

QUESTIONS  
and  
ANSWERS

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***An Explanation of  
Covenants Not to Compete***



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### **What are covenants not to compete?**

Covenants not to compete are contractual agreements between employees and employers whereby the employee promises not to compete with the employer for a specific period of time and/or within a particular geographic area should the employment relationship terminate. Generally, Massachusetts courts have enforced such covenants where necessary to protect trade secrets, confidential data, or the employer's good will. In doing so, the courts balance the reasonable needs of the former employer against concern for the right of the employee to earn a living. They also take into consideration the public's interest in not enforcing these agreements if they interfere with ordinary, healthy competition.

### **What is confidential information, trade secrets, good will?**

Confidential information or trade secrets may be defined as valuable information used in the business that gives the owner an advantage over a competitor. The more valuable the information, the more likely the agreement is to be enforced by the courts. On the other hand, the court will not enforce the agreement if the employee can demonstrate that he kept the information confidential. Good will may be defined as a beneficial relationship between a business and its customers. For example, good will may be impacted where a salesperson leaves his firm and attempts to entice his former customers to become customers of the new firm.

### **Enforcement of covenants not to compete**

Courts will only enforce covenants not to compete if they are reasonable in time and geographic area. For example, short-term



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employees pose less of a threat to the firm's good will relationship than those who have been employed for a very long time. In making their decision, the courts will also consider the character of the employment involved, as well as the situation of the parties, the necessity of the time and geographic restriction for the protection of the employer's business balanced against the right of the employee to work to earn a livelihood. Generally, covenants to protect an employer's good will relationship will be enforced in the geographic area previously served by the employee. The geographic restriction may be expanded when it is necessary to protect confidential information, or when the employee was a key employee in the former firm.

### **Sale of business**

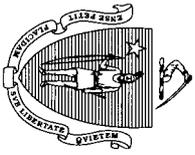
Covenants not to compete between a firm which is selling its business to another and those contained in franchise agreements are more likely to be enforced by the courts than those arising out of an employer-employee relationship because the bargaining position of the parties is more balanced. With regard to the sale of the business, the proceeds of the sale generally enable the seller to support him/herself after the sale and the seller is usually paid a premium not to compete with the buyer.

With regard to franchise agreements, the courts have been persuaded by the fact that the owner of the franchise is challenging the very covenant that had protected him from competition of other franchisees.

### **When are covenants not to compete unenforceable?**

The court may not uphold a covenant not to compete in instances where the employee was forced to sign a covenant after his/her employment began in order to keep his/her job. Also, if the employee was discharged without adequate cause or if the employer broke the employment contract, the courts may not enforce the covenant.

Physician covenants not to compete are unenforceable as a matter of public policy. In addition, ethical rules may also limit certain professionals, such as lawyers, from entering into or seeking enforcement of covenants not to compete.



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