

## Pennsylvania's Post-Employment Non-Compete Agreements

Pennsylvania post-employment non-compete agreements are enforceable if 1) they are incident to an employment relationship between the parties; 2) the restrictions imposed by the covenant are reasonably necessary for the protection of the employer; and 3) the restrictions imposed are reasonably limited in duration and geographic extent.<sup>1</sup> Employers should be mindful that restrictive covenants not to compete post-employment are not favored in Pennsylvania. Courts often view restrictive covenants as a trade restraint that prevents a former employee from earning a living.<sup>2</sup> These agreements are closely scrutinized because Pennsylvania courts recognize “the inherently unequal bargaining positions” of the employer and employee<sup>3</sup> and the significant hardship that can result when an employee is bound by such an agreement.<sup>4</sup>

When drafting a restrictive covenant, the Employer must consider the employer's protectable interests, the employee's interest in earning a living in their chosen profession and the public's interests. A restrictive covenant must be reasonably necessary for the protection of the employer's legitimate interests. Courts have determined that some legitimate interests include trade secrets, confidential information, good will and unique or extraordinary skills.<sup>5</sup> Pennsylvania courts have held that eliminating competition or gaining an economic advantage are not legitimate business interests.<sup>6</sup> A court will also criticize a covenant not to compete if its geographical restriction is too broad and/or if its duration is too long. If a Court determines that the non-compete agreement imposes broader and/or longer restrictions than necessary, a court of equity can “blue pencil” the agreement, which means granting enforcement of the agreement but only after reducing the geographical restriction and/or the duration of the restriction.

Employers should also be aware that a Court may not enforce a restrictive covenant against an employee who is terminated or leaves work involuntarily.<sup>7</sup> This is because a Court could determine that, once the employee is terminated, the employer's need to protect itself is diminished by the employee's less significant worth, which is often presumed in a termination.

Employers should also be aware that a Court may not enforce a restrictive covenant if the employer imposes the restrictive covenant upon the employee during the course of the employment period and without providing additional consideration (i.e. compensation) to support the new restrictive covenant. That is why employers are well advised to consider paying an employee additional compensation for accepting the new employment condition, i.e. the restrictive covenant.

The Third Circuit case of *PharMethod, Inc. v. Caserta*, 3d Cir., No. 10-1388, unpublished opinion, June 2, 2010, sets forth a checklist of factors that employers should consider when drafting non-compete agreements. Non-compete agreements should be limited to the protection of the legitimate business interest of the employer and should not be overly broad in duration or

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geography. The employer should seek to protect proprietary information, including trade secrets and should not cover information that is publically available. Be aware that a non-compete agreement is subject to revision or non-enforcement by a court if a disgruntled employee challenges the agreement. It is highly recommended that you retain experienced counsel to draft or review any non-compete agreement to protect your interests.

If you have any questions regarding employment law issues, please contact me for a free consultation at 1-877-LAW-2555.

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<sup>1</sup> *Sidco Paper Co. v. Aaron*, 351 A.2d 250, 252 (Pa. 1976).

<sup>2</sup> *Hess v. Gebhard & Co.*, 808 A.2d 912, 917 (Pa. 2002).

<sup>3</sup> *Reading Aviation Serv., Inc. v. Bertolet*, 311 A.2d 628, 630 (Pa. 1973).

<sup>4</sup> *Morgan's Home Equip. Corp. v. Martucci*, 136 A.2d 838, 846 (Pa. 1957).

<sup>5</sup> *Victaulic Co. v. Tieman*, 499 F. 3d 227, 235 (3d Cir. 2007)

<sup>6</sup> *Hess*, 808 A.2d at 920-21.

<sup>7</sup> *Insulation Corp. of Am., v. Brobston*, 667 A.2d 729 (Pa. Super. Ct. 1995)