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Noncompete Enforceability In The World Of Remote Work

By **Brian Gargano, Nicole McDonough and Daniel DeFiglio** (September 28, 2022, 10:26 AM EDT)

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As with many things over the last two years, the restrictive covenant landscape has been forced to change, most notably with the rise of remote work due to the COVID-19 pandemic.

With increasing pressure on employers to attract and retain workers who have grown accustomed to working remotely, employers have been forced to reexamine their old employment agreements insofar as restrictive covenants and noncompete clauses are concerned.

Questions abound. Does the law of the state of the employee's (sometimes former) physical office control? Alternatively, does the law of the state of the employee's (often new) home office control?

While there necessarily remains some uncertainty regarding courts' and legislatures' handling of restrictive covenants in light of an employee's remote work location, one thing is clear: The law regarding the enforceability of noncompete agreements varies by state, and employers should be guided by their respective state laws to determine what measures must be taken to obtain the protection of their noncompete agreements in the world of remote work in which we now live.

Most recently, on July 11, the U.S. District Court for the District of Connecticut, in Onward Search LLC v. Noble, examined a noncompete clause in an employment agreement that prevented the defendant from competing with its employer "within a radius of sixty (60) miles from any [affiliated company] office."[1]

The employer argued for an expansive reading of what constituted an affiliated company office as a result of the COVID-19 pandemic. In so doing, the plaintiff argued one of its affiliate offices included the defendant's remote home office.[2]

On an application for preliminary injunctive relief, the court disagreed, finding that "[s]uch an expansive interpretation of the non-compete clause is unlikely to be enforceable."[3]

The court further noted that Connecticut courts consider five factors when evaluating the reasonableness of a noncompete agreement, quoting the Connecticut Supreme Court's 1988 Weiss v. Wiederlight decision:

> "(1) the length of time the restriction operates; (2) the geographical area covered; (3) the fairness of the protection accorded to the employer; (4) the extent of the restraint on the employee's opportunity to pursue his occupation; and (5) the extent of interference with the public's interests."[4]

The court explained that the employer's interpretation of what constituted an affiliate office unduly restrained the defendant to pursue his livelihood, and analogized to noncompete agreements with no geographic limitation, which are unenforceable under Connecticut law.[5]

The Onward case is the most recent case law considering the applicability of noncompete agreements to remote home office locations. Because the laws of many states consider the geographical limitation of a restrictive covenant in deciding whether to enforce it, the Onward case is instructive for evaluating the enforceability of noncompetes in other states, including New Jersey, New York and Texas.

New Jersey

For more than a century, New Jersey courts have considered and validated contractual noncompete agreements. However, no published New Jersey decision has squarely dealt with the question presented here; namely, if and how a noncompete agreement can be enforced against employees who are working remotely.

Even so, certain guiding principles can be extrapolated from existing case law to make an argument that they could.

The first principle comes from the New Jersey Supreme Court's 1970 guidance in Solari Industries Inc. v. Malady. Declining to completely erase overbroad restrictive covenants, the state Supreme Court permitted employers to enforce noncompete agreements, so long as they protected "legitimate interests of the employer, impose[d] no undue hardship on the employee, ... [are] not injurious to the public,"[6] and are otherwise "reasonable in duration, area, and scope of activity."[7]

In the 50-plus years since Solari was decided, New Jersey courts have consistently reinforced this basic idea and have adopted judicial mechanisms like blue penciling to ensure its continued viability.[8]

As articulated by the Superior Court of New Jersey, Appellate Division, in a 2019 decision in ADP LLC v. Kusins, the "term 'blue pencil[ing]' refers to a court's modification or tailoring of a restrictive covenant" that is overly broad to ensure it reasonably guards the employer's interest while not imposing an undue hardship on the employee.[9]

Notably, not all states permit such modification by courts and will instead strike the provision completely, leaving the employer with no protections.[10]

However, in New Jersey, so long as employers abide by the court's guidance in Solari, noncompete agreements can, and will, be enforced.

The second principle comes from existing contract law. Because noncompete agreements are interpreted like any other contractual obligation, courts should hypothetically enforce provisions related to remote work — even novel ones — so long as they comply with Solari.

In this regard, the Appellate Division's 2019 observation in Calabotta v. Phibro Animal Health Corp. provides potential guidance.[11]

Although analyzing a different legal issue, the panel presciently observed that the increasing ability of employees to perform work tasks remotely would complicate "the application of geographic factors" in determining the appropriate application of New Jersey law.

Importantly, however, the panel qualified this observation by noting that employers could avoid these complications by including clear and explicit employment agreements that were not otherwise contrary to constitutional or statutory principles.[12]

New York

Like New Jersey, no published New York decision has addressed the issue of enforcing a noncompete agreement with a home office as the pinpoint for the geographical limitation.

However, the Court of Appeals of New York made clear in its 1976 ruling in Reed, Roberts Associates Inc. v. Strauman that New York generally disfavors noncompete agreements as an unreasonable restraint "'sanctioning the loss of a man's livelihood.'"[13]

As a result, when evaluating a restrictive covenant, New York courts look to whether the noncompete is necessary to protect the employer's legitimate interests, does not impose an undue hardship on the employee, does not harm the public, and is reasonable in duration and geographic scope.[14]

New York law recognizes an employer's trade secrets and confidential information, its goodwill, and its interest in preventing loss of an employee's special, unique or extraordinary services as legitimate interests that help support a reasonable noncompete.

Restrictive covenants must be supported by adequate consideration, and under New York law, this can include an employment offer; continued at-will employment; and any modification to existing employment terms, i.e. a change in compensation, professional status or other benefits.

Like New Jersey, New York courts will modify, or blue pencil, an overbroad noncompete as an alternative to rejecting it entirely. Additionally, the employer has the burden of proof to demonstrate that a restrictive covenant is reasonable.[15] Reasonableness is determined by looking at both the geographic and time limitations imposed by the covenant.

Importantly, there are certain professions for which noncompetes are specifically prohibited. Lawyers and broadcasters are among the professions New York expressly prohibits from being bound by noncompete agreements.[16]

Texas

Unlike New Jersey and New York, Texas has a specific statute governing covenants not to compete, i.e., the Covenants Not to Compete Act.[17] Covenants that place limits on former employees' professional mobility or restrict their solicitation of the former employers' customers and employees are restraints on trade governed by the act.[18]

However, agreements not to disclose trade secrets and confidential information are not expressly governed by the act.[19]

Texas views covenants not to compete as restraints of trade, and they are unenforceable as a matter of public policy unless the restraints are reasonable.[20]

Texas has a two-step threshold inquiry to evaluate enforceability under the act: (1) a court must determine whether there is an "otherwise enforceable agreement" between the parties, and if so, (2) a court must determine whether the covenant is "ancillary to or part of" that agreement.[21]

Notably, according to the Texas Supreme Court's 2011 ruling in Marsh USA Inc. v. Cook, "[t]he 'otherwise enforceable agreement' requirement is satisfied when the covenant is 'part of an agreement that contained mutual non-illusory promises.'"[22]

If this two-step inquiry is met, the covenant not to compete is enforceable to the extent that it contains limitations as to time, geographical area and scope of activity to be restrained that are reasonable and do not impose a greater restraint than is necessary to protect the goodwill or other business interest of the promisee.[23]

Generally, the territory in which an employee works is deemed a reasonable geographic area for a covenant not to compete.[24] However, the permissible breadth of geographic restraint also "depend[s] on the nature and extent of the employer's business and the degree of the employee's involvement in that business," according to the Texas Court of Appeals for the Fifth District's 2014 ruling in AmeriPath Inc. v. Hebert.[25]

As such, Texas courts will uphold broad geographic restrictions when the area constitutes the employee's actual work territory or when the employee held a management or executive position with the employer.[26]

This paves the way for a potential decision by a Texas court enforcing the type of broad reading of an affiliated company office for which the employer advocated in the Connecticut Onward Search case.

Unlike New Jersey and New York, where it is questionable whether such covenants not to compete will be upheld for remote workers, there is a strong argument to be made that under Texas law, noncompete agreements as to remote workers are enforceable, provided they are reasonable in time, geographical area and scope of activity to be restrained.

As to territorial restraints, Texas law is clear. As the U.S. District Court for the Western District of Texas noted in McKissock LLC v. Martin in 2016, "'The breadth of enforcement of territorial restraints in covenants not to compete depends upon the nature and extent of the employer's business and the degree of the employee's involvement.'"[27]

Typically, "[a] reasonable geographic restriction is generally considered to be the territory in which the employee worked for the employer."[28]

The fact that Texas courts have upheld nationwide geographic limitations in noncompete agreements where it was clearly established that the business is national in character amply demonstrates how this is a fact-intensive analysis that could benefit the employer that seeks to prevent its remote worker from competing with it.[29]

Guidance for Employers

As employers navigate the increasing prevalence of remote work, it is important to note the following when trying to string enforceable noncompete clauses:

1. If remote employees do not perform job activities specifically in their homes, then it is more likely the laws of the company's home office will apply.

2. An employer with employees outside the state of their home office needs to make sure its noncompete agreements are enforceable in those additional states and that they can enforce those agreements in the courts of their home office, if that is their preferred litigation venue.

For example, California does not typically enforce noncompete clauses. As such, it is vital that any noncompete agreement contain a specific choice-of-law clause designating, for example, Texas law as governing the agreement. Of course, in that situation, the clause must pass muster under a Texas conflict-of-laws analysis.

3. If an employer wants to obtain both the benefits of its noncompete agreements and offer the flexibility of remote work, it should consider an appropriately tailored agreement that explicitly defines that arrangement.

Indeed, as the Onward case shows, employers will likely not be able to use existing catchall terms like "affiliate office" to shoehorn in additional noncompete protections. Instead, employers should consider clear and explicit language defining the employee's specific work arrangement, including when and how the noncompete restrictions will apply.

4. In instances where narrowly drafting a noncompete agreement for a remote worker is cumbersome or not feasible, employers should consider other protections, such as nonsolicitation or nondisclosure agreements. Often, states take a much more favorable view to such restrictions, which may end up providing a similar or greater level of protection to that expected of a noncompete.

5. Lastly, an employer should consider the possibility of making the home office of a remote worker a small satellite office of the employer, as this may expand the reach of the permissible geographical area for the noncompete.

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[1] Onward Search LLC v. Noble, 3:22-cv-00369, 2022 WL 2669520 (Jul. 11, 2022), at *2.

[2] Id. at *12.

[3] Id. at *14.

[4] Id. at *12 (citing Robert S. Weiss & Assocs., Inc. v. Wiederlight, 208 Conn. 525, 529 n.2 (1988)).

[5] Id. at *12-14.

[6] Solari Indus., Inc. v. Malady, 55 N.J. 571, 576 (1970).

[7] See ADP, LLC v. Kusins, 460 N.J. Super. 368, 400, 215 A.3d 924, 943 (App. Div. 2019).

[8] See Id.

[9] Id.

[10] See e.g., Hassler v. Circle C Res., 505 P.3d 169, 178 (Wyo. 2022).

[11] Calabotta v. Phibro Animal Health Corp., 460 N.J. Super. 38, 74 (App. Div. 2019).

[12] Id.

[13] Reed, Roberts Assocs., Inc. v. Strauman, 40 N.Y.2d 303, 307 (1976).

[14] See id.; BDO Seidman v. Hirshberg, 690 N.Y.S.2d 854, 856-57 (1999).

[15] Ingersoll-Rand Co. v. Ciavatta, 110 N.J. 609, 638, (1988); Tedeschi v. Hopper, 167 A.D.3d 1129, 1131 (3d Dep't. 2018).

[16] Ipsos-Insight, LLC v. Gessel, 547 F.Supp.3d 367 (S.D.N.Y.) (citing Denburg v. Parker Chapin Flattau & Klimpl, 82 N.Y.2d 375, 380 (1993) (interpreting NY ST RPC Rule 5.6) (lawyers no subject to restrictions on right to practice); N.Y. Lab. Law § 202-k (McKinney 2008) (broadcasters not subject to non-competes).

[17] Texas Business & Commerce Code §§ 15.50 - 15.52.

[18] Marsh USA Inc. v. Cook, 354 S.W.3d 764, 768 (Tex. 2011).

[19] Id.

[20] John R. Ray & Sons, Inc. v. Stroman, 923 S.W.2d 80, 85 (Tex. App.—Houston [14th Dist.] 1996, writ denied); see Tex. Bus. & Com. § 15.50(a).

[21] Marsh USA Inc., 354 S.W.3d at 773.

[22] Id.

[23] Tex. Bus. & Com. § 15.50(a).

[24] Zep Mfg. Co. v. Harthcock, 824 S.W.2d 654, 660 (Tex. App.—Dallas 1992, no writ).

[25] AmeriPath, Inc. v. Hebert, 447 S.W.3d 319, 335 (Tex. App.—Dallas 2014, no writ).

[26] See id. (upholding broad geographic restriction beyond the scope of employee's work where employer's interest in limiting former employee's competition "grew out of not only his employment

as a pathologist, but also his service as a member of appellants' highest level management team."); Vais Arms, Inc. v. Vais , 383 F.3d 287, 295 (5th Cir. 2004) (holding national restraint reasonable given the national character of employee's work); Daily Instruments Corp. v. Heidt , 998 F. Supp. 2d 553, 567 (S.D. Tex. 2014) (finding worldwide geographic restraint reasonable given employee's international clientele and intimate knowledge of sensitive company information).

[27] McKissock, LLC v. Martin , 267 F. Supp. 3d 841 (W.D. Tex. 2016).

[28] Id.; (citing TransPerfect Translations Inc. v. Leslie , 594 F.Supp.2d 742, 754 (S.D. Tex. 2009)).

[29] See, e.g., Vais Arms Inc. v. Vais , 383 F.3d 287, 296 n.20 (5th Cir. 2004); see also Daily Instruments Corp. v. Heidt , 998 F.Supp.2d 553, 567 (S.D. Tex. 2014) ("Covenants with wide geographic areas have been upheld in Texas courts, especially when the area covered constitutes the employee's actual sales or work territory).
