NON-COMPETES, DUTY OF LOYALTY, WORK FOR HIRE, CONFIDENTIALITY AND IP

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I. SO, ARE NON-COMPETES REALLY ENFORCEABLE?

A. What is a non-compete?

1. A non-compete agreement is a contractual provision in which an employee agrees not to enter into competition with an employer during or after employment.

2. These agreements typically restrict employees from working for competitors, starting a competing business, or engaging in activities that could harm the former employer's competitive edge.

   a. Non-competes often include limitations on duration, geographic scope, and the type of restricted activities.

   b. Non-competes are designed to protect *legitimate business interests* such as trade secrets, confidential information, and client relationships, courts scrutinize their reasonableness to ensure they do not unduly limit an individual's ability to earn a livelihood.

B. Michigan courts take a case-by-case approach to non-compete agreements, assessing their reasonableness in terms of duration, geographic scope, and the protection of legitimate business interests.

1. The Michigan Antitrust Reform Act (MARA)

   a. MARA prohibits unreasonable restraints on trade, meaning overly broad non-competes may be unenforceable.

   b. Courts generally uphold non-competes that protect trade secrets, confidential information, or goodwill but may strike down those that unduly restrict an employee's ability to work.

      i. In *Coates v. Bastian Brothers, Inc.*, the Michigan Court of Appeals upheld the enforcement of a one-year non-compete agreement against a former employee. The employee had worked in a sales role and had access to confidential customer information, including pricing strategies and sales leads. After leaving the company, he took a similar position with a direct competitor and began soliciting former clients.

(A) The court analyzed the agreement under MCL 445.774a, which allows non-competes in Michigan so long as they are:

(1) Reasonable in duration and geographic scope;

(2) Narrowly tailored to protect a legitimate business interest, such as trade secrets, confidential information, or customer goodwill.

(3) The court emphasized that protecting customer relationships—especially when the employee had access to confidential client lists—constituted a legitimate business interest. The restriction was limited to one year and applied only to competitors in the same industry and territory, making it sufficiently narrow and enforceable.

ii. Innovation Ventures v. Liquid Manufacturing, the Michigan Supreme Court clarified that non-compete agreements between businesses are not evaluated under the same standard as those between employers and employees.

(A) Instead of applying MCL 445.774a, which governs employment-related non-competes, the Court held that commercial non-competes must be evaluated under the "rule of reason" as established under federal antitrust principles and the Michigan Antitrust Reform Act (MARA).

(1) This rule requires courts to assess:

(2) Whether the restraint promotes or suppresses competition,

(3) Its necessity to achieve a legitimate business goal,

(4) The existence of less restrictive alternatives,

(5) And its actual or probable market effects.

(B) The Court reversed the Court of Appeals for applying the wrong legal standard and remanded the case for further analysis under the rule of reason.

C. The Federal Trade Commission (FTC) rule banning non-competes

1. FTC Final Rule (issued Apr 23 / published Apr 24, 2024) — bans most post-employment non-compete agreements nationwide, asserting they suppress wages and stifle competition.

a. If/when effective, the rule bars employers from "prohibiting," "penalizing," or otherwise "functioning to prevent" any worker —including employees, independent contractors, and unpaid workers—from taking a new job or starting a business in the United States after their employment ends.

b. Employers must also give written rescission notices to all non-exempt workers telling them pre-existing covenants are unenforceable.

2. Limited carve-outs

a. Senior-executive grandfather clause — existing covenants remain enforceable for workers earning >$151,164 in a policy-making role; however, no new non-competes may be entered with senior executives after the effective date.

b. Sale-of-business exception — non-competes tied to a bona fide sale of a business, an ownership interest, or substantially all operating assets are allowed.

3. Litigation status — *Ryan LLC v. FTC* (N.D. Tex.)

a. Nationwide injunction — on Aug 20, 2024, the court ruled the FTC lacks statutory authority for a categorical ban and stayed the rule nationwide; the FTC appealed to the Fifth Circuit on Oct 18, 2024.

b. Key findings: the FTC Act's § 6(g) does not authorize substantive competition rules, and the rule is arbitrary & capricious because it adopts a one-size-fits-all approach.

c. Impact of *Loper Bright* (U.S. Sup. Ct. Jun 28, 2024) — by overruling Chevron, courts must now exercise independent judgment over agency power, raising the FTC's litigation hurdles.

4. New political dynamics & "purgatory" timeline

a. New FTC Chairman Andrew Ferguson (sworn Jan 20, 2025) — previously voted against the rule and called it "the most extraordinary assertion of authority in the Commission's history," signaling a likely push to rescind.

b. Appeal posture: the FTC (under prior leadership) filed its opening brief on Jan 2, 2025; observers expect the Trump-era Commission to move to dismiss the appeal, making the scheduled Feb 24, 2025 reply-brief date potentially moot.

c. Intervention effort (Jan 13, 2025) — private parties asked the Fifth Circuit to defend the rule if the government abandons it; such motions are rarely granted.

d. Commission vacancy — Lina Khan's resignation leaves the FTC with four commissioners; a fifth seat must be filled before a formal rescission vote, slowing any immediate repeal.

5. Practical compliance note

a. Even while the nationwide stay is in place, the FTC has warned it may still pursue case-by-case enforcement against "unlawful" non-competes under existing antitrust authority. Employers should keep covenants narrow (or rely on non-solicitation/trade-secret protections) until the rule's fate is settled

D. The National Labor Relations Board (NLRB) View on Non-Compete Agreements

1. Unlike traditional state-law analyses, the NLRB looks at non-competes through the lens of Section 7 rights (the right of employees—other than supervisors—to act together to improve terms and conditions of employment). Even a perfectly "reasonable" covenant under state law can trigger an unfair-labor-practice (ULP) charge if it chills protected concerted activity.

2. GC Memorandum 23-08 – "Non-Compete Agreements that Violate the NLRA" (May 30, 2023)

a. Declared that proffering, maintaining, or enforcing broad non-competes violates § 8(a)(1) unless "narrowly tailored" to special circumstances.

i. Chilled activities identified:

(A) Threatening mass resignation or accepting jobs elsewhere to secure better wages/conditions.

(B) Seeking or accepting employment with a competitor to continue concerted activity.

(C) Soliciting co-workers to join another employer.

ii. Possible safe harbors: Clauses limited to protecting proprietary information or narrowly preventing poaching of unique clients.

b. Directed Regions to seek "full make-whole" remedies, even absent proof of actual enforcement.

3. 2024 Enforcement Push & Remedies Memo (GC 25-01, Oct 7, 2024)

a. Expanded focus to "stay-or-pay" TRAPs (training-repayment, quit-fees) and reiterated that non-competes + TRAPs suppress mobility and organizing.

b. Ordered Regions to pursue monetary relief for lost pay, repayment of fees, and front-pay for chilled opportunities.

4. Early Case Activity (2024)

a. Region 9 (Cincinnati) settlement (Feb 2024) – employer rescinded non-compete & TRAPs and reimbursed affected workers.

b. Team Heating & Cooling ALJ decision (June 13, 2024) – found non-compete and non-solicitation clauses unlawful and ordered rescission + notice posting.

5. Divergent ALJ Rulings – NTT Data (Oct 11, 2024)

a. Detroit ALJ held 1-year non-compete lawful because it only barred employees from soliciting former clients/co-workers and did not reasonably deter Section 7 activity.

b. Shows the unsettled state of Board law—outcome often turns on clause wording and how broadly it restricts future employment.

6. Policy Reversal – GC Memorandum 25-05 (Feb 14, 2025)

a. Acting GC William Cowen rescinded GC 23-08 and GC 25-01, citing need for further Board guidance and "changed enforcement priorities."

b. Effect:

i. Regions no longer required to treat non-competes as presumptively unlawful.

ii. Past ULP cases based solely on the GC memos may be closed or reassessed.

iii. The underlying legal theory (Stericycle work-rule standard + McLaren severance principles) remains available, so risk is reduced but not eliminated until the Board issues a definitive ruling.

(A) McLaren Macomb severance standard (372 NLRB No. 58, Feb 21, 2023): Employers may not offer, maintain, or enforce severance agreements whose broad confidentiality or non-disparagement clauses would chill employees' rights to discuss wages, conditions, or file ULP charges; only narrowly tailored provisions to protect proprietary information survive scrutiny.

(B) Stericycle "work-rule" test (372 NLRB No. 113, Aug 2, 2023): A facially neutral handbook or policy is unlawful if, in context, a reasonable employee could view it as restricting Section 7 activity; the employer then bears the burden to show the rule is narrowly tailored to a legitimate business interest—overruling the more employer-friendly Boeing framework.

(1) For example, the Board specifically mentions the prior rule prohibiting cameras in the workplace as one that had previously been categorically accepted by the board as

lawful, and which would likely fail under the new standard, because of the "importance of photo or video documentation of unfair labor practices, protected concerted activity, and the like."

7. Current Status & Practical HR Take-Aways (Spring 2025)

a. Risk calculus shifted—but not gone. Employers can again use carefully drafted non-competes, yet clauses that reasonably deter Section 7 activity (e.g., blanket bans on working for any competitor nationwide) may still be challenged.

b. Supervisors vs. non-supervisors: NLRA only protects non-supervisory employees; covenants for true supervisors are not subject to NLRB scrutiny.

E. What does an *enforceable* non-compete look like?

1. Customizing non-compete agreements based on industry-specific risks ensures they remain enforceable while protecting legitimate business interests. For example:

a. Tech Industry

i. A software development company implements a non-compete clause preventing employees who had direct access to proprietary source code and trade secrets from working at a direct competitor within a 12-month period in the same geographic market.

(A) This restriction is narrowly tailored to protect confidential business information without unnecessarily restricting career mobility.

b. Manufacturing

i. A specialty automotive parts manufacturer requires key engineers who develop proprietary production techniques to sign non-competes restricting them from working for direct competitors within a 50-mile radius for 18 months.

(A) This restriction reasonably protects confidential information and prevents unfair competitive advantages.

c. Healthcare

i. A medical practice enforces a non-compete agreement preventing specialist physicians who have built strong patient relationships from opening a competing practice within a 10-mile radius for two years.

(A) This restriction reasonably protects patient retention and business goodwill.

F. What does an *unenforceable* non-compete look like?

a. Tech Industry

i. A software development company imposes a blanket non-compete preventing all engineers, regardless of role or access to trade secrets, from working at any other tech company nationwide for five years. This is overly broad and unlikely to hold up in court due to excessive restrictions on employment.

b. Manufacturing

i. A general assembly line worker is required to sign a non-compete prohibiting them from working at any manufacturing company in the state for three years.

(A) Since the worker does not have access to proprietary processes, this broad restriction is likely to be deemed unreasonable and unenforceable.

c. Healthcare

i. A hospital requires all nurses, regardless of specialization or access to sensitive patient information, to sign a non-compete preventing them from working at any healthcare facility within a 50-mile radius for five years.

(A) This broad restriction excessively limits employment opportunities in a high-demand field and is likely to be struck down as unreasonable.

II. PROTECTING OUR STUFF

A. What is a trade secret versus what is general employee knowledge?

a. Trade secrets include proprietary formulas, processes, customer lists, and other confidential business information that provide economic value by remaining undisclosed.

i. Trade secrets may be protected through confidentiality agreements and enforcement mechanisms to prevent misappropriation.

b. General employee knowledge refers to the skills, experience, and general industry know-how that an employee acquires over time and can take with them to future jobs.

i. General employee knowledge cannot be restricted by a confidentiality agreement because it is not proprietary to the employer and does not constitute a trade secret.

B. What is a confidentiality agreement?

1. Confidentiality agreements outline specific obligations for employees and third parties to prevent unauthorized disclosure of sensitive business information.

a. Employers must ensure these agreements are narrowly tailored to protect only legitimate business interests without overreaching into publicly available, commonly known industry knowledge or general employee knowledge.

C. How do we make sure employees know the difference between a trade secret and general employee knowledge?

1. Educating Through Training Programs

a. Regular training sessions help employees distinguish between trade secrets and general industry knowledge.

i. These programs should include real-world examples, case studies, and interactive discussions to reinforce the differences.

2. Developing Clear Confidentiality Policies

a. Employers should draft clear and accessible policies that outline what constitutes a trade secret and how employees are expected to handle such information.

i. These policies should be included in employee handbooks and re-visited during performance evaluations.

3. Implementing Secure Information Management Practices

a. Restricting access to trade secrets through role-based security, encrypted databases, and internal monitoring ensures that confidential information remains protected and prevents unintentional dissemination.

4. Enforcing Consequences for Breaches

a. Establishing and consistently enforcing penalties for unauthorized disclosures ensures that employees understand the gravity of mishandling trade secrets.

i. This may include disciplinary actions, termination, or legal consequences when appropriate.

III. WHAT ARE THE NON-CONTRUCTUAL OBLIGATIONS OF WORKERS?

A. Duty of Loyalty and Good Faith

1. Employees must act in the best interest of their employer, meaning they should avoid conflicts of interest, self-dealing, or actions that undermine the company's operations.

    a. It is crucial to establish clear conflict-of-interest policies and provide training on ethical business practices to mitigate risks of employee misconduct.

        i. Ensure transparency and disclosure mechanisms that allow employees to report potential conflicts before they become legal issues.

B. Workplace Safety and Compliance

1. Employees have an obligation to follow safety regulations, adhere to OSHA standards, and comply with internal workplace policies.

2. Employers should regularly update safety protocols, conduct training, and perform audits to prevent workplace hazards.

3. Management teams play a key role in enforcing compliance, addressing violations, and fostering a culture of accountability to minimize legal exposure and enhance employee well-being.

C. Confidentiality and Data Protection

1. Employees must safeguard proprietary company information, trade secrets, and sensitive client data, even if they have not signed a formal confidentiality agreement.

2. Implement strong cybersecurity policies, limit data access based on roles, and educate employees about the consequences of data breaches.

    a. Employers should establish procedures for handling confidential data breaches and reinforce expectations during onboarding and periodic training sessions.

D. Professional Ethics and Conduct

1. Upholding ethical standards is a fundamental expectation for employees across all industries. This includes honesty in reporting time worked, proper use of company resources, and adherence to professional codes of conduct.

    a. Employers must communicate these expectations through codes of ethics, training, and disciplinary procedures to ensure integrity in the workplace.

E. Whistleblower Protections and Reporting Duties

1. Employees who report unlawful or unethical activities are protected under state and federal whistleblower laws.

    a. Michigan's Whistleblowers' Protection Act (WPA), MCL 15.361 et seq.

        i. The WPA prohibits employers from retaliating against employees who report violations of law, participate in investigations, or refuse to engage in illegal activities.

    b. Federal statutes such as the Sarbanes-Oxley Act and the Dodd-Frank Act.

        i. These federal statutes provide protections for employees in financial and corporate sectors who expose fraudulent or unlawful conduct.

2. Employers should create clear internal reporting mechanisms, provide assurances against retaliation, and ensure compliance with legal protections.

    a. Establishing anonymous reporting options and fostering a culture where employees feel safe speaking up.