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A PRACTICAL GUIDE TO NON-COMPETITION AGREEMENTS:

What Employers, Employees and Business Sellers Ought to Know¹

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At various times in a business career it is common to find oneself on different sides of a non-competition agreement or dispute: perhaps first as an employee leaving a job with valuable information, skills and trade secrets; later as a manager worrying about the comings and goings of employees; and, eventually, as an executive buying or selling a company. This article summarizes the key legal principles governing non-competition agreements in all these contexts, including issues that may arise in litigation. It then provides checklists of important do's and don'ts from the perspectives of an employer, a departing employee, a new employer and the buyer/seller of a business.

THE LAW OF NON-COMPETITION AGREEMENTS

Non-competition agreements represent an attempt to reconcile two conflicting rights — the right of a company to protect itself against unfair competition *vs.* the right of an individual (an employee or the seller of a business) to compete fairly in the marketplace, to earn a living, and to take advantage of the general skills and knowledge he or she possesses. The conflicting values represented by these rights make non-competition law an inherently difficult area where close analysis of the particular facts of each case is essential, where the outcomes of disputes can be difficult to predict, and where an ounce of prevention can substantially improve a party's position in any subsequent litigation.

GENERAL RULE.

The traditional common law rule is that a company may protect its established business interests either by requiring an employee to sign a “reasonable” post-employment covenant not to compete, or by requiring a person selling a business to sign a similar agreement. Most states follow some version of this rule, subject to significant variations.² The key under the traditional rule is to determine what is “reasonable” under the circumstances.

A non-competition agreement generally will be deemed reasonable and enforceable under the traditional rule, if: (A) The company imposing the restriction has a legitimate

business interest to protect; (B) The agreement is supported by adequate consideration; and (C) The scope of the restriction is carefully tailored to protect only the company's legitimate interests without unreasonable interference with the employee's or seller's ability to earn a living, or the public's ability to obtain necessary goods and services.³

A. Company's Legitimate Business Interest.

Legitimate interests typically include: (1) Protection of close customer and client relationships; and (2) Protection of trade secrets.

1. Customer and Client Relationships.

Protectable customer and client relationships most commonly arise "in situations where the employee must work closely with the customer or client over a long period of time, especially when [the employee's] services are a significant part of the total transaction."⁴ Sales representatives, account executives and business consultants frequently fit this description.

2. Trade Secrets.

A "trade secret" is typically defined as any information that: (i) has economic value because it is not generally known or available to competitors; and (ii) is the subject of reasonable efforts to protect its secrecy.⁵ Trade secrets can include formulas, databases, processes, methods of doing business and, in some cases, even customer lists. Information will not qualify as a trade secret, however, if it can readily be ascertained by others using proper means. A client or customer list, therefore, cannot be protected if it simply includes the members of a particular industry who could be identified by looking in a directory. On the other hand, a detailed list of specific information about the needs and preferences of individual contacts at particular clients and customers is more likely to qualify as a trade secret.⁶

If a company legitimately possesses any trade secret(s), it is entitled to protection against use or disclosure of those secrets even without a written non-competition or non-disclosure agreement. It is nevertheless advisable to back up this right with a written agreement. Doing so helps assure that employees are reminded of their legal duties regarding trade secrets. It also allows the company to seek protection for *all* confidential information it discloses to its employees, even if some of that information might not qualify as a "trade secret." Further, in the event of litigation, the existence of a non-disclosure agreement may be useful as evidence to help demonstrate that the company is making reasonable efforts to protect its secret information.

Given the increasing importance and complexity of trade secrets in today's economy, non-disclosure agreements may be just as important for some companies as non-competition agreements. Given, too, that many gray areas can arise in defining a "trade secret" (for example, a court being asked to issue a restraining order against a former employee may take a narrower view of what qualifies as a trade secret than it would in other contexts), protection

of trade secrets can be a difficult task. For these reasons, it is critical to have the advice of experienced counsel when drafting a non-disclosure agreement or contemplating litigation to enforce such an agreement. Careful consideration must be given to the applicable state law, the particular facts of the case, the precise language of the agreement, the exact “secrets” to be protected and the nature of the relief to be sought from the court. Failure to take account of all these facts can lead to disaster in litigation.

B. Agreement Supported by Consideration.

A non-competition agreement must be supported by adequate consideration – that is, the company must exchange something of value in return for the individual’s agreement to forego certain types of competition. In the sale of a business, the purchase price provides the necessary consideration. In the case of hiring a new employee, granting the employment generally is sufficient. For existing employees, however, a question may arise whether mere continued employment will be sufficient.⁷ An employer seeking a non-competition agreement from an existing employee, therefore, is well-advised to check the relevant state law and, if possible, to link the agreement to the granting of some additional consideration, such as stock options, a promotion, a raise special training, a written employment contract in place of employment at will, etc., to help assure enforceability.

C. Permissible Scope of Restrictions.

A restriction on an employee’s or seller’s right to compete must be no greater than necessary to protect the legitimate business interests of the party imposing the restriction. Courts analyze this issue on a case-by-case basis, taking into account several factors, of which the most relevant usually are the following: (1) The length of time the restriction applies; (2) The geographical area of the restriction; and (3) Fairness in relation to the company’s legitimate interests and the employee’s or seller’s ability to earn a living.

1. Length of Time.

No fixed rule sets the length of time a non-competition agreement can apply. A common length for employment agreements is one year, and this period has often found to be enforceable. Eighteen months or two years might also be acceptable in some circumstances. In the context of selling a business, a somewhat longer period may be acceptable, such as 2-3 years. Generally, however, the shorter the time the more likely the agreement will be enforceable. Moreover, in fast-moving, technology-driven industries, even shorter periods may be required. A federal court in New York City recently refused to enforce an Internet company’s 1-year non-competition agreement (suggesting that 6 months might have been more appropriate), on the following grounds:

[T]he one-year duration of [the former employer's] restrictive covenant is too long given the dynamic nature of this industry. . . .The Court further finds that enforcement of this provision would work a significant hardship on [the former employee]. When measured against the [information technology] industry in the Internet environment, a one-year hiatus from the workforce is several generations, if not an eternity.⁸

2. Geographic Area.

As with time, no fixed rules define the proper geographic area for a non-competition agreement. The answer in each case depends largely upon the geographic area where the company does business. A local retail business with a presence in a single community would have little justification to impose restrictions beyond the borders of that community and, perhaps, the immediately adjacent communities. A company whose business is nationwide or international in scope, on the other hand, might legitimately insist on a nationwide, or even a worldwide, non-competition agreement (assuming all other factors are reasonable),⁹ especially if it only prohibits the servicing of existing clients or customers, or, even more narrowly, clients or customers on whose accounts the relevant individual worked personally.¹⁰

3. Fairness.

In some states, notably New York, the courts take a hard look at the interest a company is seeking to protect, especially in employee non-competition agreements, and insist that any non-competition agreement be carefully tailored to protect only that interest. Under this approach, a court may insist on proof that the employee is somehow “unique” (a category typically applicable to artists, actors and athletes), or that the agreement only restricts particular types of activity that are likely to result in misuse of trade secrets, or that any prohibited customer/client group is carefully limited only to those customers and clients to whom the employer introduced the employee (excluding, for example, any clients the employee knew before taking the job or that the employee never directly serviced or met).¹¹

The variable approaches among the states to defining “fairness” underscore the importance of obtaining proper legal assistance in drafting a non-competition agreement. The following provision, for example, would likely be unenforceable in many, if not all, states:

Employee agrees, for a period of 5 years after termination not to work, directly or indirectly, for any person or entity, or for his or her own account, in any business similar to Company's business anywhere in the United States.

A provision more likely to be upheld in most states, including New York, might be drafted as follows:

Employee agrees, for a period of 1 year after termination, not to work directly or indirectly for the account of any Client of Company on whose matters Employee worked at any time during the 12 months immediately prior to termination, unless such Client had already been a client of Employee prior to the start of employment with Company.

Of course, it may not always be necessary to draft a non-competition provision so narrowly. Many states will allow broader restrictions. However, if a narrow provision is adequate to address a company's biggest concerns, then it is worth considering. A narrow provision is always more likely to be upheld in a lawsuit than a broad one. It also is more likely to be palatable to employees and sellers at the time of negotiation.

SPECIAL RULES FOR SALE-OF-BUSINESS.

The sale of a business is a unique situation where a non-competition agreement is more likely to be enforced under the general rule than a comparable provision against a mere employee. The rationale is that the owner/seller of a business poses a clear threat to the continued viability of the business in the hands of the new owner/buyer. The seller also is clearly receiving consideration for the transfer of the business and presumably has calculated the sale price to compensate himself or herself for any non-competition obligation. While the usual "reasonableness" factors of time, geography and limitation to necessary lines of business will still be applied to determine enforceability, they will typically not be applied as narrowly as in the case of an employee. Even a statute such as California's, which prohibits most forms of non-competition agreements, recognizes exceptions for the sale of a business.¹² Still, the drafter of a non-competition clause covering the seller of a business might include language along the following lines to help convince a court to enforce the provision in the event of any litigation:

The Seller understands that the restrictions in this agreement may limit his ability to earn a livelihood in a business similar to the one being sold, as presently conducted, but he nevertheless believes that he has received sufficient consideration and other benefits under this agreement to clearly justify such restrictions. Seller acknowledges and agrees that, given his education, skills and ability, these restrictions would not prevent him from otherwise earning a living.

BLUE PENCILING.

If a non-competition provision is too broad, the courts in some states may be willing to "blue pencil" it, or edit it, to make it acceptable.¹³ In other states, the entire provision might be struck and held unenforceable if any portion of it is unacceptable.¹⁴ A third approach is to merely delete offending language that can be struck out (without *changing* any language), so long as the remainder makes sense and is acceptable.¹⁵ One should *not*

rely on “blue penciling” or judicial editing to rescue a poorly drafted non-competition agreement. It is far better to understand the applicable state law and draft a reasonable restriction that is likely to be upheld. As a precaution, however, it is wise to include a provision giving the court as much leeway as possible to correct any provision it finds unacceptable. Such a provision might be as follows:

It is the desire and intent of the parties that the provisions of this Agreement be enforced to the fullest extent permissible under the Law and public policies applied in each jurisdiction in which enforcement is sought. Accordingly, in the event that any provision of this Agreement would be held in any jurisdiction to be invalid, prohibited or unenforceable for any reason, such provision, as to such jurisdiction, shall be ineffective, without invalidating the remaining provisions of this Agreement or affecting the validity or enforceability of such provision in any other jurisdiction. Notwithstanding the foregoing, if such provision could be more narrowly drawn so as not to be invalid, prohibited or unenforceable in such jurisdiction, it shall, as to such jurisdiction, be either automatically deemed so narrowly drawn, or any court of competent jurisdiction is hereby expressly authorized to redraw it in that manner, without invalidating the remaining provisions of this Agreement or affecting the validity or enforceability of such provision in any other jurisdiction.

CALIFORNIA RULE.

Unlike states that follow the traditional rule of “reasonableness,” California and a few other states (*e.g.*, Alabama, Colorado, Florida) have enacted statutes that greatly restrict the use of non-competition agreements. The California statute provides in relevant part:

Except as provided in this chapter, every contract by which anyone is restrained from engaging in a lawful profession, trade, or business of any kind is to that extent void.¹⁶

As a result, in California it would appear to be impossible to have any valid non-competition agreement. The law, however, is a little more flexible. As noted above, the statute makes an explicit exception to allow a reasonable non-competition agreement in connection with the sale of a business.¹⁷ In addition, a company may prohibit disclosure of trade secrets,¹⁸ and may also impose restrictions carefully limited to prohibiting stealing of one or more particular clients as long as the practical effect is not to bar the restricted individual generally from pursuing his or her business or profession.¹⁹

INEVITABLE DISCLOSURE.

The “inevitable disclosure” theory is a relatively new and controversial doctrine in the field of non-competition. Under this theory, a company may attempt to prevent a former employee from working for a competitor *without* a written non-competition agreement. The theory is that disclosure or misappropriation of the first employer’s trade secrets will be “inevitable” if the employee had access to the first employer’s trade secrets and then goes to work for a competitor where such trade secrets are directly relevant to the

employee's new duties. The "inevitability" might be presumed to exist as the simple result of human nature, or it might be the result of evidence that the employee and/or the new employer are untrustworthy and likely to misappropriate the former employer's trade secrets.

In one of the leading "inevitable disclosure" cases, an injunction was issued to stop a former general manager of Pepsico's non-cola drinks division from taking a similar job for Gatorade. The employee was a high-level executive with intimate knowledge of Pepsico's plans for product development and marketing strategy. No written non-competition agreement barred the employee from taking the job at Gatorade. Nonetheless, a federal appeals court in Chicago upheld the injunction and said that "unless [the employee] possessed an uncanny ability to compartmentalize information, he would necessarily be making decisions about Gatorade and Snapple by relying on his knowledge of [Pepsico's] trade secrets."²⁰ Significantly, the court found that the employee might not have been totally honest with Pepsico before he left, and, therefore, that his promises not to disclose Pepsico's trade secrets might not have been trustworthy.

The precise extent to which "untrustworthiness" must be demonstrated to prove "inevitable disclosure" is not clear. The reported cases are not consistent on this point. Courts in some states appear willing to find "inevitability" without any direct proof of bad acts by the employee, while others appear to require it as a necessary element. At the current time, therefore, the elements necessary to prove "inevitable disclosure" may be summarized as follows:

- Employee has access to former employer's trade secrets. **[Required]**
- Employee goes to work for a competitor in a capacity that is highly likely to require the employee to use or disclose the trade secrets learned from the prior employer. **[Required]**
- Some overt act(s) by the employee or the new employer to demonstrate actual misuse of trade secrets, or evidence of untrustworthiness to suggest why misappropriation is not merely speculative. **[Required in some states]**²¹

For this reason, it is crucial to understand the law of the state where an "inevitable disclosure" theory will be asserted. If the cases in that jurisdiction do not follow the simple "human nature" approach, then it will be necessary to show some bad act(s) by the employee and/or the new employer, such as lies by the employee about his or her intentions in taking the new job, misconduct or theft by the employee before leaving, or actual disclosure of the trade secrets.²²

OTHER TYPES OF RESTRICTIONS.

A pure non-competition agreement literally prohibits a party from competing with the company. This is the most extreme form of prohibition possible, and, therefore, runs the highest risk of being unenforceable if challenged in litigation. Alternative forms of restrictions, however, may sometimes be adequate to protect a company's legitimate interests and may be more likely to be enforceable (provided that the usual reasonableness factors discussed above, such as time and geography, continue to be satisfied.) Any company concerned about the ability to obtain a court order to enforce a contractual restriction should therefore consider alternatives including the following:

A. Non-Servicing of Former Clients.

This might only prohibit the rendering of services to the same customers and clients that the company is already servicing. It might also be drafted to include prospective customers or clients that are actively being pursued. The practical effect in some cases may be very close to a complete non-competition agreement, but this approach allows a departing employee or seller of a business to pursue completely *new* business in competition with the old company. A slightly narrower variation would apply only to those clients of the company on whose accounts a departing employee actually worked, or prospects that the employee actively solicited for the company.

B. Non-Solicitation.

This merely prohibits active solicitation of work from the company's clients. It does not require the restricted party to turn down work from any client or customer who comes to that party of its own volition. For this reason, such a restriction is more likely to be upheld by a court. Of course, it also allows an employee or seller to "steal" a client or customer if he or she can argue that the client or customer made the initial contact rather than vice versa. For this reason, non-solicitation agreements typically are favored by employees and sellers rather than employers or buyers. Both parties may be unhappy, however, if they realize the potential for disputes over proving who contacted whom, or trying to determine when a wink, nod or other indirect suggestion counts as a "solicitation."

C. Forfeiture or Liquidated Damages.

This type of agreement does not directly restrict a party's right to compete. Instead, it puts a price tag on that activity. The price might be the forfeit of stock options or some portion of a retirement plan. Or it might be a percentage of the earnings derived from the client(s) whose work is taken. These "money only" provisions are generally enforceable, unless the price tag is so great as to amount to a penalty rather than reasonable reimbursement to the employer. Care also must be taken not to violate any ERISA or other pension laws.

D. Continuation of Salary and Benefits.

If a company continues to pay a departing employee his or her base salary for a period of time after termination, such payment may be sufficient to support enforcement of a relatively strict non-competition agreement. The theory is that the employee is continuing to make a living, and that he or she is voluntarily accepting the continued payment in place of immediately taking competing employment. If an employee actually accepts the post-termination payments under such an arrangement, it becomes more difficult for the employee to argue that he or she is simultaneously free to compete with the company that is still making such payments.²³

CHOICE OF LAW.

Given the variation in state laws, it is important to get proper legal assistance to understand the relevant law when drafting any form of non-competition agreement. Even then, questions may arise if the competing party ends up in a new state. In such circumstances, the courts of the new state may conclude that, as a matter of public policy, the new state's law should apply. Since this risk cannot be controlled, the best one can do is draft a clear provision expressly adopting the law of a state that has a logical connection to the original relationship and that enforces non-competition agreements. An example might be as follows:

This agreement shall be governed by and interpreted in accordance with the substantive laws of the State of _____ applicable to contracts made and to be performed wholly within said state, without any application of principles of conflicts of laws. Both parties acknowledge and agree that the selection of the substantive law of _____ is a material term of this Agreement, and both parties agree that they accept such law and will not seek to challenge its applicability in any proceeding relating to this agreement.

It also is a good idea to include a provision specifying the venue for any litigation. Doing so can help assure that a local court will hear any dispute and be more willing to apply the local law selected by the parties. A sample provision might be as follows:

Any disputes relating to this Agreement will be adjudicated in the state or federal courts located in _____. Both parties expressly consent to the exclusive jurisdiction of said courts for any such dispute and hereby expressly agree not to object to such jurisdiction for any reason or to seek any dismissal or transfer of any action relating to this Agreement brought in such courts.

EMPLOYEE CHECKLIST

When you start your Employment:

- Avoid signing a written non-competition agreement, if possible.
- If you must sign a non-competition agreement, consult with an attorney and try to negotiate as narrow a restriction as possible, such as only a prohibition against soliciting existing clients rather than a bar against all competitive activity.

When you're thinking about leaving a job:

- Don't start a new business that competes with your current employer until after your employment is officially terminated. You are bound by a duty of loyalty to your existing employer. Pre-termination competition is a breach of that duty.
- Don't use your current employer's facilities, phones, computers or other resources (including your on-the-job time) to set up your own business.
- You may be able to start organizing a new business on your own time before you leave your old job, but you need to be very careful about this. Seek legal advice to determine how to organize your activity to avoid violating any duty or agreement.
- Remember that you are entitled to use your general knowledge and expertise in a new job, but you may *not* take anything that belongs to your former employer. This includes trade secrets, proprietary information and all tangible property. Don't even think about taking any files, rolodexes, etc., unless they were things you clearly brought with you, to your former job or you expressly reserved the right to take them in an agreement with your employer. Otherwise, leave them behind.
- Don't necessarily be afraid of an exit interview. You may be able to use it to your advantage. Try to clarify what items your employer deems to be a trade secret or not and what kinds of jobs are considered competitive or not. You may be able to clear the air about important issues before they become controversial. But be careful. Don't sign any new obligations without legal review.
- Be honest if asked about your future plans. Don't lie. Dishonesty may be used as evidence of "untrustworthiness" to prove "inevitable" disclosure of trade secrets.
- Before leaving a job, review your contracts carefully. Have a lawyer review them, too.

When you're talking to a Prospective Employer:

- Show your old contracts to the new employer. If the new employer says, “don’t worry,” get a promise in writing that the prospective employer will defend and indemnify you against any claims from your old employer.
- If you have important trade secrets in your head from your old job, think twice about taking a job with a competitor where you are likely to draw on those secrets. Consider alternate positions or duties where you can use your general expertise and knowledge without using or disclosing the trade secrets.
- Don’t try to curry favor in an interview by disclosing trade secrets or suggesting that you will do so later.

ORIGINAL EMPLOYER CHECKLIST

When you are hiring:

- Have all employees sign written non-competition agreements. Include provisions prohibiting use or disclosure of any company confidential information.
- Draft your agreements carefully. Have your lawyer review them. Make sure they will be enforceable under local law. Remember that some states such as California greatly restrict such agreements.
- Make your non-competition agreement reasonable with regard to length of time, geographic area and category(ies) of prohibited activity. Remember that laws vary from state to state.
- If you can’t obtain or enforce a non-competition agreement, consider possible alternatives, such as a forfeit-of-benefits or liquidated damages provision if the employee takes competing employment.

Day-to-Day operations:

- Take reasonable steps to protect your trade secrets, such as limiting access, keeping sensitive documents under lock and key, etc. Failure to take reasonable steps can invalidate your claim to trade secret protection.
- If you ask an existing employee to sign a non-competition agreement, consider offering something in return, such as stock options, a promotion, a raise, special

training, a written contract in place of employment at will, etc. Some states may require consideration beyond mere continued employment.

When an Employee is leaving:

- Conduct an exit interview. Have two managers present as witnesses. Keep a written record. Remind the employee of his or her contractual duties. Give the employee a copy of any signed non-competition agreement. Remind the employee of any particular categories of information you consider especially important, and remind the employee not to take any company property or trade secrets. Ask about the employee's future plans, such as where the new job will be, what the duties will be, etc.
- If you have any concerns about a departing employee's plans, consider sending a letter to the new employer to give notice of the employee's contractual duties. Take care in drafting the letter. Seek legal advice. Avoid threats or unjustified interference with other parties' contractual relations.
- If you don't have a signed non-competition agreement, consider whether you can argue that use or disclosure of trade secrets will be "inevitable" in the new job. Look for any evidence of dishonesty, untrustworthiness or actual disclosure of trade secrets to help buttress this argument.

NEW EMPLOYER CHECKLIST

- Seek employees for their general skills and qualities, not specific information they may possess about or from competitors.
- Advise job applicants that you do *not* want them to disclose any trade secrets or violate any rights of a former employer.
- Don't use job interviews to probe for competitors' trade secrets.
- Ask the applicant to provide copies of any non-competition agreement he or she signed with the former employer. Analyze the agreement carefully. Does it completely bar the new employment? Or does it only prohibit solicitation or other activity that can be avoided.
- Tailor the employee's duties to avoid violating any non-competition provisions.

- Have legal counsel analyze whether the non-competition agreement is enforceable. Pay attention to which state’s law applies.
- Think about the risk of “inevitable disclosure.” If it exists, consider whether the employee can be assigned to a “safe” task for the period of his or her non-competition period – for example, avoiding certain projects or departments.
- Make sure the employee is not bringing any tangible property from the old job.
- Don’t encourage the employee to breach a contractual obligation.
- Don’t promise to take responsibility for any breach unless you are prepared to pay the costs of any litigation.
- Encourage the employee to review the non-competition agreement with his or her own lawyer.

SALE OF BUSINESS CHECKLIST

The issues are very similar to those outlined above. The seller of the company is in the position of the employee. (If you are the seller, re-read the Employee Checklist above.) The buyer is in the position of the original employer. (If you are the buyer, re-read the Original Employer Checklist above.)

Key issues to negotiate include:

- Length of time of restrictions
- Geographic area of restrictions
- Line(s) of business and specific activity(ies) restricted
- Non-competition vs. non-solicitation
- Exceptions, carve-outs, referral deals or other “special” arrangements that may be mutually beneficial
- Particular customers/clients to be included or excluded.

¹ This article provides only an overview of the general principles governing non-competition agreements. It is not intended as legal advice or as a substitute for professional assistance in preparing or interpreting a

particular non-competition agreement. Laws vary from state to state. Each case depends heavily upon its unique facts and circumstances. The author acknowledges the assistance of John T. Shaban, Esq. in preparing this article.

² A few states, such as California, do not follow the traditional rule but instead have adopted statutes significantly restricting the use of non-competition agreements. See discussion in part II herein.

³ See generally, Restatement (Second) of Contracts § 188.

⁴ *BDO Seidman v. Hirshberg*, 93 N.Y.2d 382, 391-92 690 N.Y.S. 2d 854 (1999), quoting Blake, *Agreements Not to Compete*, 73 Harv L. Rev. 625, 647, 661 (Feb. 1960).

⁵ This definition is based upon the Uniform Trade Secrets Act, which has been adopted in many states, and which is generally consistent with prior common law. See, e.g., Conn. Gen. Stat. § 35-51(d).

⁶ See, *Panther Systems II v. Panther Computer Systems*, 783 F. Supp. 53, 67 (E.D.N.Y. 1991); *Holiday Food Co. v. Munroe*, 37 Conn. Sup. 546, 553 (Conn. App. 1981), citing *Southern California Disinfecting Co. v. Lomkin*, 183 Cal. App. 2d 43, 7 Cal. Rptr. 43 (1960).

⁷ See, *Dick v. Dick*, 167 Conn. 210, 355, A.2d 110 (1974)(continued employment, standing alone, not found to be sufficient consideration); see also, *Ruffing v. 84 Lumber Co.*, 600 A.2d 545, 548 (Pa. Super. 1991), appeal denied, 610 A.2d 46 (Pa. 1992)(continued employment not sufficient consideration). But see, *Zellner v. Stephen D. Conrad, M.D.*, 183 A.D.2d 250, 589 N.Y.S.2d 903, 907 (2d Dep't 1992) (continued employment constitutes sufficient consideration where alternative was discharge or where the employment continued for a substantial period of time).

⁸ *EarthWeb, Inc. v. Schlack*, 71 F. Supp.2d 299, 313, 316 (S.D.N.Y. 1999).

⁹ See generally, *Ivy Mar Co. v. C.R. Seasons, Ltd.*, 907 F. Supp. 547, 559 and cases cited therein (E.D.N.Y. 1995).

¹⁰ See, *Robert S. Weiss & Associates, Inc. v. Wiederlight*, 208 Conn. 525, 531-532 (1988) (lack of geographic limitation did not invalidate a two-year restriction against soliciting company's clients that existed when employee left); *Mallory Factor, Inc. v. Schwartz*, 146 A.D.2d 465, 536 N.Y.S.2d 752 (1st Dep't 1989)(upholding eighteen-month restriction against working on any account of employer, without geographic limitation); *Solari Indus. v. Malady*, 55 N.J. 571, 264 A.2d 53 (1970)(covenant with no geographical restriction upheld because it was limited to former employer's actual or prospective customers in the United States with whom employee had dealings).

¹¹ See, *BDO Seidman*, 93 N.Y.2d 382, 391-92. See also, *Peat Marwick Main & Co. v. Haass*, 818 S.W.2d 381 (Tex. 1991) (striking restrictive covenant prohibiting employee from providing post-employment services to employer's clients without regard to whether employee served client).

¹² Cal. Bus. & Prof. Code § 16601.

¹³ See, e.g., Tex. Bus. & Com. Code Ann. §15.51(c) (specifically authorizing courts to reform an overbroad non-competition agreement "as to time, geographical area, and scope of activity to be restrained" to be reasonable); *Raimonde v. Van Vlerah*, 42 Ohio St. 2d, 21, 28 (1975) (allowing courts to "fashion a contract reasonable between the parties, in accord with their intentions at the time of the contacting"); *Hillard v.*

Medtronic, Inc., 910 F. Supp. 173, 177 (M.D. Pa. 1995) (acknowledging authority of court, under Pennsylvania law, to both add and subtract terms to modify and overbroad non-competition agreement).

¹⁴ See, e.g., Wis. Stat. Ann. §103.465 (prohibiting even partial enforcement of an unreasonable non-competition agreement); *Rector-Phillips-Morse, Inc. v. Vroman*, 253 Ark. 750 (1973) (specifically refusing to re-write an overbroad non-competition agreement); *CAE Vanguard, Inc. v. Newman*, 246 Neb. 334, 337 (1994) (noting that Nebraska law “has never allowed reformation of a covenant not to compete”).

¹⁵ See, e.g., *Beit v. Beit*, 135 Conn. 195 (1948).

¹⁶ Cal. Bus. Prof. Code §16600.

¹⁷ Cal. Bus. & Prof. Code §16601.

¹⁸ *Gordon v. Landau*, 49 Cal.2d 690, 321 P.2d 456 (1958) (upholding narrow contractual restraints barring departing employee from using trade secrets).

¹⁹ See, *General Commercial Packaging v. TPS Package Eng., Inc.*, 126 F.3d 1131, 1132-33 (9th Cir. 1997) (upholding one-year prohibition against dealing with a particular client on the grounds that, while the statute prevents restraint on a party’s entire business, trade or profession, restraints on a “small or limited part of the business” can be valid).

²⁰ *Pepsico, Inc. v. Redmond*, 54 F.3d 1262, 1269 (7th Cir. 1995).

²¹ See generally, B. Lyerla, “Thirteen Rules for Inevitable Disclosure Trials,” *Computer Lawyer*, vol. 15, no. 6, p. 10 (June, 1998) (describing the “strong” and “weak” versions of the inevitable disclosure doctrine). See also J. DiBoise, D. Berger and J. Pearce, “The Alchemy of Inevitable Disclosure: How Courts Turn Trade Secrets into Non-Compete Agreements,” *IP Litigator*, vol. 4, no. 2, p. 9 (March/April 1998).

²² See, *EarthWeb v. Schlack*, 71 F. Supp.2d at 310 (“[I]n its purest form, the inevitable disclosure doctrine treads an exceedingly narrow path through judicially disfavored territory. Absent evidence of actual appropriation [of trade secrets] by an employee, the doctrine should be applied only in the rarest of cases.”)

²³ See, e.g., *Lumex, Inc. v. Highsmith*, 919 F. Supp. 624, 636 (E.D.N.Y. 1996); *Aetna Retirement Serv., Inc. v. Hug*, 1997 WL 396212 (Conn. Super. June 18, 1997).