to apply only to Connecticut, Massachusetts, and New York).

9. The involuntary termination of an employee’s employment does not make a reasonable restrictive covenant invalid or unenforceable.

Robert S. Weiss & Associates v. Wiederlight, 208 Conn. 525, 532 (1988) (“[T]he reasonableness of a restrictive covenant of employment does not turn on whether the employee subject to the covenant left his position voluntarily or was dismissed by the employer.”)

10. An employer’s material breach of an employment agreement can be a defense to the enforcement of a non-compete provision.

Heritage Benefit Consultants, Inc. v. Cole, 2001 Ct. Sup. 2891, 2902-2903 (Conn. Super. 2001) (“[T]he breach of an Employment Contract by an employer is a recognized defense to the enforcement of a non-compete agreement.”).

11. Geographic Scope and Time of Restriction.

The determination of what geographic scope and time of restriction are reasonable is fact sensitive. *Compare, e.g.,* Aetna Retirement Services, Inc. v. Hug, 1997 Ct. Sup. 6621 (Conn. Super. 1997) (temporary injunction for 6 months granted enforcing a restrictive covenant barring a senior executive from working in a similar job for a competitor worldwide for a period of one year, based on employer’s agreement to continue paying base salary during the non-compete period); Van Dyck Printing Co. v. DiNicola, 43 Conn. Sup. 191 (Conn. Super. 1993), *aff’d*, 231 Conn. 272 (1994) (covenant restricting the defendant from competing with the plaintiff for one year throughout Connecticut, with a penalty of an additional year for violation of the covenant, upheld as reasonable); Gartner Group Inc. v. Mewes, 1992 Ct. Sup. 898 (Conn. Super. 1992) (one year restrictive covenant enforced as modified by the court to apply only to Connecticut, Massachusetts, and New York); and Daniel v. Keane Agency, Inc. v. Butterworth, 1995 Ct. Sup. 1355-E (Conn. Super. 1995) (judgment entered enforcing three year restriction from engaging in the insurance agency or brokerage business within the City of Bridgeport and a 20 mile radius of the City), *with* Amphenol Corp. v. Hendry, 1997 Ct. Sup. 25 (Conn. Super. 1997) (refusing to grant a temporary injunction to enforce a one year restrictive covenant with no geographic limitation); Timenterial, Inc. v. Dagata, 29 Conn. Sup. 180 (Conn. Super. 1971) (restrictive covenant covering a radius of 50 miles from any place of business of the plaintiff – the sale & rental of motor homes – is too broad and therefore unreasonable); and Russo Associates v. Cachina, 1995 Ct. Sup. 1805 (Conn. Super. 1995) (two year restriction prohibiting employee from engaging in other computer assisted design work within a 75 mile radius of Fairfield was unreasonable).

12. Injunctive Relief.

Normally there is a four-part test that must be satisfied for the issuance of a temporary injunction. An applicant must show: (1) a likelihood of success on the merits; (2) imminent, substantial and irreparable injury; (3) lack of an adequate remedy at law; and (4) that a balancing of the equities favors the granting of the injunction. See, e.g., Griffin Hospital v. Comm'n on Hospitals and Health Care, 196 Conn. 451, 457-58 (1985).

Many cases hold, however, that irreparable injury and lack of an adequate remedy at law are presumed and need not be established where a party seeks to enforce a covenant not to compete. See, e.g., Access America, LLC v. Mazzotta, 2005 Ct. Sup. 12982 (Conn. Super. 2005); Kim's Hair Studio, LLC v. Rogers, 2005 Ct. Sup. 11680 (Conn. Super. 2005); Maintenance Technologies International v. Vega, 2006 Ct. Sup. 802 (Conn. Super. 2006). But see TD Banknorth Insurance Agency, Inc. v. Kirsche, 2005 Ct. Sup. 15660 (Conn. Super. 2005), in which the court concluded that the plaintiff in part had an adequate remedy at law because the parties' agreement provided for monetary remedies in the event of any breach of certain non-competition provisions.

13. Choice of Law Considerations.

United Rentals, Inc. v. Pruett, 296 F. Supp. 2d 220 (D. Conn. 2003). In this case, applying Section 187 of the Restatement (Second) of Conflict of Laws, the court transferred to California a case in which the plaintiff sought a temporary injunction to enforce a non-compete provision in an employment agreement. The court concluded that even though the parties' agreement had a valid choice of law provision which specified that the agreement was to be governed and construed according to Connecticut law, and even though the agreement had a valid forum selection clause which provided that disputes about enforcement of the agreement should be resolved in state or federal court in Connecticut, the case should be transferred to California because the employee had solely worked in California; the employee resided in California; almost all of the witnesses resided in California; and the interests of justice dictated that the case should be decided in California under California law because, unlike Connecticut law, California law generally prohibits covenants not to compete and California public policy strongly favors employee mobility.

14. Drafting considerations - Carefully draft non-competition and confidentiality agreements

- Consider the particular circumstances of the employer at issue to make sure that the provisions are tailored to protect the specific employer's business interests and are not overly broad or unnecessarily long
- Draft the provisions in such a way as to permit a court to "blue pencil" the provisions to strike out, if necessary, those which might be found to be unreasonable. Include a provision which specifically authorizes the court to modify, or sever, any provision that is determined to be unenforceable as drafted.
- Include choice of law and forum selection provisions, which are generally enforceable (absent strong public policy in another state with greater contacts with respect to the dispute at issue)