

# Non-compete Laws: New Jersey

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A Q&A guide to non-compete agreements between employers and employees for private employers in New Jersey. 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. Answers to questions can be compared across a number of jurisdictions (see *Non-compete Laws: State Q&A Tool* (<http://us.practicallaw.com/1-505-9589>)).

## 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

In New Jersey, there is no state statute or regulation governing non-competes in employment generally.

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

#### Lawyers: N.J. R. Prof'l Conduct 5.6

Rule 5.6 of the New Jersey' Rules of Professional Conduct governs non-compete agreements in the legal industry.

#### Licensed Psychologists: N.J. Admin. Code § 13:42-10.16

Section 13:42-10.16 of the New Jersey Administrative Code governs non-compete agreements for psychologists licensed by the New Jersey Board of Psychological Examiners.

**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

In New Jersey, there is no state statute or regulation governing non-competes in employment generally.

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

#### Lawyers: N.J. R. Prof'l Conduct 5.6

A lawyer cannot offer or make:

- A partnership or employment agreement restricting lawyers from practicing law after ending the relationship, except for agreements concerning retirement benefits.
- A settlement agreement restricting lawyers from practicing law.

(N.J. R. Prof'l Conduct 5.6.)

#### Licensed Psychologists: N.J. Admin. Code § 13:42-10.16

A licensed psychologist cannot enter into an agreement that interferes with or restricts a client's ability to see the client's preferred therapist (N.J. Admin. Code § 13:42-10.16; *Comprehensive Psychology Sys., P.C. v. Prince*, 867 A.2d 1187, 1190 (N.J. Super. Ct. App. Div. 2005)).

## 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.**

Generally, New Jersey courts will only enforce restrictive covenants if they are reasonable in scope and duration (*Community Hosp. Group, Inc. v. More*, 869 A.2d 884, 897 (N.J. 2005)). As New Jersey disfavors restraints on trade, restrictive covenants are narrowly construed (*J.H. Renarde, Inc. v. Sims*, 711 A.2d 410, 416 (N.J. Super. Ct. Ch. Div. 1998)).



To determine if a non-compete covenant is reasonable, New Jersey courts use a three prong test. Under the test, the employer must show that the restriction:

- Is necessary to protect the parties' legitimate interests.
- Does not cause undue hardship on the former employee.
- Is not against the public interest.

(*Solari Indus. v. Malady*, 264 A.2d 53, 56 (N.J. 1970).)

#### LEGITIMATE INTEREST

An employer has a legitimate interest in protecting:

- Customer relationships.
- Trade secrets.
- Confidential business information.

(*Coskey's Television & Radio Sales & Serv., Inc. v. Foti*, 602 A.2d 789, 794 (N.J. Super. Ct. App. Div. 1992).)

If a party is a physician, an employer also has a legitimate interest in protecting:

- Patient referral bases.
- Confidential business information (for example, patient lists).
- Return of investment on training.

(*Community Hosp.*, 869 A.2d at 897.)

#### UNDUE HARDSHIP

When determining whether a non-compete will cause undue hardship, a court considers:

- The likelihood that the employee will find other work in his field.
- The restriction's burden on the employee.

(*Community Hosp.*, 869 A.2d at 898.)

A court is less likely to find undue hardship if the employee terminates the employment relationship. This is because the employee's actions caused the restriction to become effective (*Pathfinder, LLC v. Luck*, No. 04-1475, 2005 WL 1206848, at \*8 (D.N.J. May 20, 2005)).

#### PUBLIC INTEREST

New Jersey courts balance the public's right to freely access professional advice with the employer's legitimate patient or client relationships. For example, in *Community Hospital*, the court balanced the hospital's interest in protecting its referral bases with the potential public harm in preventing a neurosurgeon from working in an area with a neurosurgeon shortage (869 A.2d at 897-99).

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

New Jersey courts have held that an employer may enforce a non-compete if the employer terminated the relationship. For example, in:

- *Hogan v. Bergen Brunswig Corp.*, the Supreme Court of New Jersey enforced a restrictive covenant against a discharged employee (378 A.2d 1164 (N.J. Super. Ct. App. Div. 1977)).
- *Pierson v. Medical Health Centers, P.A.*, the court enforced a restrictive covenant against an employee whose employment contract was not renewed (869 A.2d 901 (N.J. 2005)).

However, New Jersey courts do not enforce a non-compete after termination if it conflicts with the agreement terms (*All Quality Care, Inc. v. Karim*, No. SSX-L-66-03, 2005 WL 3526089, at \*3-\*4 (N.J. Super. Ct. App. Div. Dec. 27, 2005)).

A court may consider the reasons for discharge in assessing whether, and to what extent, to enforce a restrictive covenant. If a restriction creates an undue hardship, a court may not enforce it regardless of the reason for termination. Determining whether a hardship is undue does often require an examination of the underlying reasons for termination (*Community Hosp.*, 869 A.2d at 898).

#### 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?

A New Jersey court may modify or blue pencil an overbroad covenant when it is reasonable to do so (*Solari Indus.*, 264 A.2d at 61). For examples, see:

- *Community Hospital Group, Inc. v. More*, the New Jersey Supreme Court reduced a neurosurgeon's non-compete restriction from 30 miles to 13 miles because a hospital located outside the 13 mile radius had a neurosurgeon shortage. The court believed that keeping the neurosurgeon from working at that hospital violated public policy. (*Community Hosp.*, 869 A.2d at 899-900.)
- *Platinum Management, Inc. v. Dahms*, the court limited a sales employee's non-solicit restriction to a former employer's existing customers, not existing and potential customers (666 A.2d 1028, 1039-40 (N.J. Super. Ct. Law Div. 1995)).
- *Lawn Doctor, Inc. v. Rizzo*, the court, although finding the geographic scope of the non-compete provision in a franchise agreement to be overbroad, elected not to blue pencil the agreement because:
  - there was no testimony or affidavit explaining how a more limited covenant could reasonably protect the franchisor's legitimate interests; and
  - the franchisees already agreed to five types of injunctive relief, which the court found to be sufficient to protect the franchisor's legitimate interests.

(*Civil Action No. 12-1430 (PGS)* (D.N.J. June 27, 2012).)

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

Under New Jersey law, the employer has the burden of proof to show that the covenant is reasonable (*Community Hosp.*, 869 A.2d at 890).

## CHOICE OF LAW PROVISIONS

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

New Jersey courts generally enforce contractual choice of law provisions unless the chosen state's law violates New Jersey public policy (*Kalman Floor Co. v. Jos. L. Muscarelle, Inc.*, 481 A.2d 553, 555 (N.J. Super. Ct. App. Div. 1984)). For example, in:

- *Meadox Medicals, Inc. v. Life Sys., Inc.*, the court upheld a choice of law provision because:
  - the parties did not object; and
  - the provision did not violate New Jersey public policy (3 F. Supp. 2d 549 (D.N.J. 1998)).
- *Raven v. A. Klein & Co.*, the court upheld a choice of law provision because there was no significant difference between the two states' laws (478 A.2d 1208, 1210 (N.J. Super. Ct. App. Div. 1984)).

## REASONABLENESS OF RESTRICTIONS

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

Under New Jersey law, sufficient consideration for a non-compete agreement includes:

- An employment offer.
- A promise of continued employment.
- Continued at-will employment.
- A change in the employment terms.

For example, in:

- *A.T. Hudson & Co. v. Donovan*, the court held that a non-compete signed at hire was supported by adequate consideration (524 A.2d 412, 415 (N.J. Super. Ct. App. Div. 1987)).
- *Hogan v. Bergen Brunswig Corp.*, the court held that an employee's continued employment for three years after signing the non-compete was adequate consideration (378 A.2d at 1167).
- *Solari Industries, Inc. v. Malady*, the Supreme Court of New Jersey enforced a contract with new terms signed during the term of employment. However, the court did not discuss consideration. (*Solari Indus.*, 264 A.2d at 61.)

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

In New Jersey, a reasonable duration depends on the facts of the case (*Karlin v. Weinberg*, 390 A.2d 1161, 1169 (N.J. 1978)).

Courts have regularly enforced time restrictions of one to five years. In *Karlin*, the Supreme Court of New Jersey directed the trial court on remand to limit the restrictive covenant to the period needed for the employer or any new associate to demonstrate his effectiveness to the patients (390 A.2d at 1169). For example, in:

- *Pierson v. Medical Health Ctrs, P.A.*, the court enforced a physician's two-year non-compete restriction because the physician did not challenge the restriction's reasonableness (869 A.2d 901 (N.J. 2005)).

- *Karlin v. Weinberg*, the New Jersey appellate court enforced a dermatologist's five-year, ten-mile restriction because there was no evidence that it was unreasonable (*Karlin*, 390 A.2d at 1169).
- *J.H. Renarde, Inc. v. Sims*, the court enforced a nine-month non-compete restriction because there was no evidence that it was unreasonable (711 A.2d at 414-15).
- *Stryker v. Hi-Temp Specialty Metals, Inc.*, the court:
  - determined that blue penciling the non-compete agreement would cause additional harm to the former employer's business; and
  - noted that two-year restrictive covenants are generally found to be reasonable in New Jersey (*Civil Action No. 11-6384*, 2012 WL 715179 (D.N.J. March 2, 2012)).

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

In New Jersey, a reasonable geographic restriction depends on the facts of the case (*Karlin*, 390 A.2d at 1169). For example, in:

- *Rubel & Jensen Corp. v. Rubel*, the court upheld a non-compete by restricting a former employee's business activities in 11 counties, even though the employer did not conduct business in all the counties. This is because the parties reasonably thought that the employer would expand to the entire area. (203 A.2d 625, 630 (N.J. Super. Ct. App. Div. 1964).)
- *Scholastic Funding Group, LLC v. Kimble*, the court enforced a non-compete without geographic limitations where the employer's business included making nationwide calls (*No. 07-557 (JLL)*, 2007 WL 1231795, at \*4 (D.N.J. April 24, 2007)).
- *Community Hospital Group, Inc. v. More*, the Supreme Court of New Jersey held that a 30 mile non-compete against a neurosurgeon was unreasonable. The court found that preventing the neurosurgeon from working at a neighboring hospital with a neurosurgeon shortage was against public policy (*Community Hosp.*, 869 A.2d at 899-900).
- *Lawn Doctor, Inc. v. Rizzo*, the court held that a 38-state restriction against the operation of a competing lawn care business by former Lawn Doctor franchisees was unreasonable given that the former franchisees had operated a Lawn Doctor franchise in a relatively small area in only one state (*Lawn Doctor, Civil Action No. 12-1430*, 2012 WL 6156228, at \*5).

### 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)?

In New Jersey, a non-compete covenant limited to the employee's clients is a reasonable alternative to a geographic limit (*Solari Indus.*, 264 A.2d at 61). For example, in:

- *Platinum Management, Inc. v. Dahms*, the court enforced a non-compete prohibiting an employee from soliciting or accepting business from the former employer's customers. The non-compete did not have a geographic limitation and was limited to a specific product. (*Platinum Mgmt.*, 666 A.2d at 1037-40.)

- *Pathfinder L.L.C. v. Luck*, the court held that a non-compete targeted to specific customers is reasonable, even if there are no geographic restrictions (*No. Civ.A. 04-1475, 2005 WL 1206848 at \*7*).

However, a non-compete may be deemed unreasonable if it prevents a former employee from soliciting clients who:

- Developed a relationship with the former employee before he worked for the employer.
- Did not do business with the employer.

(*Coskey's Television & Radio Sales and Service, Inc. v. Foti, 602 A.2d 789, 794-95 (N.J. Sup. Ct. 1992)*.)

For example, in:

- *Coskey's Television & Radio Sales and Service, Inc. v. Foti*, the court rejected a non-compete prohibiting a former employee from competing with the employer in the employer's present and future marketing area. The former employee developed relationships with potential clients in the areas before he worked for the employer. The court reasoned that the employer did not have a legitimate business interest in those relationships and that the employee would suffer undue hardship from the restriction. (*Coskey's Television, 602 A.2d at 794-795*.)
- *Meadox Medicals, Inc. v. Life Sys., Inc.*, the court rejected a non-solicitation agreement because the distributor created its own customer relationships without the company's help (*3 F. Supp. 2d at 552-53*).

**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?**

In New Jersey, restrictions prohibiting an employee from soliciting or accepting business from the former employer's customers may be substituted for geographic limitations.

New Jersey courts have also upheld geographic restrictions based on either the:

- Employee's territory.
- Customers or clients which the employee contacted.

For more information, see *Questions 10 and 11*.

**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.**

In *Stryker v. Hi-Temp Specialty Metals, Inc.*, the court determined that a former employee's claim for a preliminary injunction preventing the employer from enforcing a non-compete agreement as currently written and for declaratory relief in the form of blue penciling the agreement may adjudicate the claim when, although the employee had not yet created a competing business:

- The employee had a plan to form a competing business.
- The planned business operation was not contingent on any funding issues related to hiring additional employees.

(*Stryker, Civil Action No. 11-6384, 2012 WL 715179, at \* 5*.)

Additionally, in *Maw v. Advanced Clinical Communications, Inc.*, the court held that an employer's decision to terminate an employee based upon her refusal to execute a non-competition agreement as a condition for continued employment was not covered under New Jersey Conscientious Employment Protection Act (*N.J. Stat. Ann. §§ 34:19-1 to 34:19-8*) (CEPA). Under the CEPA, employers cannot retaliate against an employee who objects or refuses to participate in any activity, policy or practice which the employee reasonably believes is against public policy. The court held that the CEPA did not apply in this case because:

- The employee's dispute with the employer about the reasonableness of the non-compete's terms was private in nature.
- There is no clear mandate as to non-competes under New Jersey law and the non-compete agreement does not affect the public health, safety, welfare or protection of the environment.

(*Maw, 846 A.2d 604, 608 (N.J. 2004)*.)

In *Truong, LLV v. Tran*, the New Jersey Superior Court addressed whether:

- A break in employment triggered the start of a post-employment restriction period.
- A restrictive covenant automatically renews upon an employee's rehiring.

The New Jersey Superior Court concluded that the restrictive covenant begins to run when an employee terminates his employment, regardless of cause. To revive the rights under the initial agreements, the employer and the employee would have had to reach a new agreement. In this case, the employee left in 2009 and the restrictive covenant expired two years later. The agreement did not "spring back to life" simply because the employee returned to work after an alleged breach. (*Truong, LLV v. Tran, No. C-12-12, 2013 WL 85368, at \*6 -\*11 (N.J. Super Ct. Jan. 9, 2013)*.)

Employers must be diligent in documenting their agreements.

## REMEDIES

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

A New Jersey court may award an employer:

- Tort damages.
- Lost profits.
- Incidental damages.
- Injunctive relief.

(*Platinum Mgmt., 666 A.2d at 1044-45*.)

A court will only award damages that were foreseeable when the non-compete was executed (*Totaro, Duffy, Cannova & Co. v. Lane, Middleton & Co., LLC, 921 A.2d 1100, 1108 (N.J. 2007)*). For example, in:

- *Pierson v. Medical Health Centers, P.A.*, the court upheld a \$250,000 award to the employer for the employee's contract breach and \$75,000 for attorneys' fees (*869 A.2d at 903-904*).

- *Wear-Ever Aluminum, Inc. v. Towncraft Industries*, the court awarded the employer lost profits and incidental damages, including:
    - lost profits from the former employee's solicitation of his employer's workers;
    - recruiting and training costs for the new employees; and
    - training costs for the departed employees.
- (182 A.2d 387, 396 (N.J. Super. Ct. Ch. Div. 1962).)

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

To obtain a preliminary injunction in New Jersey, the applicant must prove:

- Irreparable harm.
- A reasonable probability of success on the merits.
- The parties' relative hardship.

(*Klabin Fragrances, Inc. v. Hagelin & Co.*, No. SOM-C-12027-05, 2005 WL 1502254, \*1 (N.J. Super. Ct. Ch. Div. June 24, 2005).)

The court in *Klabin Fragrances* held that irreparable harm is harm that cannot be adequately compensated by money damages (No. SOM-C-12027-05, 2005 WL 1502254, at \*3). Examples include:

- Improper trade secret use.
- Injury to a business.
- Destruction of a business.

## OTHER ISSUES

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

### NON-SOLICITATION AGREEMENTS

New Jersey courts analyze non-solicitation agreements as a covenant not to compete because of their similar purpose and effect (*A.T. Hudson*, 524 A.2d at 432).

However, New Jersey courts do recognize that non-solicitation agreements are often a less restrictive means of protecting the same interests that non-compete agreements protect. For instance, in *Truong LLC*, the Superior Court of New Jersey noted that a full non-compete is often unnecessary where the protectable interest involves customer lists rather than a particular technology. A ban on solicitation may adequately protect an employer's interest in avoiding exploitation of a confidential customer list. (*Truong*, Docket No. C-12-12, 2013 WL 85368, at \*10.)

### NON-DISCLOSURE PROVISIONS

New Jersey courts enforce reasonable non-disclosure provisions (*Raven*, 478 A.2d at 1210).

### HOLDOVER CLAUSES

Holdover clauses require an employee to assign his right, title and interest in any invention he made during employment. New Jersey courts analyze holdover clauses similar to non-competes (see *Question 3*) (*Ingersoll-Rand Co. v. Ciavatta*, 542 A.2d 879, 885-887 (N.J. 1988)).

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

New Jersey courts have adopted the doctrine of inevitable disclosure. Courts may grant injunctive relief against a former employee if he:

- Has access to a former employer's trade secrets.
- Will likely use the employer's trade secrets in his new position.

(*Nat'l Starch & Chem. Corp. v. Parker Chem. Corp.*, 530 A.2d 31, 33 (N.J. Super. Ct. App. Div. 1987).)

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