



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

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## Overview

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- So, are non-competes really enforceable?
- Protecting our stuff
- What are the non-contractual obligations of workers?

Why does this matter?

- Rapid legal changes
- Impact on HR, management, and compliance

# SO, ARE NON-COMPETES STILL ENFORCEABLE?

## What is a Non-Compete?

- Contract preventing employees from competing against employer

## Typical restrictions:

- Time (e.g., 12-24 months)
- Geography (e.g., within 50 miles, within city limits)
- Job-specific considerations (e.g., access to proprietary info)

# SO, ARE NON-COMPETES STILL ENFORCEABLE?

## Michigan's Legal Approach

- Enforceable if:
  - Protects legitimate business interests
  - Reasonable scope and duration
- Michigan Antitrust Reform Act (MARA)
  - Prohibits unreasonable restraints on trade
  - Courts evaluate fairness case-by-case





# SO, ARE NON-COMPETES STILL ENFORCEABLE?

## Key Michigan Cases

- *Coates v Bastian Brothers, Inc.* (2007)
  - One year non-compete for direct competitors in same industry was enforced
    - Employee had direct access to customer lists and confidential sales info
- *Innovation Ventures v Liquid Manufacturing* (2016)
  - Non-competes between businesses follow federal “rule of reason” standard
    - Unreasonable restraint on trade considering purpose, competitive effects, and justifications

# SO, ARE NON-COMPETES STILL ENFORCEABLE?

## FTC Rule Banning Non-Competes

- April 2024: FTC finalized rule banning non-competes
  - Exceptions:
    - Senior Executive (\$151,164+, in policy-making roles)
    - Sale-of-Business agreements



# SO, ARE NON-COMPETES STILL ENFORCEABLE?

## Legal Challenges to the FTC Ban

- *Ryan LLC v FTC* (Aug. 2024)
  - Federal court issued nationwide injunction
  - Holding FTC lacked authority to enforce ban
- *Loper Bright* (June 2024)
  - Supreme Court ruling limiting agency power



# NLRB'S APPROACH

- NLRB scrutiny
  - Broad non-competes can violate NLRA §7 if they deter rank-and-file workers from switching jobs, soliciting co-workers, or leveraging collective action for better terms (GC Memo 23-08, 2023).
- Policy shift (Feb 2025)
  - Acting GC rescinded prior “presumptively unlawful” stance, but Stericycle work-rule test still applies—overly sweeping covenants remain at risk.



# SO, ARE NON-COMPETES STILL ENFORCEABLE?

## Get to The Point – Are Non-Competes Enforceable?

- YES!.....but the FTC is appealing the *Ryan LLC* decision

What does that mean for my business?

- Narrowly tailor your non-competes
  1. Scope
  2. Geography
  3. Legitimate Business Interest

# SO, ARE NON-COMPETES STILL ENFORCEABLE?

## (Likely) Enforceable Non-Competes

- Tech
  - Limits software engineers with access to proprietary code for 12 months in the same market
- Manufacturing
  - Prevents key engineers from working for competitors within 50 miles for 18 months
- Healthcare
  - Restricts physicians from opening a competing practice within 10 miles for 2 years

# SO, ARE NON-COMPETES STILL ENFORCEABLE?

## (Likely) Unenforceable Non-Competes

- Tech
  - Blanket 5-year ban on all engineers working at any tech company = too broad
- Manufacturing
  - Assembly line workers restricted from all manufacturing jobs = unreasonable
- Healthcare
  - Nurses barred from working at any hospital for 5 years = excessive

# PROTECTING OUR STUFF

## Trade Secrets v General Knowledge

- Trade Secrets
  - Proprietary formulas, processes, customer lists
  - Protected through legal agreements
- General Knowledge
  - Skills and expertise employees take with them
  - Not protected by confidentiality agreements





# PROTECTING OUR STUFF

## Confidentiality Agreements

- Outline what employees can't share
- Must be narrowly tailored
  - No overreaching into public knowledge



# PROTECTING OUR STUFF

## Educating Employees on Confidentiality

- Training
  - Real-world examples, case studies
- Clear policies
  - Define what a trade secret means to your business
- Security measures
  - Role-based access, encrypted databases



# NON-CONTRACTUAL OBLIGATIONS OF EMPLOYEES

## Duty of Loyalty and Good Faith

- Employees must act in employer's best interest
- Employees must prevent conflicts of interest and self-dealing





# NON-CONTRACTUAL OBLIGATIONS OF EMPLOYEES

## Workplace Safety & Compliance

- Employees must follow safety regulations
  - OSHA, internal policies
- Employers must enforce protocols and conduct audits





# NON-CONTRACTUAL OBLIGATIONS OF EMPLOYEES

## Confidentiality and Data Protection

- Even without a contract, employees must protect trade secrets
- Employers should implement:
  - Cybersecurity policies
  - Restricted data access



# NON-CONTRACTUAL OBLIGATIONS OF EMPLOYEES

## Whistleblower Protections

- Michigan Whistleblowers' Protection Act (WPA)
  - No retaliation for reporting violations
- Sarbanes-Oxley Act & Dodd-Frank Act (Federal)
  - Financial and corporate fraud protections



# NON-CONTRACTUAL OBLIGATIONS OF EMPLOYEES

## Whistleblower Protections – Best Practices for Employers

- Anonymous reporting
- Non-retaliation policies
- Foster culture of transparency and accountability





# TAKEAWAYS

1. Non-Competes are evolving – know the latest law
2. Protect trade secrets without overreaching
3. Employees have legal duties beyond contracts





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# QUESTIONS



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THANK YOU



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