



# Restrictive Covenants

## Burdens, Benefits, or Both?

By Hon. Christopher P. Yates

**M**any members of the Bar do not realize that Michigan is a hotbed for restrictive covenants, which take the forms of noncompetition, nonsolicitation, and nondisclosure agreements. After all, we in the legal profession live under Michigan Rule of Professional Conduct 5.6, which decrees that a “lawyer shall not participate in offering or making... a partnership or employment agreement that restricts the right of a lawyer to practice after termination of the relationship, except” under limited circumstances.<sup>1</sup> However, our legislature has placed its imprimatur on noncompetition agreements as long as they are reasonable,<sup>2</sup> and our appellate courts have imposed virtually no limitations on the right of employers to extract nonsolicitation and nondisclosure commitments from their employees as a matter of course.<sup>3</sup> As a result, the specialized business dockets across Michigan are inundated with requests for temporary restraining orders and motions for preliminary injunctions seeking stringent enforcement of restrictive covenants.

Because restrictive covenants—and especially noncompetition agreements—are “disfavored as restraints on commerce,”<sup>4</sup> many states have chosen to ban them to promote the free flow of human capital.<sup>5</sup> Michigan, in contrast, has warmly embraced restrictive covenants.<sup>6</sup> Moreover, our Court of Appeals has ruled that “[m]ere continuation of employment is sufficient consideration to support a noncompete agreement,”<sup>7</sup> so restrictive covenants can be imposed during an

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employee's tenure simply by obtaining the employee's signature on an employment agreement. Predictably, this approach to contracts between employers and employees has made restrictive covenants ubiquitous in our state. But aggressive use of restrictive covenants on an undifferentiated basis has engendered confusion about the nature of the three specific types of covenants available under the law in Michigan. Accordingly, this article intends to demystify and draw distinctions among the most common forms of restrictions: noncompetition, nonsolicitation, and nondisclosure obligations.

### Noncompetition agreements

Michigan's relationship with noncompetition agreements is best understood as a play in three acts. Initially, Michigan courts accepted and enforced any restrictive covenant that was made "for a just and honest purpose, for the protection of the legitimate interests of the party in whose favor it is imposed, reasonable as between them and not specially injurious to the public[.]"<sup>8</sup> But in 1905, our legislature "adopted a general rule rendering illegal noncompetition agreements."<sup>9</sup> That strict prohibition remained the law until 1985, when our legislature enacted the Michigan Antitrust Reform Act,<sup>10</sup> which repealed the statutory provisions addressing noncompetition agreements but "contained no sections specifically addressing noncompetition agreements."<sup>11</sup> Then in 1987, the legislature enacted Section 4a of the act, found at MCL 445.774a(1), which "explicitly permits reasonable noncompetition agreements between employers and employees."<sup>12</sup>

Whether a noncompetition agreement is reasonable—and therefore enforceable as a matter of Michigan law—depends on "its duration, geographical area, and the type of employment or line of business."<sup>13</sup> As a general rule, any

noncompetition obligation lasting for no more than one year is reasonable in terms of duration.<sup>14</sup> Also, most noncompetition requirements that are limited to a 100-mile radius from the employer's place of business are reasonable in terms of geographical area.<sup>15</sup> Finally, any noncompetition clause that simply prohibits an employee from working for competitors of the employer will likely pass muster under Michigan law.<sup>16</sup> Noncompetition agreements that impose broader restrictions in terms of duration, geography, and type of work may run afoul of the reasonableness requirement imposed by MCL 445.774a(1). As our Court of Appeals has held, "[t]o be reasonable in relation to an employer's competitive business interest, a restrictive covenant must protect against the employee's gaining some unfair advantage in competition with the employer, but not prohibit the employee from using general knowledge or skill."<sup>17</sup> Therefore, a noncompetition contract with a physician may be justified to protect against the loss of patients upon the physician's departure,<sup>18</sup> whereas a virtually identical noncompetition obligation imposed on a janitor may be unreasonable if the janitor leaves to take a job sweeping floors for a new employer without creating any risk of loss of business.

Significantly, MCL 445.774a(1) empowers courts in Michigan to "limit the [noncompetition] agreement to render it reasonable in light of the circumstances in which it was made and specifically enforce the agreement as limited." Accordingly, courts have substantial latitude to use a blue pencil to modify all aspects of a noncompetition agreement to render it reasonable.<sup>19</sup> Thus, drafting a noncompetition agreement to ensure that it is enforced as written requires careful planning and an understanding of how Michigan courts ordinarily treat such agreements in the industry at issue. The opinions of business courts across the state provide valuable guidance in this endeavor and are available on the Michigan Supreme Court's website and local websites like Kent County's [accesskent.com](http://accesskent.com).

### Nonsolicitation agreements

Because of their very nature, nonsolicitation agreements are usually afforded deference by Michigan courts.<sup>20</sup> A nonsolicitation covenant prohibits an employee from attempting to persuade coworkers to leave the employer or trying to convince the employer's customers to do business with another company. In other words, a nonsolicitation covenant is simply an antipiracy clause, which can readily be justified to protect the employer's fundamental business interests.<sup>21</sup> Actions that rise to the level of improper solicitation present a direct and immediate threat to the employer's business, so Michigan courts have provided relief even for isolated violations of a nonsolicitation restriction.<sup>22</sup>



## Nondisclosure agreements

The most misunderstood restrictive covenant protects against the disclosure of confidential information. Under Michigan law, “preventing the anti-competitive use of confidential information is a legitimate business interest.”<sup>23</sup> Consequently, attorneys can readily persuade Michigan courts to enforce nondisclosure agreements, but attorneys too often limit the reach of such prohibitions to materials that constitute trade secrets under the Michigan Uniform Trade Secrets Act.<sup>24</sup> To be sure, protection of trade secrets is vitally important to employers, but our Court of Appeals has permitted Michigan employers to protect all of their confidential information, which includes much more than trade secrets.<sup>25</sup> In an important—albeit unpublished—opinion, the Court of Appeals explained that information such as “customer identity, customer information, and customer lists” does not meet the definition of a trade secret but is nonetheless “protectable by a confidentiality agreement[.]”<sup>26</sup> That decision affords employers the power to use nondisclosure agreements to protect much more than their trade secrets. To accomplish that result, an employer must define its confidential information in broad terms and restrict its employees’ ability to use or disseminate any confidential information to which the employees are given access through their employment. If an employer drafts a nondisclosure agreement in this fashion, Michigan courts will readily protect much more than the employer’s trade secrets.

## Conclusion

Michigan law governing restrictive covenants is developing at a rapid pace, thanks in large measure to the burgeoning business dockets across the state. As business court judges wrestle with the requirement of reasonableness prescribed by MCL 445.774a, commercial litigators possess the ability to shape the enforcement of noncompetition, nonsolicitation, and nondisclosure agreements in our state. Indeed, as business

court judges struggle to determine, on a case-by-case basis, whether restrictive covenants are “reasonable in relation to an employer’s competitive business interest,”<sup>27</sup> litigators for employers and employees will serve Michigan courts well by honing arguments about whether the restrictive covenants under review “protect against the employee’s gaining some unfair advantage in competition with the employer” or, instead, impermissibly “prohibit the employee from using general knowledge and skill.”<sup>28</sup> ■



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## ENDNOTES

1. MRPC 5.6.
2. MCL 445.774a(1).
3. See, e.g., *Rooyakker & Sitz, PLLC v Plante & Moran, PLLC*, 276 Mich App 146, 158; 742 NW2d 409 (2007).
4. *Coates v Bastian Bros, Inc*, 276 Mich App 498, 507; 741 NW2d 539 (2007).
5. See, e.g., Cal Bus & Prof Code, § 16600; *Nitro-Lift Technologies, LLC v Howard*, 568 US 17, 19; 133 S Ct 500, 502; 164 L Ed 2d 328 (2012) (noting the Oklahoma Supreme Court’s decision that “noncompetition agreements were ‘void and unenforceable as against’ Oklahoma’s public policy”).
6. *Bristol Window and Door, Inc v Hoogenstyn*, 250 Mich App 478, 491–498; 650 NW2d 670 (2002).
7. *QIS, Inc v Industrial Quality Control, Inc*, 262 Mich App 592, 594; 686 NW2d 788 (2004).
8. *Hubbard v Miller*, 27 Mich 15, 19 (1873).
9. *Bristol Window and Door*, 250 Mich App at 491.
10. MCL 445.771 *et seq*.
11. *Bristol Window and Door*, 250 Mich App at 492.
12. *Id.* at 494.
13. MCL 445.774a(1); *Mapal, Inc v Abdelatif Atarsia and YG-1 USA*, 147 F Supp 3d 670, 677 (ED Mich, 2015).
14. *Coates*, 276 Mich App at 507.
15. *Id.* at 508.
16. *Id.*
17. *St Clair Medical, PC v Borgiel*, 270 Mich App 260, 266; 715 NW2d 914 (2006).
18. *Id.*
19. *Kelly Svcs, Inc v Marzullo*, 591 F Supp 2d 924, 939 (ED Mich, 2008).
20. *Rooyakker & Sitz*, 276 Mich App at 157–159.
21. *Id.* at 157–158.
22. *Thermatool Corp v Borzym*, 227 Mich App 366, 370–372 (1998).
23. *Rooyakker & Sitz*, 276 Mich App at 158, quoting *Whirlpool Corp v Burns*, 457 F Supp 2d 806, 812 (WD Mich 2006).
24. MCL 445.1901 *et seq*.
25. *Industrial Control Repair, Inc v McBroom Electric Co, Inc*, unpublished per curiam opinion of the Court of Appeals, issued October 10, 2013 (Docket No. 302240); slip op at 7–8.
26. *Id.* at 8.
27. *St Clair Medical*, 270 Mich App at 266.
28. *Id.*