

**EMPLOYEE COVENANTS NOT TO COMPETE**  
by  
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As a general rule, covenants not to compete in employment contracts are not favored in Virginia and are always strictly construed against the employer. Does this mean that all such covenants aren't enforceable? No. It does mean, however, that the employer has the burden of proving that their restraint is reasonable. Generally, courts in Virginia look at three questions regarding to the reasonableness of a restrictive covenant:

1. Is the restraint from the standpoint of the employer reasonable in the sense that it is no greater than is necessary to protect the employer is some legitimate business interest?
2. From the standpoint of the employee, is the restraint reasonable in the sense that it is not unduly harsh and oppressive in curtailing his legitimate efforts to earn a livelihood?
3. Is the restraint reasonable from the standpoint of a sound public policy?

In answering the first question, i.e. is the restraint no greater than necessary to protect the employer in some legitimate business interest, the courts generally look at several factors. The first is the nature of the employment. If the employee is someone that has contact with customers or confidential information such that if the employee left it could harm the employer, this would generally be deemed a legitimate business interest. If on the other hand the employment was that of a clerk that had no contact with customers and had no confidential information, there would not be a legitimate business interest to protect.

The second factor would be the geographic area involved. This is where employers often overreach either by not specifying a specific area or by specifying an area larger than is necessary for the employer's protection. In some situations, a mere restriction against soliciting customers in the area may suffice to protect the employer and the employer will not need to have an actual geographic restriction. In other cases, the geographic restriction may be necessary. In any event, when applying geographic areas, it is essential that time be spent to determine the reasonableness of the area itself. It may seem like a good idea to restrict a salesperson for a radius of 50 miles around your business but if in fact all of your business is done within a 25 mile radius of your office, you are going to have a difficult time convincing a court that the additional distance is warranted for your protection.

The third factor is that the duration of the restriction be reasonable. If one year will in fact provide adequate protection, don't push your luck with two or three years. Every case depends on its own facts and is analyzed by looking at the restrictions on business activities, the geographic limitation and the duration as a combined package, therefore the more conservative each of the elements is the more likely the overall combination will be enforced.

The second question is whether the restraint is unduly harsh and oppressive on the employee. For example, does the restriction effectively prevent the employee from practicing his vocation for which he is trained? Whether it is enforceable depends on all of the facts and circumstances including the nature of the job of the employee, the geographical area encompassed in the restriction and the duration. It always enhances an employer's argument in court if the employer can point to areas within commuting distance that an employee can serve even with the restrictive covenant being enforced.

The third question is whether the restraint is reasonable from the standpoint of a sound public policy. The question often asked is whether the public interest is served or disserved or not implicated if the particular covenant is enforced. For example, does a particular employee offer a service that is unique or so important that the public interest prohibits the restraint such as being the only physician in the area in a particular specialty so that the entire area would be deprived of an essential service.

It is important from an employer's perspective to realize that the actual words used in a restrictive covenant are critical. If the covenant is deemed to be ambiguous, it will be construed strictly against the employer and may not be enforced. Also if the restrictions are too broad, a court may deem them unreasonable and therefore unenforceable. Contrary to some states, Virginia courts will not rewrite the covenant and make it reasonable. Therefore, obtaining the service of an attorney familiar with the intricacies of drafting restrictive covenants for employees is critical.