

## Non-Compete Agreements

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Covenants not to compete, or non-compete agreements, are contracts which are entered into to protect one party against competition from another when a transaction is consummated or after a relationship ends. For example, an employer may wish to be protected against competition from an employee after the employment relationship ends, particularly if the employee is in a position to acquire some of his employer's good will and develop relationships with some of the employer's important customers. Similarly, the buyer of a business may wish to be protected against competition from the person or persons from whom he or she buys a business.

Non-compete agreements are normally enforceable in Pennsylvania if they are: (1) ancillary to the main purpose of a lawful transaction; (2) necessary to protect a party's legitimate interest; (3) supported by adequate consideration; and (4) appropriately limited in geographic scope and duration. Applying this test, numerous non-compete agreements have been upheld. Employees thus should not sign such agreements assuming them not to be valid.

However, employers, or buyers of businesses should not rely on form agreement language in the hope that it might prove enforceable. The non-compete may be drafted over-broadly, may have unenforceable geographic or time restrictions, or may be offered without consideration to support it, as is the case when employers seek to bind existing employees but do not give additional wages or benefits or other consideration to support the non-compete. Under recent case law, employers can also encounter difficulty enforcing non-compete agreements against employees discharged for unsatisfactory performance.

Generally, courts will be willing to enforce the provisions of a reasonable non-compete agreement when the employee initiates the termination; however, the answer may be different when the employer terminates the employee. In general, employees who are fired for poor performance have a better chance of avoiding their non-compete agreements than employees who are fired for misconduct. One court addressing a termination for poor performance refused enforcement, asking why the employer wanted to enforce the agreement and prevent the former employee from working for a competitor when the employer had found the employee's work to be unsatisfactory. By contrast, another court considering a termination for employee misconduct found that the agreement should be enforced, reasoning that a contrary rule would allow employees to avoid a non-compete agreement by deliberately committing misconduct. Enforcement will vary significantly from state to state.

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