

# What Employers Need to Know About Post-Employment Restrictions in Tennessee, Mississippi and Arkansas



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# TENNESSEE



## •Non Competition Agreements

- Covenants not to compete are disfavored under Tennessee law and are **strictly construed in favor of the employee.**
- However, non-compete agreements can generally be enforced provided the employer has a “**protectable**” **business interest** and the post-employment **restrictions imposed are reasonable in scope** (duration and geographic scope).

*Central Adjustment Bureau v. Ingram*, 678 S.W.2d 28 (Tenn. 1984).

*Murfreesboro Med. Clinic, PA v. Udom*, 166 S.W.3d 674 (Tenn. 2005)

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- Factors relevant to whether a covenant is reasonable include: (1) the consideration supporting the covenant; (2) the threatened danger to the employer in the absence of the covenant; (3) the economic hardship imposed on the employee by the covenant; and (4) whether the covenant is inimical to the public interest.

*Hasty v. Rent-A-Driver, Inc.*, 671 S.W.2d 471 (Tenn. 1984).

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## • The reasonableness of the restrictions

→ The scope of a covenant not to compete must be reasonable in that “the time and territorial limits involved must be no greater than is necessary to protect the business interests of the employer.” If the scope of the covenant is reasonable as written, it will be enforced as written.

→ If the scope is unnecessarily burdensome to the employee, however, it will be enforced only “to the extent that [it is] reasonably necessary to protect the employer's interest ‘without imposing undue hardship on the employee when the public interest is not adversely affected.’”

*Central Adjustment Bureau v. Ingram*, 678 S.W.2d 28 (Tenn. 1984).

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## • Enforcement

- A court may modify an unreasonable covenant so as to render it reasonable.
- Courts will hold the entire covenant invalid if credible evidence supports a finding that the covenant is deliberately unreasonable and oppressive.
- The enforceability of contracts is to be determined at the time they are executed not on the basis of subsequent events.

*Central Adjustment Bureau v. Ingram*, 678 S.W.2d 28 (Tenn. 1984).

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- There is no statute of general applicability governing non-competes in Tennessee, but certain healthcare providers can be subject to non-competes.

Tenn. Code Ann. §63-1-148.

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- Under Tennessee law an employer cannot enforce a non-compete agreement that prevents a former employee from engaging in *ordinary competition*.
- Rather, only “unfair competition” may be restrained through use of a non-competition covenant.
- An employee’s *general* knowledge and skill belong to the employee even if it was acquired on the job through expensive training.

*Hasty v. Rent-A-Driver, Inc.*, 671 S.W.2d 471 (Tenn. 1984).

# TENNESSEE

## What Is a protectable business interest?

- whether the employer provided the employee with specialized training;
- whether the employee is given access to trade or business secrets or other confidential information; and
- whether the employer's customers tend to associate the employer's business with the employee due to the employee's repeated contacts with the customers on behalf of the employer.

*Vantage Tech., LLC v. Cross*, 17 S.W.3d 637 (Tenn. Ct. App. 1999)

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- Opportunistic disintermediation has also been recognized as a legitimate business interest protectable by a non-compete covenant.
  - A staffing agency's legitimate protectable business interest in preventing "opportunistic disintermediation," that is, either the improper elimination of the staffing agency as the "middle man" or the appropriation of the staffing agency's services without proper compensation.

*Columbus Medical Services, LLC*, 308 S.W.3d 368 (Tenn. Ct. App. 2009)

# TENNESSEE

## ▪What is Specialized Training?

- Training that provides the employee with knowledge and skill that is *unique* to the employer's business.
- Whether an employer has a protectable interest in its investment in training an employee depends on whether the skill acquired as a result of that training is sufficiently special as to make a competing use of it by the employee unfair.

*Vantage Tech., LLC v. Cross*, 17 S.W.3d 637 (Tenn. Ct. App. 1999)

# TENNESSEE

## -What Qualifies as Confidential Business Information or a Trade Secret?

→ Before business information can be deemed “confidential business information” for purposes of meeting the protectable business interest requirement, it must meet the definition of a trade secret. *Heyer-Jordan & Associates, Inc. v. Jordan*, 801 S.W. 2d 814, 821 (Tenn. Ct. App. 1990).

# TENNESSEE

- A “Trade Secret” is defined as:

- Information, without regard to form, including, but not limited to, technical, nontechnical or financial data, a formula, pattern, compilation, program, device, method, technique, process, or plan that:

- Derives independent economic value, actual or potential, from not being generally known to, and not being readily ascertainable by proper means by other persons who can obtain economic value from its disclosure or use; and

- Is the subject of efforts that are reasonable under the circumstances to maintain its secrecy.

Tenn. Code Ann. §47-25-1702

# TENNESSEE

## ▪Customer Relationships

- Business interest grounded in “Good Will”
- Implicated when an employee has repeated contact with the customer and becomes to the customer “the face of the employer” and receives information that is personal or confidential with respect to the customer.
- A restriction that includes an area in which the employee never performed services are unreasonable unless the employee possesses knowledge of the employer's trade secrets

*Vantage Tech., LLC v. Cross*, 17 S.W.3d 637(Tenn. Ct. App. 1999)

# TENNESSEE

## ▪ Non-Solicitation Provisions

→ Courts are more inclined to enforce these provisions since their enforcement does not prevent the former employee from working for a competitor.

→ These provisions can be enforced absent a geographic restriction if they “prohibit the employee from soliciting the business of a specific and well-defined group of persons.”

→ Typically the restriction includes “customers” or “clients” of the employer. Tennessee courts have held that the protections apply only to “present” customers or clients of the employer which “are a protectable interest of an employer.”

*Shannon Lumber Co. v. Barrett*, 2010 WL 3069818, at \*10 (W.D. Tenn. 2010); *Thompson, Breeding, Dunn, Creswell & Sparks v. Bowlin*, 765 S.W.2d 743 (Tenn. Ct. App. 1987).

# TENNESSEE

## ▪ Consideration

- A noncompete signed prior to, contemporaneously with or shortly after employment begins is part of the original agreement and is supported by adequate consideration.
- Where a noncompete is signed during the employment relationship, it is possible that employment for only a short period of time after execution of the noncompete would be insufficient consideration under the circumstances.
- Salary increases, promotions, and other favorable changes in the terms and conditions of employment can constitute sufficient consideration for a non-compete signed during employment.

*Central Adjustment Bureau v. Ingram*, 678 S.W.2d 28 (Tenn. 1984).

# TENNESSEE

## ▪ Tennessee Uniform Trade Secrets Act

→ Actual or threatened misappropriation may be enjoined.

→ Damages can include both the actual loss caused by misappropriation and the unjust enrichment caused by misappropriation that is not taken into account in computing actual loss. In lieu of damages measured by any other methods, the damages caused by misappropriation may be measured by imposition of liability for a reasonable royalty for a misappropriator's unauthorized disclosure or use of a trade secret.

→ If willful and malicious misappropriation exists, the court may award exemplary damages in an amount not exceeding twice the amount of damages awarded.

Tenn. Code Ann. §47-25-1702

# MISSISSIPPI



# MISSISSIPPI

- NonCompetes are disfavored, but can be enforced

→ Under Mississippi law, “[n]on-competition agreements have been viewed ... as restrictive contracts which are in restraint of trade and individual freedom and are not favorites of the law.”

→ “However, they are valid unless unreasonable, and when reasonable, the courts will not hesitate to hold the parties to their contracts.”

*Scott v. Southern Electric Supply Company, Inc.*, 2013 WL 3280276 (N.D. Miss 2013)

## -Protectable Business Interests

→ “[C]ovenants not to compete are valid and enforceable. Such covenants may be used to protect confidential information, trade secrets, proprietary information, customer lists, vendor relationships, business practices, and the employer's investment in training and education of an employee. The employee may not simply take such information to a competitor.”

→ An “investment in the training and education of an employee” is also a legitimate interest protectable by a noncompetition covenant.

→ “The burden properly falls on the employer to draft a non-competition agreement which clearly delineates the scope of the employee's permissible business activities following the termination of employment.”

*Business Communications, Inc. v. Banks*, 91 So.3d 1 (Miss. Ct. App. 2011).

*Kennedy v. Metropolitan Life Ins. Co.*, 749 So.2d 362 (Miss. 2000).

# MISSISSIPPI

→Employers may restrain competition where the employee has knowledge of business methods, confidential information, and trade secrets and was acquainted with the employer's customers.

→The “primary” [protectable business interest] involves protecting the employer “from loss of customers by the activities of the former employees who have peculiar knowledge of and relationships with the employer's customers.”

*Donahoe v. Tatum*, 134 So. 2d 442 (Miss. 1961).

*Advanced Sols. Network v. Gill*, 2013 WL 5278201 (S.D. Miss. 2013).

# MISSISSIPPI

## Relevant Factors

- The enforceability of a non-compete largely depends upon the reasonableness and specificity of its terms, primarily, the duration of the restriction and its geographic scope.
- The three factors generally used by courts to determine the enforceability of a noncompete are: (1) the employer's interests; (2) the employee's interest; and (3) the public interest.
- The public interest is not harmed by a noncompete when ample services are available and a monopoly is not created.

*Redd Pest Control Co. v. Heatherly*, 157 So. 2d 133 (Miss. 1963).

*Raines v. Bottrell Ins. Agency, Inc.*, 992 So. 2d 642 (Miss. Ct. App. 2008)

# MISSISSIPPI

## ▪ Time and Geographic Scope Restrictions

→ Only those “reasonably necessary for the protection of the employer or principal, without imposing undue hardship on the employee or agent.”

→ Example: Not enforced where employee for three years would have had to commute at least 50 miles from any location at which he had worked for the employer during the 24 months preceding termination.

→ Example: One year restriction upheld for a medical device salesperson recognizing employer would have to hire, train and place a new salesperson in the territory.

*Empiregas, Inc. of Kosciusko v. Bain*, 599 So. 2d 971 (Miss. 1992)

*Taylor v. Cordis Corp.*, 634 F. Supp 1242 (S.D. Miss. 1986)

**▪ Consideration**

→ Continued employment alone can be sufficient consideration to uphold a contract entered into during the employment relationship.

→ The Mississippi Supreme Court has upheld a noncompete between an employer and an employee even when the agreement did not provide for continued employment as consideration for the restrictive covenant because the employee worked and received a salary for a number of years after the agreement was signed.

*Raines v. The Bottrell Insurance Agency, Inc.*, 992 So. 2d 642 (Miss. Ct. App. 2008).

# MISSISSIPPI

## • Enforcement of NonCompetes

→ Mississippi Courts follow the “reasonable alteration” rule and will modify an overbroad time or geographic restriction.

→ A noncompete will not be enforced if the employer's termination of the employee is arbitrary, capricious, or in bad faith.

*Redd Pest Control Co. v. Heatherly*, 157 So. 2d 133 (Miss. 963).

*Empiregas, Inc. of Kosciusko v. Bain*, 599 So.2d 971 (Miss. 1992).

## ▪ Damages for Breach of Noncompetes

- Actual/compensatory damages are recoverable where it is reasonably certain that damages have resulted from a breach of the noncompete.
- Punitive damages are generally recoverable where the breach of the noncompete involves an intentional wrong, insult, abuse, or such gross negligence as amounts to an independent tort.
- Attorneys' fees are recoverable where punitive damages are awarded.

*Raines v. Bottrell Ins. Agency, Inc.*, 992 So. 2d 642 (Miss. Ct. App. 2008)

# MISSISSIPPI

## ▪ Mississippi Uniform Trade Secrets Act

- “Trade secret” means information, including a formula, pattern, compilation, program, device, method, technique or process, that:
  - (i) Derives independent economic value, actual or potential, from not being generally known to, and not being readily ascertainable by proper means by, other persons who can obtain economic value from its disclosure or use, and
  - (ii) Is the subject of efforts that are reasonable under the circumstances to maintain its secrecy

Miss. Code Ann. § 75-26-3

# MISSISSIPPI

- Actual or threatened misappropriation may be enjoined.
- In exceptional circumstances, an injunction may condition future use upon payment of a reasonable royalty for no longer than the period of time for which use could have been prohibited.
- Damages can include both the actual loss caused by misappropriation and the unjust enrichment caused by misappropriation that is not taken into account in computing actual loss
- If willful and malicious misappropriation exists, the court may award exemplary damages.

Miss. Code Ann. § 75-26-5, 7

# ARKANSAS



# ARKANSAS

- Arkansas has a statute that governs noncompetes

- A.C.A. § 4-75-101

- (a) A covenant not to compete agreement is enforceable if the agreement is ancillary to an employment relationship or part of an otherwise enforceable employment agreement or contract to the extent that:

- (1) The employer has a protectable business interest; and

- (2) The covenant not to compete agreement is limited with respect to time and scope in a manner that is not greater than necessary to defend the protectable business interest of the employer.

# ARKANSAS

**•The statute sets out business interests that can be protected by noncompetes:**

(1) Trade secrets; (2) Intellectual property;(3) Customer lists;(4) Goodwill with customers;(5) Knowledge of his or her business practices;(6) Methods;(7) Profit margins;(8) Costs.....

# ARKANSAS

## ▪ Protected Business Interests

(9) Other confidential business information that is confidential, proprietary, and increases in value from not being known by a competitor; (10) Training and education of the employer's employees; and (11) Other valuable employer data that the employer has provided to an employee that an employer would reasonably seek to protect or safeguard from a competitor in the interest of fairness.

# ARKANSAS

## ▪ Reasonable Time and Scope Required

(c)(1) The lack of a specific or defined geographic descriptive restriction in a covenant not to compete agreement does not make the covenant not to compete agreement overly broad under subdivision (a)(2) of this section if the covenant not to compete agreement is limited with respect to time and scope in a manner that is not greater than necessary to defend the protectable business interest of the employer.

# ARKANSAS

## ▪ Factors to Evaluate Reasonableness

- (A) The nature of the employer's protectable business interest;
- (B) The geographic scope of the employer's business and whether or not a geographic limitation is feasible under the circumstances;
- (C) Whether or not the restriction placed on the employee is limited to a specific group of customers or other individuals or entities associated with the employer's business; and
- (D) The nature of the employer's business.

# ARKANSAS

- **A two year restriction is presumed reasonable**

(d) A post-termination restriction of two (2) years is presumptively reasonable as to length of time under subdivision (a)(2) of this section unless the facts and circumstances of a particular case clearly demonstrate that two (2) years is unreasonable compared to the employer's protectable business interest.

# ARKANSAS

▪ Statute presumes irreparable harm, but also allows for the recovery of damages

(e)(1) In a private court action, a court may award the employer damages for a breach of a covenant not to compete agreement, appropriate injunctive relief, or both, if appropriate.

(2) The immediate harm associated with the breach of a covenant not to compete agreement shall be considered irreparable to establish the appropriateness of a preliminary injunction.

(3) This subsection does not limit:

(A) Any other defense available to a party against a claim for preliminary injunctive relief; or

(B) An employer's right to monetary damages for breach of a covenant not to compete agreement.

# ARKANSAS

## • The Statute Permits a Court to “Reform” an “Unreasonable” Noncompete

(f)(1) If restrictions in a covenant not to compete agreement are found to be unreasonable and impose a greater restraint than is necessary to protect the protectable business interest of the employer under subdivision (a)(1) of this section, the court shall reform the covenant not to compete agreement to the extent necessary to:

(A) Cause the limitations contained in the covenant not to compete agreement to be reasonable; and

(B) Impose a restraint that is not greater than necessary to protect the protectable business interest.

(2) The court shall enforce the covenant not to compete agreement under the reformed terms and conditions.

# ARKANSAS

## ▪Other Key Provisions of the Statute

- Continued employment provides sufficient consideration
  - Does not apply outside the employment context
  - Does not cover\*:
    - Agreements not to solicit, recruit, or hire employees
    - Confidentiality and nondisclosure agreements
    - The terms and conditions of an employment or employment agreement.
- \*Common law applies

# ARKANSAS

## ▪ Arkansas Cases Applying the Statute

→ *Lamb & Associates Packaging, Inc. v. Best, et al.*

2020 WL 466637 (Ark Ct App. 2020)

→ *Box v. J.B. Hunt Transport, Inc.*, 533 S.W.3d 603 (Ark Ct App 2017)

# ARKANSAS

- **Trade Secrets Statute, A.C.A. §4-75-601, *et seq***

- Nearly identical to the Tennessee and Mississippi Statutes
- Not affected by the Noncompete statute
- Damages don't include exemplary damages

# FINAL QUESTIONS

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# Thank You



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