Non-compete Laws: Virginia
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A Q&A guide to non-compete agreements between employers and employees for private employers in Virginia. This Q&A addresses enforcement and drafting considerations for restrictive covenants such as post-employment covenants not to compete and non-solicitation of customers and employees. Federal, local or municipal law may impose additional or different requirements.

OVERVIEW OF STATE NON-COMPETE LAW

1. If non-competes in your jurisdiction are governed by statute(s) or regulation(s), identify the state statute(s) or regulation(s) governing:
   - Non-competes in employment generally.
   - Non-competes in employment in specific industries or professions.

GENERAL STATUTE AND REGULATION
Virginia does not have any statutes or regulations governing non-competes generally.

INDUSTRY- OR PROFESSION-SPECIFIC STATUTE AND REGULATION
Rule 5.6 of the Virginia Rules of Professional Conduct governs non-compete agreements in the legal industry.

2. For each statute or regulation identified in Question 1, identify the essential elements for non-compete enforcement and any absolute barriers to enforcement identified in the statute or regulation.

GENERAL STATUTE AND REGULATION
Virginia does not have any statutes or regulations governing non-competes generally.

INDUSTRY- OR PROFESSION-SPECIFIC STATUTE AND REGULATION
Lawyers: Virginia Rule of Professional Conduct 5.6
A lawyer cannot offer or make:
- A partnership or employment agreement that restricts his right to practice law after the termination of a relationship, except for an agreement about retirement benefits.
- A settlement agreement that restricts him from practicing law, unless approved by a tribunal or government entity.
(Va. R. Prof’l Conduct 5.6 (2010)).
COMMON LAW

Under Virginia case law, a non-compete agreement must be reasonable. A reasonable non-compete is:

- No more restrictive than necessary to protect the employer’s legitimate business interest.
- Not unduly burdensome on the employee’s legitimate efforts to earn a livelihood.
- Consistent with sound public policy.


To assess the reasonableness of a non-compete, courts look at the following factors:

- The duration of the restraint.
- The geographic scope of the restraint.
- The scope and extent of the restricted activity.

(Simmons, at 678; Strategic Enter. Solutions, Inc. v. Ikuma, 2008 WL 8201356 (Va. Cir. Ct. Oct. 7, 2008).)

ENFORCEMENT CONSIDERATIONS

3. If courts in your jurisdiction disfavor or generally decline to enforce non-competes, please identify and briefly describe the key cases creating relevant precedent in your jurisdiction.

Non-competes in Virginia are viewed as disfavored restraints on trade, so any ambiguities in non-compete agreements are construed in favor of the employee (Grant v. Carotek, Inc., 737 F.2d 410 (4th Cir. 1984); Omniplex, at 342; Simmons, at 678; Motion Control Syss., Inc. v. East, 546 S.E.2d 424 (2001); Richardson v. Paxton Co., 203 Va. 790 (1962)).

In addition, whether a non-compete agreement is enforceable is a question of law for the courts to decide (Omniplex, at 342; Simmons, at 678; Motion Control, at 426).

4. Which party bears the burden of proof in enforcement of non-competes in your jurisdiction?

Under Virginia law, the employer bears the burden of proving that a non-compete is enforceable. It must show the restraint is reasonable (Motion Control, at 425 and Question 2: Common Law).

5. Are non-competes enforceable in your jurisdiction if the employer, rather than the employee, terminates the employment relationship?

Absent a provision in the non-compete holding otherwise, whether an employee was discharged or resigned is irrelevant when enforcing a non-compete agreement in Virginia (Blue Ridge, at 469).

BLUE PENCILING NON-COMPETES

6. Do courts in your jurisdiction interpreting non-competes have the authority to modify (or “blue pencil”) the terms of the restrictions and enforce them as modified?

Although the Supreme Court of Virginia has not expressly ruled on the courts’ power to blue pencil a non-compete agreement, Virginia courts are hesitant to blue pencil non-compete agreements (Lanmark Tech., Inc. v. Canales, 454 F. Supp. 2d 524 (E.D. Va. 2006); Strategic Enter., at *4; Better Living Components, Inc. v. Coleman, 62005 WL 771592 (Va. Cir. Ct. Apr. 6, 2005)).

Virginia courts construe ambiguous clauses in non-compete agreements against the employer (Lanmark, at 529). In addition, some courts have found that blue pencil provisions permitting judicial modification in non-compete agreements are invalid or discouraged under Virginia law (Lasership Inc. v. Watson, 2009 WL 7388870 (Va. Cir. Ct. Aug. 12, 2009); Pace v. Ret. Plan Admin. Serv., Ltd., 2007 WL 5971432 (Va. Cir. Ct. Sept. 28, 2007)).

CHOICE OF LAW PROVISIONS

7. Will choice of law provisions contained in non-competes be honored by courts interpreting non-competes in your jurisdiction?

The Virginia Supreme Court has not addressed whether choice of law provisions in non-compete agreements are valid. However, Virginia generally recognizes choice of law provisions (Paul Bus. Syss., Inc. v. Canon U.S.A., Inc., 397 S.E.2d 804 (1990)).

REASONABLENESS OF RESTRICTIONS

8. What constitutes sufficient consideration in your jurisdiction to support a non-compete agreement?

The Virginia Supreme Court has not specifically addressed what constitutes sufficient consideration to support a non-compete agreement.
Courts have differed on whether continued employment alone constitutes sufficient consideration. For example, the federal district court in Mona Electric Group, Inc. v. Truland Service Corp., held that continued employment alone is insufficient consideration in Virginia (193 F. Supp. 2d 874 (E.D. Va. 2002)). In contrast, the Virginia Supreme Court found that there was sufficient consideration for non-competes when signing the non-competes was a condition of the continued employment (Paramount Termite Control Co. v. Rector, 380 S.E.2d 922 (1989)). However, the Virginia Circuit Court, relying on Paramount, held that continued employment alone is sufficient consideration in an at will employment situation (Alan J. Zuccari, Inc. v. Adams, 1997 WL 1070565 (Va. Cir. Ct. Apr. 10, 1997)).

Virginia courts have also upheld non-compete agreements where:

• An employee signed a non-compete agreement at termination in exchange for $2,000 (New River, at 26).
• An employee entered into a non-compete agreement at the beginning of employment (Blue Ridge, at 468).

Virginia courts have not addressed whether a change in the terms and conditions of employment constitutes sufficient consideration.

9. What constitutes a reasonable duration of a non-compete restriction in your jurisdiction?

Whether the duration of a non-compete is reasonable depends on the facts of each case, as each non-compete agreement must be analyzed by balancing the contract provisions with the parties’ specific circumstances (Omniplex, at 342; Mantech Intl Corp. v. Analex Corp., 2008 WL 6759967 (Va. Cir. Ct. July 18, 2008)).

In general, however, non-competes with smaller geographic limitations are more likely to be considered reasonable. Examples of reasonable geographic restrictions include:

• In New River, the court upheld a restriction prohibiting a local radio disc jockey from engaging in any business that competed with his former employer within a 60-mile radius of his employer’s radio station (the employer’s radio station’s signal strength was about 60 miles (New River, at 26)).
• In Roanoke, the court upheld a three-year restriction prohibiting an employee from engaging in work similar to that of his employer in the territory covered by his former employer (Roanoke, at 885).
• In Blue Ridge, the court upheld a restriction prohibiting salesmen from working within the territories they had serviced on behalf of their former employer (Blue Ridge, at 470).
• In Strategic Resources, Inc. v. Nevin, the court struck down a non-compete clause without a geographic restriction. Although the employer operated on a world-wide basis, the non-compete was not restricted to the employer’s covered areas and therefore the court held that it was unenforceable. (2005 WL 3143941 (E.D. Va. Nov. 23, 2005)).

11. Does your jurisdiction regard as reasonable non-competes that do not include geographic restrictions, but instead include other types of restrictions (such as customer lists)?

The lack of a geographic limitation alone does not render a non-compete invalid. Where other factors such as the time restriction or the scope of the restricted activity are reasonable, non-compete agreements may be upheld despite the lack of a geographic limitation. (Mantech, at *3; Market Access Int’l, Inc. v. KMD Media, LLC, 2006 WL 3775935 (Va. Cir. Ct. Dec. 14, 2006); Zuccari, at *3).

12. Does your jurisdiction regard as reasonable geographic restrictions (or substitutions for geographic restrictions) that are not fixed, but instead are contingent on other factors.

Virginia has allowed restrictions that are contingent on customers (Foti v. Cook, 263 S.E.2d 430 (1980)).

13. If there is any other important legal precedent in the area of non-compete enforcement in your jurisdiction not otherwise addressed in this survey, please identify and briefly describe the relevant cases.

Non-competes that bar an employee from seeking subsequent employment in unrelated or non-competitive fields have been rejected as overbroad (Omniplex, at 342-43; Motion Control, at
Non-compete Laws: Virginia

426; Richardson, at 795). Similarly, non-competes that ban an employee from being employed in any capacity by a competing company are often considered unreasonable (Roto-Die Co. v. Lesser, 899 F. Supp. 1515 (W.D. Va. 1995); Modern Envtls, Inc. v. Stinnett, 561 S.E.2d 694 (2002)).

Non-compete agreements are also unenforceable when the employer has no legitimate business interest in precluding the employee's new employment. For example, the court in Parikh v. Family Care Ctr., Inc. held that since a non-professional corporation itself could not engage in a competing practice of medicine, it had no legitimate business interest in precluding its former employee, a physician, from practicing medicine (641 S.E.2d 98 (2007)).

OTHER ISSUES

16. Apart from non-competes, what other agreements are used in your jurisdiction to protect confidential or trade secret information?

Virginia courts recognize non-disclosure and non-solicitation agreements (Lasership, at *1; Leddy v. Commc’n Consultants, Inc., 2000 WL 33259906 (Va. Cir. Ct. Apr. 5, 2000)). Courts have analyzed non-disclosure and non-solicitation agreements in the same way as non-competes (Lasership, at *4; Strategic Enter., at *3; Mantech, at *3; Zuccari, at *4).

17. Is the doctrine of inevitable disclosure recognized in your jurisdiction?


REMEDIES

14. What remedies are available to employers enforcing non-competes?

Employers enforcing non-competes can generally seek the following relief:

- Preliminary and permanent injunctions (see Question 15).
- Lost profits damages.
- Damages for lost good will.
- Liquidated damages (if provided in the agreement).
- Attorneys’ fees.


15. What must an employer show when seeking a preliminary injunction for purposes of enforcing a non-compete?

To obtain a preliminary injunction in Virginia, the employer must show:

- A likelihood of success on the merits.
- It will suffer irreparable harm if the injunction is not granted.
- It has no adequate remedy at law.
- Injury to the employee is not severe enough to prevent equitable relief.
- The injunction would not be against the public interest.

(Int’l Limousine, at *2.)