



# Non-compete Laws: Maryland

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A Q&A guide to non-compete agreements between employers and employees for private employers in Maryland. 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

Maryland does not have a general statute or regulation governing non-competes.

### INDUSTRY- OR PROFESSION-SPECIFIC STATUTE OR REGULATION

Rule 5.6 of the Maryland Lawyer's 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

There is no statute or regulation that governs non-competes generally.

### INDUSTRY- OR PROFESSION-SPECIFIC STATUTE OR REGULATION

#### Lawyers: Maryland Lawyer's Rule of Professional Conduct 5.6

A lawyer cannot participate in an agreement that restricts his right to practice law:

- After the termination of a relationship, except for an agreement about retirement benefits.
- As part of a settlement.

(*Md. Lawyer's R. Prof'l Conduct 5.6 (2011).*)

### COMMON LAW

Non-competes will be upheld if:

- There is adequate consideration.
- They are ancillary to the employment contract.
- The restraints are limited in geographic scope and duration to what is reasonably necessary to protect the employer's business.
- They do not impose undue hardship on the employees.
- They are not against the public interest.

(*Becker v. Bailey*, 268 Md. 93 (1973); *Ruhl v. F.A. Bartlett Tree Expert Co.*, 245 Md. 118 (1967); *MacIntosh v. Brunswick Corp.*, 241 Md. 24 (1965).)

Courts also consider the following factors:

- Whether the employee is an unskilled worker whose services are not unique.
- Whether the employee is exploiting close personal contacts with the employer's customers.
- Whether the non-compete is necessary to prevent misuse of the employer's:
  - established customer relationships;
  - trade secrets;
  - sales or delivery routes; or
  - customer or client lists.

(*Budget Rent A Car of Wash., Inc. v. Raab*, 268 Md. 478 (1973); *Becker*, at 97-102; *Ecology Servs., Inc. v. Clym Envtl. Servs., LLC*, 952 A.2d 999 (Md. Ct. Spec. App. 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.

Maryland courts carefully review covenants not to compete, and generally enforce them only:

- Against employees providing unique services.
- To prevent misuse of the employer's:
  - established customer relationships;
  - trade secrets;
  - sales or delivery routes; or
  - customer or client lists.

(*Becker*, at 97.)

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

The party seeking to enforce the non-compete has the burden of proof (*Silver v. Goldberger*, 231 Md. 1 (1963)).

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

If the termination is a breach of contract by the employer, Maryland courts may decline to enforce the non-compete. For example, the court in *Ruhl* upheld the non-compete agreement where the employee resigned, but stated that if the employee had been terminated by the employer through no fault of his own, "a different legal situation might well have been presented" (*Ruhl*, at 128).

### 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?

Maryland courts may blue pencil non-compete agreements (*Deutsche Post Global Mail, Ltd. v. Conrad*, 292 F. Supp. 2d 748 (D. Md. 2003); *Tawney v. Mut. Sys. of Maryland, Inc.* 186 Md. 508 (1946)).

In *Holloway v. Faw, Casson & Co.*, the Maryland Court of Special Appeals affirmed the lower court's decision to replace the non-compete's five-year limitation prohibiting competition with a three-year restriction (78 Md. App. 205 (Md. Ct. Spec. App. 1989)).

However, cases since *Holloway* have limited blue penciling to the removal of language, not the addition of words or phrases (see *Fowler v. Printers II, Inc.*, 89 Md. App. 448 (Md. Ct. Spec. App. 1991)).

### CHOICE OF LAW PROVISIONS

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

Maryland courts will honor a choice of law provision in a non-compete, unless either:

- There is no reasonable basis for the selected forum.
- The choice of law violates the fundamental public policy of a state with a greater interest in the outcome of the issue.



(*PADCO Advisors, Inc. v. Omdahl*, 179 F. Supp. 2d 600 (D. Md. 2002); *Labor Ready, Inc. v. Abis*, 767 A.2d 936 (Md. Ct. Spec. App. 2001).)

## REASONABLENESS OF RESTRICTIONS

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

Under Maryland law, sufficient consideration for a non-compete includes:

- Signing a non-compete at initial employment.
- Continued employment.

(*Gill v. Computer Equip. Corp.*, 266 Md. 170 (1972); *Simko, Inc. v. Graymar Co.*, 55 Md. App. 561 (Md. Ct. Spec. App. 1983).)

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

In Maryland, a reasonable duration of a non-compete depends on the facts of a particular case (see *Ruhl*, at 124 and *Question 2*). The court in *Becker* noted a reasonable time restriction is partly measured by the amount of time an employer will need to re-establish solid relationships with his clients or customers after the employee leaves (*Becker*, at 101).

Maryland courts have consistently upheld non-compete restrictions of up to two years. For examples of non-competes determined to be reasonable, see:

- In *TEKsystems, Inc., v. Bolton*, the court upheld an 18-month prohibition against working in staffing technical service personnel (2010 WL 447782 (D. Md. Feb. 4, 2010)).
- In *NaturaLawn of America v. West Group, LLC*, the court upheld a two-year non-compete restriction in a franchise agreement (484 F. Supp. 2d 392 (D. Md. 2007)).
- In *Millward v. Gerstung Int'l Sports Educ., Inc.*, the court upheld a two-year prohibition against working at a sports camp (268 Md. 483 (1973)).
- In *Gill*, the court upheld a two-year prohibition against serving the company's customers of the year before the employee's employment was terminated (*Gill*, at 181).
- In *Ruhl*, the court upheld a two-year prohibition against working in areas the employer had previously assigned to the employee (*Ruhl*, at 128).

10. What constitutes a reasonable geographic non-compete restriction in your jurisdiction?

A reasonable geographic restriction depends on the facts of the case, but Maryland courts generally enforce geographic limitations consisting of the former employer's territory (see *Ruhl*, at 128). For examples of geographic restrictions found to be reasonable, see:

- In *TEKsystems*, the employee was restricted from working within a 50-mile radius of his previous office. The court upheld the restriction in part because the employer operated on a nationwide and international level, and also noted that a 50-mile radius restriction was facially reasonable (*TEKsystems*, at \*1).
- In *NaturaLawn*, the court upheld a restriction prohibiting the employee from working within a 20-mile radius of the licensed territory of any of the former employee's franchises (*NaturaLawn*, at 400).
- In *Ruhl*, the court upheld a geographic restriction covering the six counties where the employee had worked while in the employer's tree service business (*Ruhl*, at 122).
- In *National Instrument, LLC v. Braithwaite*, the court upheld a two-year non-compete restriction that covered the US and Mexico, because the geographic scope was no broader than reasonably necessary to protect the employer's business in their relevant market (2006 WL 2405831 (Md. Cir. Ct. June 5, 2006)).

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)?

Maryland courts have not specifically addressed whether non-competes with no geographic restrictions are enforceable (see *Deutsche Post*, at 757). However, the court in *Gill* upheld a non-compete that prohibited an employee from working for customers his former employer had in the year before he left (*Gill*, at 180).

In addition, the federal district courts in Maryland have enforced non-competes that do not include geographic restrictions but instead prohibit an employee from:

- Working for two specific competitors (*PADCO*, at 607).
- Working for any direct competitor (*Intelus Corp. v. Barton*, 7 F. Supp. 2d 635 (D. Md. 1998)).

(See *Question 12*.)

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.

Maryland courts have upheld restrictions based on the employer's:

- Competitors in relevant markets.
- Previous customers.

(See *Question 11*.)

In *Deutsche Post*, however, the court found a two-year restriction, which prohibited employees from engaging in any competitive activity where the employer dominated the market, was unreasonable (see *Deutsche Post*, at 756).

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.

There is no other important legal precedent in the area of non-compete enforcement in Maryland not otherwise addressed in this survey.

## REMEDIES

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

Employers enforcing non-competes in Maryland can generally seek:

- Preliminary and permanent injunctions (see *Question 15*).
- Damages.
- Liquidated damages (if provided in the non-compete agreement).

(*PADCO*, at 612; *Nationwide Mut. Ins. Co. v. Hart*, 73 Md. App. 406 (Md. Ct. Spec. App. 1988); *Holloway*, at 227.)

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

To obtain a preliminary injunction to enforce a non-compete, the employer must show:

- A likelihood of success on the merits.
- Irreparable harm to the employer if the injunction is not granted.
- The opposing party would not suffer greater injury by granting the injunction.
- The injunction would not be adverse to public interest.

(*Nationwide*, at 410.)

## OTHER ISSUES

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

Maryland courts have enforced non-disclosure, non-solicitation and confidentiality agreements to protect confidential or trade secret information and have analyzed such agreements under the same rubric as non-competes (see *Lofton v. TLC Laser Eye Ctrs., Inc.*, 2001 WL 121809 (D. Md. Feb. 8, 2001); *Intelus*, at 637; *Fowler*, at 464).

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

Maryland courts have not expressly adopted the doctrine of inevitable disclosure and the Maryland Court of Appeals has declined to adopt it in at least one case (see *LeJeune v. Coin Acceptors, Inc.*, 381 Md. 288 (2004)).

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